

OREGON DEPARTMENT OF TRANSPORTATION 2016 AVAILABILITY AND DISPARITY STUDY



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TABLE OF CONTENTS

EXECUTIVE SUMMARY. ODOT 2016 DISPARITY STUDY

A. Background.....	ES-2
B. Disparity Study Research Activities	ES-2
C. Availability Results and Base Figure for ODOT Overall DBE Goal	ES-4
D. Potential Adjustments to Calculate the Overall DBE Goal.....	ES-7
E. Information to Project the Portion of the Overall Goal to be Met through Neutral Means	ES-7
F. Quantitative and Qualitative Information for the Oregon Marketplace	ES-9
G. Disparity Analysis for ODOT Contracts	ES-10
H. Recommendations.....	ES-13
I. Next Steps in the Disparity Study Process	ES-14

CHAPTER 1. INTRODUCTION

A. Study team.....	1-2
B. Federal DBE Program.....	1-2
C. Oregon MWESB Program and Other Programs.....	1-5
D. Previous Disparity Analyses Regarding ODOT Contracts.....	1-6
E. Analyses Performed in the 2016 Disparity Study and Location of Results	1-6
F. Public Participation in the 2016 Disparity Study	1-9
G. Public Comment Process for the 2016 Disparity Study Report and ODOT DBE Goal	1-10

CHAPTER 2. LEGAL FRAMEWORK

A. The Federal DBE Program.....	2-3
B. State and Local MBE/WBE Programs in the United States.....	2-5
C. Legal Standards that Race- and Gender-Conscious Programs Must Satisfy.....	2-5

CHAPTER 3. ODOT TRANSPORTATION CONTRACTS

A. Overview of ODOT Transportation Contracts.....	3-1
B. Collection and Analysis of ODOT Contract Data	3-3
C. Types of Work Involved in ODOT Contracts	3-5
D. Location of Businesses Performing ODOT Work	3-8

CHAPTER 4. ODOT OPERATION OF THE FEDERAL DBE PROGRAM

- A. Setting an Overall Annual DBE Goal – 49 CFR Section 26.454-1
- B. Role of Race- and Gender-Neutral Measures in Meeting the Goal4-2
- C. Types of Race- and Gender-Neutral Measures.....4-3
- D. Use of Any Race- and Gender-Conscious Measures4-12
- E. Statements, Reporting and Recordkeeping.....4-19
- F. Summary.....4-20

CHAPTER 5. MARKETPLACE CONDITIONS

- A. Historical Context in Oregon5-2
- B. Entry and Advancement5-5
- C. Business Ownership.....5-7
- D. Access to Capital, Bonding and Insurance5-9
- E. Success of Businesses5-15
- F. Summary.....5-21

CHAPTER 6. AVAILABILITY ANALYSIS

- A. Purpose of the Availability Analysis.....6-1
- B. Definitions of MBEs, WBEs, Certified DBEs, Potential DBEs and Majority-owned Businesses.....6-2
- C. Information Collected about Potentially Available Businesses6-5
- D. Businesses Included in the Availability Database6-8
- E. MBE/WBE Availability Calculations on a Contract-by-Contract Basis6-9
- F. Availability Results.....6-12
- G. Base Figure for ODOT’s Overall DBE Goal for FHWA-funded Contracts6-13

CHAPTER 7. UTILIZATION AND DISPARITY ANALYSIS

- A. Overview of the Utilization Analysis7-1
- B. Overall MBE/WBE and DBE Utilization on ODOT Contracts7-4
- C. Utilization by Racial, Ethnic and Gender Group7-6
- D. Disparity Analysis for ODOT Contracts7-10
- E. Statistical Significance of Disparity Analysis Results.....7-17

CHAPTER 8. FURTHER EXPLORATION OF MBE/WBE AND DBE UTILIZATION ON FHWA- AND STATE-FUNDED CONTRACTS

- A. Contracts With and Without DBE Contract Goals8-1
- B. Construction and Engineering Contracts8-2
- C. ODOT Contracts and Local Public Agency (LPA) Contracts8-3
- D. ODOT Regions8-4
- E. Prime Contracts and Subcontracts8-5
- F. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ODOT Construction Contracts8-6
- G. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ODOT Engineering-related Prime Contracts8-12
- H. ODOT Operation of the Federal DBE Program, including Overconcentration Analysis8-16
- I. Summary from Further Exploration of MBE/WBE and DBE Utilization8-23

CHAPTER 9. OVERALL ANNUAL DBE GOAL

- A. Establishing a Base Figure9-1
- B. Consideration of a Step 2 Adjustment9-2

CHAPTER 10. PORTION OF DBE GOAL FOR FHWA-FUNDED CONTRACTS TO BE MET THROUGH NEUTRAL MEANS

- A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?10-3
- B. What has been the agency’s past experience in meeting its overall DBE goal?10-5
- C. What has DBE participation been when ODOT has not applied DBE contract goals (or other race-conscious remedies)?10-6
- D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?10-7
- E. Summary10-8

CHAPTER 11. RECOMMENDATIONS

- 1. Openness11-2
- 2. Simplicity11-4
- 3. Fairness11-5
- 4. Transparency11-9
- 5. Impact11-9
- 6. Monitored and improving11-13
- Summary11-16

APPENDIX A. DEFINITION OF TERMS A-1

APPENDIX B. LEGAL FRAMEWORK AND ANALYSIS

A. IntroductionB-1
B. U.S. Supreme Court CasesB-4
C. The Legal Framework Applied to the Federal DBE Program and State and Local
Government MBE/WBE Programs.....B-7
D. Recent Decisions Involving the Federal DBE Program and State or Local
Government MBE/WBE Programs in the Ninth CircuitB-29
E. Recent Decisions Involving the Federal DBE Program and its Implementation in
Other Jurisdictions.....B-61
F. Recent Decisions Involving State or Local Government MBE/WBE Programs in
Other Jurisdictions.....B-116
G. Recent Decisions and Authorities Involving Federal Procurement that May Impact
DBE and MBE/WBE Programs.....B-189

APPENDIX C. CONTRACT DATA COLLECTION

A. ODOT Contract and Agreement DataC-1
B. Local Certification Program Contract DataC-3
C. ODOT Bid and Proposal DataC-4
D. Characteristics of Utilized Firms and BiddersC-4
E. ODOT and External Stakeholder ReviewC-4
F. Data LimitationC-5

APPENDIX D. GENERAL APPROACH TO AVAILABILITY ANALYSIS

A. General Approach to Collecting Detailed Availability Information D-1
B. Development of the Survey Instruments D-6
C. Execution of Surveys..... D-8
D. Additional Considerations Related to Measuring Availability D-11
E. ODOT Disparity Study — Standard Availability Survey Instrument D-15

**APPENDIX E. ENTRY AND ADVANCEMENT IN THE OREGON CONSTRUCTION AND
ENGINEERING INDUSTRIES**

A. Introduction.....E-1
B. Construction Industry.....E-4
C. Engineering Industry.....E-17
D. Summary.....E-22

APPENDIX F. BUSINESS OWNERSHIP IN THE OREGON CONSTRUCTION AND ENGINEERING INDUSTRIES

A. Business Ownership Rates F-1
B. Business Ownership Regression Analysis F-6
C. Summary of Business Ownership in the Construction and Engineering Industries..... F-12

APPENDIX G. ACCESS TO CAPITAL FOR BUSINESS FORMATION AND SUCCESS

A. Homeownership and Mortgage Lending G-2
B. Access to Business Capital G-14
C. Bonding and Insurance G-31
D. Summary..... G-33

APPENDIX H. SUCCESS OF BUSINESSES IN THE OREGON CONSTRUCTION AND ENGINEERING INDUSTRIES

A. Participation in Public and Private Sector Markets H-2
B. Relative Bid Capacity H-6
C. Business Closures, Expansions and Contractions H-9
D. Business Receipts and Earnings H-15
E. Availability Survey Results Concerning Potential Barriers H-24

APPENDIX I. DESCRIPTION OF DATA SOURCES FOR MARKETPLACE ANALYSES

A. IPUMS Data I-1
B. Survey of Small Business Finances (SSBF)..... I-9
C. Survey of Business Owners (SBO) I-11
D. Home Mortgage Disclosure Act (HMDA) Data I-12

APPENDIX J. QUALITATIVE INFORMATION FROM IN-DEPTH PERSONAL INTERVIEWS, TELEPHONE INTERVIEWS, PUBLIC MEETINGS AND WRITTEN COMMENTS

A. Introduction and Background..... J-2
B. Background on the Businesses in Oregon J-6
C. Economic Conditions Affecting the Transportation Contracting Industry in Oregon.... J-20
D. Public and Private Sector Transportation Contracting in Oregon J-28
E. Doing Business as a Prime Contractor or as a Subcontractor..... J-38
F. Keys to Business Success and Any Barriers in the Way J-48
G. Experience Doing Business with Public Agencies Including Oregon Department of Transportation..... J-64
H. Allegations of Unfair Treatment J-99
I. Information Regarding any Racial-, Ethnic- or Gender-based Discrimination J-105
J. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures..... J-120

K. Insights Regarding DBE/MWESB Programs and Other Related Race- and Gender-based Measures	J-150
L. DBE and MWESB Certification	J-170
M. Any Other Insights and Recommendations for ODOT	J-178

EXECUTIVE SUMMARY.

ODOT 2016 Disparity Study

The Oregon Department of Transportation (ODOT) is required to implement the Federal Disadvantaged Business Enterprise (DBE) Program as a condition of receiving funding from the U.S. Department of Transportation (USDOT). ODOT's operation of the Federal DBE Program is guided by federal regulations and instructions from USDOT.

ODOT has periodically conducted disparity studies since 2007 to analyze whether there is a level playing field for minority- and women-owned firms in the Oregon transportation contracting industry. The information collected through these studies helps ODOT operate the Federal DBE Program in compliance with Title 49 Code of Federal Regulations (CFR) Part 26, USDOT guidance and Ninth Circuit case law. ODOT's last disparity study was completed in 2011.

In late 2014 ODOT engaged a team led by Keen Independent Research LLC (Keen Independent) to prepare the 2016 Disparity Study, which examines the relative availability and participation of minority- and women-owned firms in ODOT's contracts from October 2010 through September 2014. The disparity study also analyzes conditions for minorities, women, and minority- and women-owned firms within the Oregon marketplace. Finally, the study identifies recommendations and specific steps that may be taken to encourage utilization of all small businesses in ODOT contracting as well as programs specific to DBEs.

Information from the 2016 Disparity Study will assist ODOT with the following:

- Setting an overall annual goal for DBE participation in its contracts funded by the Federal Highway Administration (FHWA) for federal fiscal years 2017 through 2019;
- Evaluating whether it can attain its overall DBE goal solely through neutral measures, or whether race- or gender-conscious measures are also needed; and
- Determining the specific race, ethnic and gender groups that may be eligible for any race- or gender-conscious program elements, such as DBE contract goals.

This Executive Summary includes:

- A. Background;
- B. Disparity Study research activities;
- C. Availability results and base figure for the overall DBE goal;
- D. Potential adjustments to calculate ODOT's overall DBE goal;
- E. Information to project the portion of the overall goal to be met through neutral means;
- F. Quantitative and qualitative information for the Oregon marketplace;
- G. Disparity analysis for ODOT contracts;
- H. Recommendations; and
- I. Next steps in the Disparity Study process.

A. Background

For federal fiscal years (FFYs) 2015 and 2016, ODOT's overall goal for DBE participation on its FHWA-funded contracts is 13.1 percent. The agency is attempting to meet that goal through a combination of neutral and race- and gender-conscious measures.

ODOT must implement the Federal DBE Program in light of the pivotal 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT*. The Court upheld the constitutionality of the Federal DBE Program, but found that Washington State DOT failed to show its implementation of the Federal DBE Program was narrowly tailored.

In response to the *Western States Paving* decision and per USDOT guidance, state and local agencies affected by the decision, including ODOT, suspended use of race- and gender-conscious program elements such as setting goals for DBE participation on federally-funded contracts. USDOT recommended that agencies conduct disparity studies to determine how they might narrowly tailor the Federal DBE Program to their local industries. ODOT completed a disparity study in 2007 and, based on the results, began setting DBE contract goals again in FFY 2008 for its construction contracts. However, as a result of the study findings, only a subset of DBE groups was eligible to meet contract goals. ODOT completed an update report in 2011 and, based on the results, continued setting DBE goals on construction contracts and reinstated setting goals on architectural and engineering and related services contracts. Again, only a subset of DBE groups was eligible to meet contract goals.

A 2013 Ninth Circuit decision regarding operation of the Federal DBE Program by the California Department of Transportation (Caltrans) provides further direction on agency implementation of the program. Leaders of the Keen Independent team directed the 2007 Caltrans disparity study and helped to defend Caltrans when a contractors association challenged its operation of the Federal DBE Program. The Ninth Circuit favorably reviewed the methodology and information provided in the disparity study and determined that the information supported Caltrans' operation of the Federal DBE Program. Keen Independent applied a methodology in the 2016 Disparity Study for ODOT that is very similar to what the Court favorably reviewed in the Caltrans case.

B. Disparity Study Research Activities

Keen Independent began the Disparity Study in November 2014. The study team includes Holland & Knight, a law firm; local subconsultants JLA Public Involvement, Benetti Partners, Donaldson Enterprises, Merina & Company and Customer Research International, a survey firm.

- **Stakeholder engagement and other public input.** Throughout the study, the study team consulted with an External Stakeholder Group that included representatives from DBE-certified firms, other businesses, industry associations, other public agencies and FHWA. The team set up a study website, dedicated email address, and a telephone hotline, and both ODOT and the study team conducted extensive communications with the public from the beginning of the study. This included requests for public input and public meetings held at the start of the study in 2015 and in upon release of a draft report to the public in spring 2016. Also, ODOT and the External Stakeholder Group reviewed the race, ethnicity, and gender contractor data together before Keen Independent completed the disparity analysis.

- **Data collection and review.** The study team collected information about FHWA- and state-funded contracts awarded by ODOT or by local agencies from October 2010 through September 2014. The contract data included 8,027 prime contracts and subcontracts totaling \$1.9 billion.
- **Utilization analysis.** Keen Independent identified the race, ethnicity and gender ownership of companies receiving ODOT prime contracts or subcontracts through a combination of sources, including telephone interviews with those firms. The team then calculated the value of the contracts and subcontracts awarded to each contractor, or the contractor's "utilization." The utilization analysis then examined the value of contracts awarded to minority-owned firms (by race and ethnicity), white women-owned firms and majority-owned firms (firms that are not minority- or women-owned).
- **Relevant market area determination.** Because 88 percent of ODOT contract dollars during the study period went to firms located in Oregon or the two Washington counties within the Portland Metropolitan Area, the study team defined Oregon and Southwest Washington as the study area. Keen Independent examined quantitative and qualitative information about the statewide transportation contracting industry gathered through survey research, secondary data and in-depth interviews with representatives of 71 companies, trade associations and other public agencies throughout the state.
- **Benchmark availability determination.** The study team completed telephone surveys with thousands of businesses to determine the benchmark availability of different types of businesses for individual ODOT prime contracts and subcontracts. The availability analysis also examined the size and location of prime contracts and subcontracts when determining a firm's availability for specific ODOT contracts.
- **Contracting disparity analysis.** The study team then compared the percentage of contract dollars going to minority-, white women, and majority-owned firms to the benchmark availability for each group.
- **Overall DBE goal calculations.** Finally, Keen Independent prepared analyses that would help ODOT set an overall goal for DBE participation on FHWA-funded contracts, project the portion to be met through neutral means, and determine which groups of DBEs might be eligible for any race- and gender-conscious programs such as DBE contract goals.

The full Disparity Study report is more than 700 pages in length and provides a complete discussion of methodology and study information. The following briefly summarizes results.

C. Availability Results and Base Figure for ODOT Overall DBE Goal

Keen Independent compiled information about the availability of minority- and white women-owned firms (MBEs and WBEs, regardless of certification status) and majority-owned firms (firms with less than 51 percent minority or women ownership) for work in ODOT transportation contracts. The study team used this information to establish availability benchmarks for MBE and WBE utilization that could be compared with actual MBE and WBE utilization observed for ODOT contracts.

The study team also used availability analyses as inputs to the overall DBE goal for FHWA-funded contracts. Keen Independent calculated the overall goal based on firms currently certified as DBEs (“current DBEs”) and those minority- and women-owned firms that potentially could be certified as DBEs (“potential DBEs”). Not all MBE/WBEs are current or potential DBEs, as explained below.

Database of firms available for ODOT contracts. Keen Independent created a master availability database that contains detailed information from businesses about the types, sizes and locations of the highway construction and engineering-related work they perform. The study team surveyed firms that had expressed interest in ODOT work or operated in fields related to highway construction and engineering. The study team’s final availability database included 1,639 businesses with qualifications and interest in specific types of ODOT and local agency transportation contracting. Of those 1,639 businesses, 446 (27%) were minority- or women-owned.

Figure ES-1 shows the number of businesses by ownership in the availability database for this study. Because results are a simple headcount of firms with no analysis of availability for specific ODOT contracts, they only reflect the first step in the availability analysis.

Figure ES-1.
Number of minority-, women- and majority-owned businesses included in the availability database

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

Source:
Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	38	2.3 %
Asian-Pacific American-owned	27	1.6
Subcontinent Asian American-owned	15	0.9
Hispanic American-owned	57	3.5
Native American-owned	35	2.1
Total MBE	172	10.5 %
WBE (white women-owned)	274	16.7
Total MBE/WBE	446	27.2 %
Total majority-owned firms	1,193	72.8
Total firms	1,639	100.0 %

Dollar-weighted availability. For each of the availability analyses prepared for this study, Keen Independent developed dollar-weighted availability benchmarks:

- The study team identified specific characteristics of each of the 8,027 prime contracts and subcontracts included in the set of contracts being analyzed.

- For each prime contract and subcontract, Keen Independent identified the businesses in the detailed availability database that indicated that they performed the type, size and location of work pertinent to that prime contract or subcontract. After the available firms for a prime contract or subcontract were identified, the study team calculated the percentage of available firms that were minority-owned (by group), white women-owned and majority-owned.
- Once Keen Independent had calculated availability for 8,027 individual prime contracts and subcontracts, the study team developed aggregate availability results across all prime contracts and subcontracts.

The first step to aggregating results was to determine dollar weights for the availability figures for each prime contract and subcontract. Keen Independent calculated weights by dividing the value of that prime contract or subcontract by the total dollars of all the contracts (\$1.9 billion when examining all contracts).

After applying the weights to the results of the availability analysis for each prime contract and subcontract, Keen Independent added the results to calculate overall availability estimates for WBEs and each MBE group for the entire set of contracts.

Including all 8,027 prime contracts and subcontracts, dollar-weighted MBE/WBE availability was 19.24 percent. In other words, if there were a level playing field for firms available for ODOT work, MBE/WBEs might be expected to receive 19.24 percent of ODOT transportation contract dollars. This dollar-weighted availability was lower than the proportion of firms in the availability database that were MBE/WBEs (27%) because minority- and women-owned firms comprised a smaller portion of firms available for large highway construction prime contracts than for specialty trade prime contracts or subcontracts. Figure ES-2 presents dollar-weighted availability results for FHWA-funded, state-funded and all contracts combined.

Figure ES-2.
Overall dollar-weighted availability estimates for MBE/WBEs for ODOT FHWA- and state-funded contracts, October 2010–September 2014

Race/ethnicity and gender	FHWA	State	Total
African American-owned	2.92 %	2.59 %	2.86 %
Asian-Pacific American-owned	0.83	1.04	0.86
Subcontinent Asian American-owned	0.62	0.81	0.66
Hispanic American-owned	2.31	2.09	2.27
Native American-owned	<u>2.78</u>	<u>2.34</u>	<u>2.71</u>
Total MBE	9.47 %	8.86 %	9.37 %
WBE (white women-owned)	<u>9.82</u>	<u>10.15</u>	<u>9.88</u>
Total MBE/WBE	19.29 %	19.01 %	19.24 %

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis.

Converting MBE/WBE availability to identify current and potential DBEs for the base figure.

Figure ES-3 provides the calculations to separately identify current and “potential” DBE availability from the 19.29 percent MBE/WBE availability figure for FHWA-funded contracts shown in Figure ES-2. There were three groups of MBE/WBEs that Keen Independent did not count as current/potential DBEs when calculating the base figure:

- **Graduated or been denied DBE certification.** Keen Independent did not include MBE/WBEs that in recent years graduated from the DBE Program or had applied for DBE certification in Oregon and had been denied (based on information supplied by ODOT’s Office of Civil Rights). This was three firms.
- **Revenue exceeding DBE size limits.** The study team did not count MBE/WBEs with average annual revenue that exceeded the revenue limits for DBE certification for their subindustry. This was 18 firms.
- **Ineligible for public contracts.** Also excluded were MBE/WBEs in the availability surveys that are prohibited from work for any portion of the FFY 2017-FFY 2019 time period based on their inclusion on the Oregon Bureau of Labor and Industries (BOLI) List of Contractors Ineligible to Receive Public Works Contracts (as of November 2, 2015). This was one firm.

Adjusting for these three categories of MBE/WBEs reduces the base figure for FHWA-funded contracts by 3.45 percentage points. The base figure for ODOT’s overall DBE goal is 15.84 percent. It represents the level of current/potential DBE participation anticipated based on analysis of FHWA-funded contracts from October 2010 through September 2014.

Assuming ODOT’s mix of future FHWA-funded contracts is expected to be similar to FHWA-funded contracts from October 2010 through September 2014, Keen Independent recommends that ODOT use the 15.84 percent current/potential DBE availability figure as the “base figure” when determining its overall DBE goal for FFY 2017 through FFY 2019.

Figure ES-3.

Overall dollar-weighted availability estimates for current and potential DBEs for FHWA-funded contracts, October 2010–September 2014

Calculation of base figure	FHWA
Total MBE/WBE	19.29 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue thresholds or on BOLI list	<u>3.45</u>
Subtotal	15.84 %
Plus white male-owned DBEs	<u>--</u>
Current and potential DBEs	15.84 %

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis.

For purposes of comparison, Keen Independent also performed dollar-weighted availability calculations for currently-certified DBEs. The dollar-weighted availability of current DBEs is 6.00 percent.

D. Potential Adjustments to Calculate the Overall DBE Goal

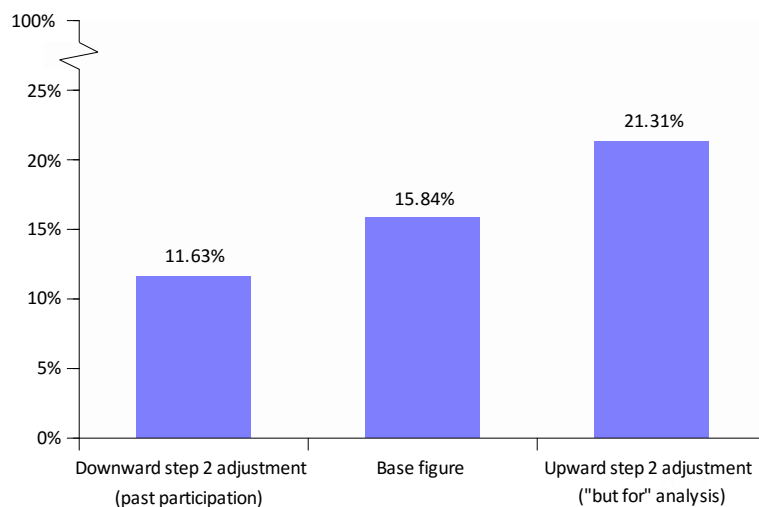
Per the Federal DBE Program, ODOT must consider potential adjustments to the base figure as part of determining its overall annual DBE goal for FHWA-funded contracts. The Federal DBE Program outlines factors that an agency must consider when assessing whether to make any adjustments to its base figure:

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

If ODOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FHWA-funded contracts might be 11.63 percent. If ODOT decides to not make a downward adjustment and to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal might be 21.31 percent. ODOT might also choose to not make a step 2 adjustment, which would mean a DBE goal of 15.84 percent. Figure ES-4 summarizes this information and Chapter 9 further explains these calculations.

Figure ES-4.
Potential step 2 adjustments to overall DBE goal for FHWA-funded contracts, FFY 2017–FFY 2019

Note:
For further explanation see Chapter 9.



E. Information to Project the Portion of the Overall Goal to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.¹ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small

¹ 49 CFR Section 26.51.

businesses, and are not specifically limited to MBE/WBEs or DBEs. Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then it would propose using only neutral measures in its operation of the Federal DBE Program.
- If an agency determines that a combination of race- and gender-neutral and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures when operating the Federal DBE Program.

Projections of goal attainment through neutral means. USDOT offers guidance concerning how transportation agencies should make these projections. Using this information, Keen Independent analyzed different approaches ODOT could apply when making its projection for FFY 2017 through FFY 2019.

The most complete and accurate information about past DBE participation in a neutral environment comes from Keen Independent’s utilization analysis for contracts without DBE contract goals. ODOT achieved 5.0 percent DBE participation on ODOT contracts without DBE contract goals based on Keen Independent analysis of these contracts from October 2010 through September 2014.

Using this 5.0 percentage point projection for illustration, Figure ES-5 summarizes this analysis for three different examples of overall DBE goals that ODOT might select. In each column, the neutral projection (row 2) is subtracted from the overall DBE goal (row 1) to derive the race-conscious projection (row 3). The left-most column of results presents ODOT’s overall goal and neutral projection for the current time period (FFY 2015 through FFY 2016).

Figure ES-5.
Current ODOT overall DBE goal and projections of race-neutral for FHWA-funded contracts for FFY 2014–FFY2016 and examples of overall goal and projections for FFY 2017 through FFY 2019

Component of overall DBE goal	FFY 2015- FFY 2016	FFY 2017- FFY 2019		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	13.10 %	11.63 %	15.84 %	21.31 %
Neutral projection	- 7.90	- 5.00	- 5.00	- 5.00
Race-conscious projection	5.20 %	6.63 %	10.84 %	16.31 %

Source: Keen Independent analysis.

Determining whether there is evidence of discrimination. Before making the projection of neutral attainment and determining whether it will use DBE contract goals for any group, or which groups, ODOT must consider whether there is evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups.

In *Western States Paving*, the Ninth Circuit Court of Appeals held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.² In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Ninth Circuit Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups that suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.³

ODOT should review the results of this disparity study and other information it has when making this determination. The balance of this Executive Summary briefly outlines key information provided in the full report concerning quantitative and qualitative information for the Oregon marketplace; and results of the disparity analysis for ODOT contracts.

F. Quantitative and Qualitative Information for the Oregon Marketplace

As discussed in Chapter 5 of the report and in supporting appendices, there is quantitative and qualitative information indicating that there is not a level playing field for minorities and women, and minority- and women-owned businesses, in the Oregon transportation contracting industry.

Summary of quantitative information. From Keen Independent's analysis of U.S. Bureau of the Census data, survey data and other information, there is quantitative information indicating disparities for certain minority groups and women regarding entry and advancement as employees within the industry, disparities in business ownership, disparities concerning access to capital and bonding, and certain disparities in success of minority- and women-owned firms. Also, relatively more minority- and women-owned firms report difficulties networking with prime contractors or customers based on survey data.

There was evidence of disparities in the Oregon marketplace affecting African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned firms as well as white women-owned firms. This includes evidence that there are fewer Hispanic American, Native American and female business owners in the Oregon construction industry than what might be expected given a level playing field.

² *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

³ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

Summary of qualitative information. Based on in-depth interviews of business owners and others, telephone surveys, public meetings and other information, there was substantial evidence of barriers to new and small businesses in the Oregon transportation contracting industry. Owners and managers of small businesses reported that public agency contracting processes and requirements, such as minimum prequalification, bonding, and insurance levels, often put small businesses at a disadvantage when competing for public sector work.

Existing relationships are an important factor in finding opportunities to bid on work according to many prime contractors and subcontractors. There is also substantial evidence that a “good ol’ boy” network negatively affects opportunities for businesses including those owned by minorities and women.

From the in-depth interviews, availability interviews and other information analyzed as part of the study, there appeared to be difficulties for minorities and women beyond those associated with being a small business. This included evidence of:

- Workplace conditions unfavorable to women and minorities in the Oregon construction industry;
- Greater difficulties for women and minorities to obtain financing;
- Different treatment of minority- and women-owned firms by bonding companies; and
- Negative stereotypes concerning minority- and women-owned firms held by some prime contractors and customers.

The combined quantitative and qualitative information indicate that there is not a level playing field for minorities, women and minority- and women-owned firms in the Oregon transportation contracting industry.

G. Disparity Analysis for ODOT Contracts

Keen Independent compared the share of ODOT contract dollars going to minority- and women-owned firms with what might be expected from the availability analysis. (Disparity analysis is properly done based on utilization and availability of all MBE/WBEs, not DBEs.)

Utilization. Considering all FHWA- and state-funded ODOT transportation construction and engineering contracts from October 2010 through September 2014, minority- and women-owned firms received \$225 million out of the \$1.9 billion in contract dollars, or 11.7 percent of total dollars. As shown in Figure ES-5:

- About 5.1 percent of total dollars went to white women-owned firms and 6.5 percent went to minority-owned firms (including businesses owned by minority women).
- Firms certified as DBEs received 7.1 percent of total dollars. About one-half of the MBE/WBE utilization was for firms not DBE-certified at the time of contract award. This included former DBEs that are now too large to be certified or have otherwise let their certifications expire or have withdrawn from the program.

Figure ES-6 also demonstrates the drop in MBE utilization between the first two years of the study period (FFY 2011 and FFY 2012) and the most recent two years (FFY 2013 and FFY 2014). Participation of DBEs was also much lower in the FFY 2013 and FFY 2014.

Figure ES-6.
MBE/WBE and DBE share of prime contract/subcontract dollars for ODOT FHWA- and state-funded transportation contracts, October 2010–September 2014

Group	FFY 2011 - FFY 2012	FFY 2013 - FFY 2014	Total
MBE	8.4 %	5.0 %	6.5 %
WBE	5.2	5.0	5.1
Total MBE/WBE	13.6 %	10.0 %	11.7 %
DBE	8.7 %	5.7 %	7.1 %

Note:

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

Source:

Keen Independent availability analysis.

Disparity analysis. To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on ODOT contracts with the percentage of contract dollars that MBEs and WBEs might be expected to receive based on their availability for that work. Keen Independent made those comparisons for MBEs, WBEs and individual MBE groups.

White women-owned firms received 5.1 percent of ODOT contract dollars (FHWA- and state-funded combined). This utilization was below what might be expected from the availability analysis — 9.9 percent. Minority-owned firms received 6.5 percent of ODOT contract dollars, a result that was also below what might be expected from the availability analysis — 9.4 percent. Figure ES-7 shows these results.

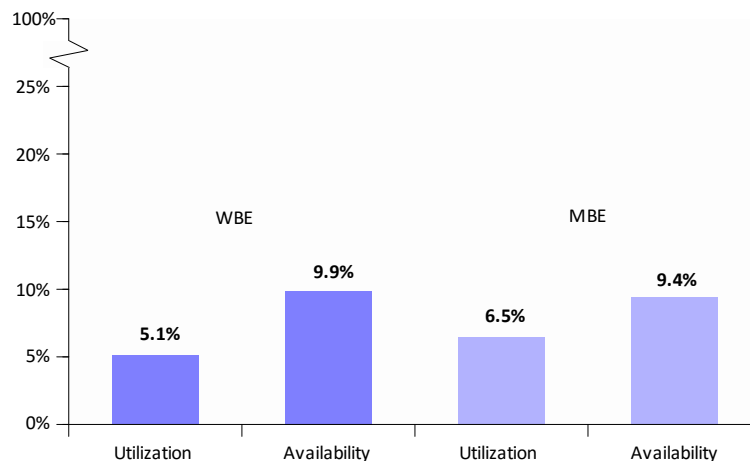
Figure ES-7.
MBE/WBE utilization and availability for ODOT FHWA- and state-funded contracts, October 2010–September 2014

Note:

Number of contracts/subcontracts analyzed is 8,027.

Source:

Keen Independent disparity analysis for ODOT and LPA contracts.



Calculation of disparity indices. Keen Independent then calculated a “disparity index” to help compare utilization and availability results among MBE/WBE groups and across different sets of contracts. A disparity index of “100” indicates “parity,” or an exact match between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts. A

disparity index of less than 100 may indicate a disparity between utilization and availability, and disparity indices of less than 80 in this report are described as “substantial” based on relevant court decisions.

The resulting disparity indices for ODOT contracts were:

- 51 for WBEs (5.1% divided by 9.9%, multiplied by 100); and
- 69 for MBEs (6.5% divided by 9.4%, multiplied by 100).

Because the indices for WBEs and for MBEs were below 80, they are “substantial.”

In addition to the above results for white women-owned firms and MBEs overall, utilization was below the availability benchmarks for the following MBE groups for the October 2010 through September 2014 study period:

- African American-owned firms received 1.7 percent of contract dollars, substantially less than what might be expected in the availability analysis (2.9%). The disparity index for this group was 58. Keen Independent identified this substantial disparity for African American-owned firms even with DBE-certified African American-owned businesses being eligible to participate in ODOT’s DBE goals for construction contracts.
- Utilization of Asian-Pacific American-owned firms (0.6%) was substantially below what might be expected from the availability analysis (0.9%), and the disparity index was 69 for this group even though DBEs owned by Asian-Pacific Americans were eligible to meet DBE contract goals in the first two years of the study period.
- Utilization of Subcontinent Asian-owned (0.6%) was somewhat less than expected from the availability analysis (0.7%). The disparity index for this group was 90, indicating a disparity even though Subcontinent Asian American-owned firms were eligible to meet DBE contract goals for construction contracts during the study period. (There was less than 0.2 percent participation of Subcontinent Asian American-owned firms for contracts without goals, with a disparity index of 24 for those contracts.)
- Native American-owned firms had a utilization of 1.3 percent, below what might be expected based on the availability analysis (2.7%). The disparity index for this group was 49.

From October 2010 through September 2014, Hispanic American-owned firms obtained 2.4 percent of ODOT contract dollars, higher than what might be expected from the availability analysis (2.3%), resulting in a disparity index of 104. Most of this utilization was two firms: Capital Concrete Construction and LaDuke Construction. The availability results for Hispanic American-owned firms are limited by the fact that neither of these firms provided information to be included in the detailed availability analysis. Capital Concrete has voluntarily surrendered its contractor’s license, no longer has a working telephone number and does not appear to be available for ODOT work. LaDuke Construction indicated that they were not interested in discussing future work for ODOT when contacted by the study team to participate in an availability interview in 2015. Even though neither

firm provided information necessary to be included in the availability analysis for Hispanic American-owned firms, both of these firms are still counted in the utilization results. (Without these two firms, utilization of Hispanic American-owned firms would have been 0.9 percent, a substantial disparity.)

Keen Independent also examined utilization and availability for Hispanic American-owned firms for the most recent two years of the study period; October 2012 through September 2014. There was a large drop in utilization of Hispanic American-owned firms in this time period, with utilization of Hispanic American-owned firms (1.2%) substantially less than availability for that time period (2.1%), resulting in a disparity index of 59. These most recent results indicate the need for a race-conscious remedy for Hispanic American-owned firms, especially given apparent changes in the operations of the two firms that accounted for most of the contract dollars for this group.

Statistical significance of disparities. Keen Independent also examined whether the disparities for MBEs and for WBEs could be replicated simply through “chance” in award of prime contracts and subcontracts to available firms. The study team determined that the disparities for MBEs and for WBEs are statistically significant and cannot be reasonably replicated by chance.

Other disparity analyses. Keen Independent analyzed the utilization and availability of minority- and women-owned firms for additional subsets of ODOT prime contracts and subcontracts. The study team identified a pattern of disparities in the utilization of MBE/WBEs across different subsets of ODOT contracts, including by contract type and by region.

H. Recommendations

Study team recommendations emerged from the quantitative and qualitative results of the disparity study, especially the comments of many individuals inside and outside ODOT who provided input.

First, many of those providing input recognized ODOT’s past changes in contracting policies and practices that enhanced access for small businesses. Suggestions for further improvement, as well as Keen Independent’s assessment of results, tended to group around a set of desired outcomes regarding ODOT contracting and assistance programs. Simply put, ODOT can do more to ensure that its contracting and assistance is:

1. Open;
2. Simple;
3. Fair;
4. Transparent;
5. Impactful; and
6. Monitored and improving.

ODOT should continue top-to-bottom improvement regarding its contracting and its assistance programs.

Figure ES-8, on the following page, summarizes examples of initiatives ODOT might consider in pursuing these objectives. The initiatives are illustrative and by no means exhaustive. ODOT might find that some are not possible or effective after further review, or might be able to address the identified issue through another approach. Chapter 11 discusses these recommendations in detail.

Figure ES-8.
Examples of potential ODOT initiatives under each objective

Objectives and recommendations
1. Openness
<ul style="list-style-type: none"> a. Continue outreach to potential bidders, proposers, subcontractors and suppliers b. Disseminate information through an electronic newsletter c. Provide real-time training and assistance on how to win and perform work on ODOT projects
2. Simplicity
<ul style="list-style-type: none"> a. Simplify learning about, bidding on and performing ODOT work, especially small contracts b. Increase number of certified DBEs through targeted outreach and certification assistance
3. Fairness
<ul style="list-style-type: none"> a. Review how firm qualifications are assessed in construction and A&E contract awards b. Implement payment notification service for subcontractors and subconsultants c. Explore initiatives to limit opportunities for bid shopping and other unfair contracting practices d. Research other ways to improve treatment of subcontractors on ODOT contracts e. Continue support for apprenticeships and other programs to promote entry and advancement
4. Transparency
<ul style="list-style-type: none"> a. Expand awareness of construction contract award information b. Provide comprehensive information about consultant contract awards, including subcontractors
5. Impact
<ul style="list-style-type: none"> a. Continue partnerships to provide general business assistance b. Build stronger DBEs and other small businesses within core transportation contracting disciplines c. Consider an ESB contract goals program for state-funded contracts d. Pursue changes in state law to allow expansion of Small Contracting Program and ESB/SBE Programs e. Consider including each DBE group as eligible for DBE contract goals program
6. Monitored and improving
<ul style="list-style-type: none"> a. Expand data collection and reporting including a comprehensive business contact list b. Continue to use external stakeholder groups that include DBEs and ESBs c. Plan future disparity studies

I. Next Steps in the Disparity Study Process

There is considerably more quantitative and qualitative information in the full report, which ODOT should review when making decisions about its future operation of the Federal DBE Program and other programs.

In March 2016, ODOT made this Executive Summary and the draft report available for public comment. ODOT also published its proposed overall DBE goal regarding FHWA-funded contracts. ODOT held public meetings in April 2016 to solicit input on both the draft report and DBE goal. Keen Independent augmented the report with public input regarding the study before finalizing the ODOT 2016 Disparity Study report. Information about this process can be found at www.ODOTDBEstudy.org. ODOT should review the final report and public comments before submitting its final DBE goal to FHWA for its consideration and approval.

CHAPTER 1.

Introduction

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Oregon Department of Transportation (ODOT) has operated some version of the Federal DBE Program for many years.

Most of the USDOT funds that ODOT receives are for highway-related work from the Federal Highway Administration (FHWA), which is the focus of the 2016 Disparity Study.¹ ODOT must set an overall goal for participation of DBEs in its FHWA-funded contracts, expressed as the percentage of contract dollars that ODOT would expect to go to DBEs absent the effects of discrimination. ODOT's next three-year overall DBE goal will begin October 1, 2016.

ODOT retained Keen Independent Research LLC (Keen Independent) to conduct the 2016 Disparity Study. This report is a draft and will be augmented based on further public input. ODOT is using information from this report to propose a three-year overall DBE goal for FHWA-funded contracts and to propose the measures it will use to meet that goal, which can be found at www.ODOTDBEstudy.org. ODOT received public comment on the 2016 Disparity Study draft report and its proposed overall DBE goal through April 30, 2016.

The balance of Chapter 1:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Describes Oregon's MWESB Program and other programs;
- D. Discusses previous disparity analyses regarding ODOT contracts;
- E. Outlines the analyses in the 2016 Disparity Study and describes where results appear in the report;
- F. Summarizes the public participation process in the 2016 Disparity Study; and
- G. Provides information about the public comment process for the draft report and ODOT's proposed DBE goal, including five public meetings held in April 2016.

¹ ODOT also receives a relatively small amount of funds from the Federal Transit Administration (FTA) and separately sets an overall DBE goal for those contracts. The Oregon Department of Aviation operates the Federal DBE Program for Federal Aviation Administration (FAA) funding that the State of Oregon receives.

A. Study Team

David Keen, Principal of Keen Independent, directed this study. He has led similar studies for more than 90 public agencies throughout the country, including a number of state departments of transportation. Keith Wiener from Holland & Knight provided the legal framework for this study. Mr. Wiener has extensive experience with disparity studies as well, and has worked with Mr. Keen in this field since the early 1990s. Mr. Keen and Mr. Wiener have helped public agencies successfully defend DBE and minority business enterprise programs in court.

As shown in Figure 1-1, JLA Public Involvement, Benetti Partners and Donaldson Enterprises performed in-depth interviews and outreach as part of the study. Merina & Company conducted onsite contract data collection at ODOT offices. Customer Research International (CRI) performed telephone surveys with business owners and managers that identified firms available for ODOT contracts. These five team members are minority- and/or women-owned firms.

Keen Independent worked closely with ODOT staff, including senior leadership, throughout the study.

Figure 1-1.
2016 Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Denver CO Wickenburg, AZ	David Keen Principal	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener Partner	Legal framework
JLA Public Involvement, Inc.	Portland, OR	Stacy Thomas Sr. Project Manager	In-depth interviews, public outreach
Benetti Partners LLC	Portland, OR	Juanita Walton Principal	In-depth interviews
Donaldson Enterprises Consulting	Washougal, WA	Suzanne Donaldson Principal	In-depth interviews
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews
Merina & Company LLP	West Linn, OR	Kamala Austin Partner	Data collection

B. Federal DBE Program

ODOT has been operating some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be operated by state and local agencies receiving USDOT funds. USDOT recently revised the Federal DBE Program in 2011 and again in 2014.

Federal regulations located at Title 49 Code of Federal Regulations (CFR) Part 26 direct how state and local governments must operate the Federal DBE Program.² If necessary, the Program allows state and local agencies to use DBE contract goals, which ODOT currently sets on certain FHWA-funded contracts. When awarding those contracts, ODOT considers whether or not a bidder or proposer meets the DBE goal set for a contract or has shown adequate good faith efforts to do so.

The Federal DBE Program also applies to cities, towns, counties, transportation authorities, tribal governments and other jurisdictions that receive USDOT funds as a subrecipient of ODOT. When agencies such as TriMet and the Port of Portland directly receive USDOT funds, they are responsible for determining overall DBE goals and how they will implement the Federal DBE Program.

Key Program elements. The Federal DBE Program includes the following elements.

Setting an overall goal for DBE participation. Every three years, ODOT must develop an overall annual goal for DBE participation in its USDOT-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.³ For FHWA-funded contracts for the federal fiscal year (FFY) ending September 30, 2016, ODOT has a 13.10 percent overall DBE goal.

ODOT’s overall goal for DBE participation is aspirational. An agency’s failure to meet an annual DBE goal does not automatically cause any USDOT penalties unless that agency fails to administer the DBE Program in good faith. However, if an agency does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.⁴

Establishing the portion of the overall DBE goal to be met through neutral means. The Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.”

Race-neutral program measures include removing barriers to participation and promoting use of small businesses. The Federal DBE Program requires agencies such as ODOT to develop programs to assist small businesses.⁵ For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, to be met through race-conscious measures such as DBE contract goals. USDOT has outlined a number of

² 49 CFR Part 26 http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl.

³ 49 CFR Section 26.45.

⁴ 49 CFR Section 26.47.

⁵ 49 CFR Section 26.39.

factors for an agency to consider when making that determination.⁶ Some state DOTs and other agencies operate a 100 percent race- and gender-neutral program and do not apply DBE contract goals. Other state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures.

The 2016 Disparity Study provides information for ODOT to make this projection (Chapter 10).

Determining whether all racial/ethnic/gender groups will be eligible for race- or gender-conscious elements of the Federal DBE Program. To be certified as a DBE, the firm's owner must be both socially and economically disadvantaged. Under the Federal DBE Program, the following racial, ethnic and gender groups can be presumed to be socially disadvantaged:

- Black Americans (or "African Americans" in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

To be economically disadvantaged, a company must be below an overall revenue limit and an industry-specific limit, and its firm owner(s) must be below personal net worth limits.⁷ White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67(d).

ODOT's current operation of the Program limits participation in the contract goals program to:

- DBEs owned by African Americans and Subcontinent Asian Americans on construction contracts; and
- All DBEs except those owned by Asian-Pacific Americans on engineering-related contracts.

Only DBEs in the above groups can count toward meeting an assigned DBE contract goal. Any DBE can currently participate in other aspects of the Federal DBE Program. ODOT counts utilization of other DBEs toward its overall DBE goal.

⁶ See Chapter 10 of this report for an in-depth discussion of these factors.

⁷ 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than a \$23.98 million annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26e2255aef5fb43e3f450a13&node=49:1.0.1.1.20.4&rgn=div6>. Under 49 CFR Section 26.67(b), a certifying agency may consider other factors to determine if an individual is able to accumulate substantial wealth, in which certification is denied (annual gross income of the owner and whether the fair market value of the owner's assets exceed \$6 million are two such factors that may be considered).

The 2016 Disparity Study includes information for ODOT to consider in evaluating whether any, all, or just some of the DBE groups should be eligible for the contract goals element of the Program (if ODOT chooses to continue to use DBE contract goals).

Past court challenges to the Federal DBE Program and to state and local agency

implementation of the Program. Although agencies are required to operate the Federal DBE Program in order to receive USDOT funds, different groups have challenged program operation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have certain local government agencies. In 2005, the Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

The Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans) in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. As discussed in more detail in Chapter 2 and Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent's methodology in ODOT's 2016 Disparity Study is very similar to what the court favorably reviewed in the Caltrans case.

C. Oregon MWESB Program and Other Programs

ODOT participates in other programs beyond the Federal DBE Program. These include:

- **State MBE/WBE Policy.** The State of Oregon has a policy of supporting Oregon's minority business enterprises and woman business enterprises. Eleven Oregon state agencies including ODOT set aspirational targets for MBE/WBE procurement contracts valued at \$150,000 or less that might be performed by MBEs/WBEs. In addition to aspirational targets, the State implements other initiatives to improve opportunities for certified business enterprises, address race- and gender-based discrimination and ensure state funds are used to foster an inclusive business climate.
- **Emerging Small Business Program.** The State of Oregon and several local governments operate an Emerging Small Business Program that reserves certain contracting opportunities for ESB bidders. Under the Program, qualified small businesses compete against other small companies for identified small contracts.
- **Small Contracting Program.** ODOT operates a Small Contracting Program that streamlines bidding or proposing on small architectural, engineering and land surveying contracts, small construction contracts and other small purchases. Any company may register to participate in the program.

- **Other small business support.** ODOT supports small businesses through other programs such as the Oregon Small Business Initiative and the Project Specific Mentor-Protégé Program.

Chapter 11 of the report assesses opportunities to expand efforts to encourage participation of small businesses in ODOT contracts.

D. Previous Disparity Analyses Regarding ODOT Contracts

The USDOT recommends that agencies such as ODOT conduct disparity studies to develop the information needed to effectively implement the Program. ODOT completed full disparity studies in 2007 and 2011, and an availability update in 2013. MGT of American, Inc. prepared each of those studies.⁸

ODOT used results of the studies prepared by MGT when determining how to implement the Federal DBE Program for past years, including its request to FHWA for a “waiver” in which only certain racial, ethnic and gender groups of DBEs would participate in the DBE contract goals program.

- ODOT first applied for a waiver in January 2008 based on the results of the 2007 study prepared by MGT.
- It applied for a new DBE Program Waiver in 2012 for years 2013 through 2015 based on the results of the 2011 study prepared by MGT.

Under the waiver, only some DBE groups can participate in meeting a DBE contract goal ODOT sets for its FHWA-funded construction and engineering-related contracts.⁹

The 2016 Disparity Study examines participation of minority- and women-owned firms in ODOT contracts from October 2010 through September 2014. Keen Independent and ODOT chose this study period so that the utilization analysis would begin where the 2011 study ended (contracts awarded through September 2010). The 2016 Study also includes certain enhancements to the disparity study methodology compared to what was employed in ODOT’s previous studies, in accordance with the more recent 2013 Ninth Circuit review of Mr. Keen’s methodology for a Caltrans disparity study.

E. Analyses Performed in the 2016 Disparity Study and Location of Results

Figure 1-2 on the following page outlines the chapters in the 2016 Disparity Study.

⁸ http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_disp_avail_stud.aspx.

⁹ ODOT’s waiver requests and FHWA’s past approvals can be viewed at http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_prog_wav.aspx.

Figure 1-2. Chapters in 2016 Disparity Study report

Chapter	Description of 2016 Disparity Study report chapters
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and overview of analyses
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions
3. ODOT Transportation Contracts	How the study team collected ODOT contract data and defined the geographic area and transportation contracting industry
4. ODOT Operation of the Federal DBE Program	Review of ODOT's implementation of the Federal DBE Program and other programs as well as State and local agency programs and other technical assistance programs in Oregon
5. Marketplace Conditions	Summary of quantitative and qualitative information about the Oregon transportation contracting marketplace
6. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for ODOT contracts and subcontracts
7. Utilization and Disparity Analysis	Comparison of utilization and availability of minority- and women-owned firms (disparity analysis)
8. Exploration of Neutral Explanations for any Disparities	Further examination of disparity results to determine if any can be explained by neutral factors
9. Overall Annual DBE Goal	Information to review when setting a three-year overall DBE goal, including consideration of a "step 2 adjustment"
10. Portion of Overall DBE Goal to be Met Through Neutral Means	Information to review when determining the portion of the overall DBE goal to be met through neutral means
11. Recommendations	Study team recommendations concerning future implementation of the Federal DBE Program and other ways to assist small businesses and minority- and women-owned companies

The following briefly describes where to find specific information in the 2016 Disparity Study report.

Definition of terms. Appendix A provides explanations of acronyms and definitions of key terms used in the study.

Legal framework. Chapter 2 summarizes the legal framework for the study. Appendix B presents detailed analyses of relevant cases.

Collection of prime contract and subcontract information for past USDOT- and state-funded contracts. The study team collected information about past FHWA- and state-funded contracts awarded by ODOT or by local public agencies from October 1, 2010 through September 30, 2014. Chapter 3 outlines the data collection process and describes these contract data. Appendix C provides additional documentation.

ODOT and other agencies' programs. Background on the Federal DBE Program is provided in Chapter 4. The chapter also discusses ODOT's implementation of the program and its race- and gender-neutral efforts for DBE participation.

Analysis of local marketplace conditions. The study team examined quantitative and qualitative information relevant to the Oregon transportation contracting industry. Chapter 5 synthesizes quantitative information about local marketplace conditions. In accordance with USDOT guidance, Keen Independent analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the construction and engineering industries in Oregon (detailed results in Appendix E);
- Any differences in rates of business ownership in Oregon (discussed in Appendix F);
- Access to business credit, insurance and bonding (detailed results in Appendix G);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (examined in detail in Appendix H); and
- Certain other issues potentially affecting minorities and women in the local marketplace.

Appendices E through I provide supporting information.

Chapter 5 also summarizes analysis of qualitative information, including results of in-depth personal interviews and focus groups with 71 business owners, trade associations and public agencies as well as comments 275 business owners and managers provided through online and telephone surveys. The study team conducted additional interviews and focus groups with staff from ODOT and local public agencies and public input as part of the public comment process held at the outset of the study. Appendix J of this report summarizes comments received and provides detailed analysis of this qualitative information.

This combined quantitative and qualitative information about the marketplace is relevant to ODOT's development of an overall DBE goal and its projection of how much of the goal will be met through neutral means.

Availability analysis, including calculation of base figure for overall DBE goal. Keen Independent's availability analysis generates benchmarks to use when assessing ODOT's utilization of minority- and women-owned firms. The availability results also provide information for ODOT to consider when setting its overall annual goal for DBE participation on FHWA-funded contracts in FFY 2017 through FFY 2019.

Chapter 6, which presents these results, is organized as follows:

- The methods used to collect and analyze availability of minority-, women- and majority-owned firms;
- Availability benchmarks used in the disparity analysis; and
- Information relevant to ODOT’s “base figure” for its overall DBE goals for FHWA-funded contracts.

MBE/WBE utilization and disparity analysis. Chapter 7 describes Keen Independent’s analysis of the utilization of minority- and women-owned businesses in ODOT’s FHWA- and state-funded contracts during the study period. The disparity analysis in Chapter 7 compares utilization to availability to determine whether there is underutilization of minority- or women-owned firms in ODOT transportation contracts. Chapter 7 provides utilization and disparity analysis results for ODOT contracts overall, and for contracts within two-year time periods.

Chapter 8 further explores this information, including utilization and disparity results for different types of ODOT contracts. It also contains analysis of DBE participation on FHWA- and state-funded contracts, and explores whether there is any evidence of overconcentration of DBEs.

Information for overall DBE goal and DBE Program operation for FHWA-funded contracts.

Chapter 9 provides Keen Independent’s analysis of the overall DBE goal for FHWA-funded contracts for October 1, 2016 through September 30, 2019. This provides information to ODOT as it determines its overall DBE goal for these three federal fiscal years.

Portion of overall DBE goal to be met through neutral means. Chapter 10 details Keen Independent’s analysis of the portion of the overall DBE goal that can be met through neutral means and whether there is evidence that race- and gender-conscious programs will be needed. ODOT can review this information as it determines how it will implement the Federal DBE Program starting October 1, 2016, including which racial, ethnic and gender groups of DBEs, if any, will participate in a DBE contract goals program.

Recommendations. Keen Independent suggests refinements to ODOT implementation of the Federal DBE Program and other efforts to include small and minority- and women-owned businesses in ODOT contracts. Chapter 11 provides recommendations for ODOT consideration.

F. Public Participation in the 2016 Disparity Study

Keen Independent and ODOT implemented an extensive public participation process as part of the 2016 Disparity Study. To date, these activities include:

- An External Stakeholder Group that met with the study team and ODOT at key junctures of the study process (meetings in December 2014; January, June, August and October 2015; and January and March 2016).
- Information provided to interested groups through press releases, email blasts and presentations.

- A study website that posted information about the 2016 Disparity Study from the outset of the study.
- A telephone hotline and dedicated email address for anyone wishing to comment.
- Public meetings at the start of the study to obtain input from stakeholders and other interested groups. ODOT held these meetings in Bend, Roseburg, Salem and Portland in February 2015, and included call-in opportunities for individuals unable to attend a meeting in person. As discussed under Part G below, ODOT held additional public meetings upon release of the draft report and its proposed overall DBE goal.
- Opportunities for company owners and managers to provide information about their businesses and any perceived barriers in the marketplace. The study team successfully reached 7,119 businesses through online surveys and telephone surveys conducted in summer 2015.
- In-depth personal interviews and focus groups with 71 business owners, managers and trade association representatives throughout the state. The study team also interviewed staff from ODOT and other public agencies in Oregon.

G. Public Comment Process for the 2016 Disparity Study Report and ODOT DBE Goal

Keen Independent published this draft Disparity Study report for public comment before finalizing the report. Public comments concerning information in this report as well as ODOT’s proposed overall DBE goal were made from mid-March 2016 through April 30, 2016. The public was able to give feedback at the meetings listed below and provide written comments (a) in person at the meetings, (b) online at www.ODOTDBEstudy.org, (c) via email at info@ODOTDBEstudy.org, (d) through regular mail to ODOT Office of Civil Rights, MS31, 355 Capitol Street NE, Salem OR 97301-3871.

ODOT held five public meetings concerning the study and ODOT’s proposed DBE goal:

- La Grande on April 5;
- Bend on April 6;
- Medford on April 7;
- Portland on April 11; and
- Eugene on April 12.

The La Grande and Bend public meetings were also hosted live online for people who wished to participate remotely.

Keen Independent incorporated information from the public meetings and written comments into the final Disparity Study report. ODOT will also review this information as when finalizing its proposed overall DBE goal calculation for submission to FHWA prior to August 1, 2016.

CHAPTER 2.

Legal Framework

The legal framework for the disparity study is based on applicable regulations for the Federal DBE Program and other sources, including the Official USDOT Guidance, court decisions related to the Federal DBE Program and relevant court decisions concerning challenges to minority- and women-owned business programs. The applicable federal regulations are located at Title 49 Code of Federal Regulations (CFR) Part 26.

Since the 1980s, there have been lawsuits challenging the constitutionality of the Federal DBE Program and individual state and local agencies' implementation of the Program. Figure 2-1 on the following page provides an overview of some of the recent legal challenges. To summarize:

- The Federal DBE Program has been upheld as valid and constitutional.
- For the most part, state DOTs have been successful in defending against legal challenges. Western States Paving Company, however, was successful in challenging the Washington State Department of Transportation's implementation of the Federal DBE Program.
- Many state and local agencies, especially those in the West (i.e., states within the Ninth Circuit), made adjustments in their implementation of the Federal DBE Program to comply with the United States Ninth Circuit Court of Appeals decision in the *Western States Paving* case, and in accordance with the Official USDOT Guidance issued after the decision.
- The Ninth Circuit Court of Appeals held California Department of Transportation's implementation of the Federal DBE Program was valid and complied with the decision in *Western States Paving*.

Each of the lawsuits identified in Figure 2-1 pertains to state DOT implementation of the Federal DBE Program for USDOT-funded contracts. Appendix B discusses court decisions regarding local and state government implementation of the Federal DBE Program.

Individual companies and trade associations have also challenged the constitutionality of state or local government MBE/WBE programs related to non-federally-funded contracts (including state programs in California, Illinois, Montana, North Carolina and Florida). Appendix B of this report provides a detailed analysis of relevant legal decisions and federal regulations.

Figure 2-1. Legal challenges to state DOT implementation of the Federal DBE Program

State	Successfully defended implementation of Federal DBE Program	Unsuccessfully defended implementation of Federal DBE Program	Ongoing litigation at time of report
California	<i>Associated General Contractors of America, San Diego Chapter v. California DOT</i> ¹		
Illinois	<i>Northern Contracting, Inc. v. State of Illinois</i> ² <i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i> ³ <i>Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.</i> ⁴		<i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i> ³ appeal pending <i>Dunnet Bay</i> , Petition for Writ of Certiorari to the Supreme Court pending ⁴
Minnesota	<i>Sherbrooke Turf, Inc. v. Minnesota Department of Transportation</i> ⁵ <i>Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i> ⁶		
Montana	<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> appeal pending in the U.S. Court of Appeals, Ninth Circuit ⁷ <i>M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.</i> ⁸		<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> , appeal pending ⁷
Nebraska	<i>Gross Seed Company v. Nebraska Department of Roads</i> ⁹		
Washington		<i>Western States Paving Co., v. Washington State DOT</i> ¹⁰	
<p>¹ <i>Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.</i>, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).</p> <p>² <i>Northern Contracting, Inc. v. Illinois</i>, 473 F.3d 715 (7th Cir. 2007).</p> <p>³ <i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i>, 2015 WL 1396376 (N.D. Ill, March 24, 2015) <i>appeal pending</i> in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827.</p> <p>⁴ <i>Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.</i>, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the U.S. Supreme Court, pending. Docket No. 15-906; <i>Dunnet Bay Construction Co. v. Illinois DOT, et al.</i> 2014 WL 552213 (C. D. Ill. 2014), affirmed by <i>Dunnet Bay</i>, 2015 WL 4934560 (7th Cir. August 19, 2015).</p> <p>⁵ <i>Sherbrooke Turf, Inc. v. Minnesota Department of Transportation</i>, 345 F.3d 964 (8th Cir. 2003), <i>cert. denied</i>, 541 U.S. 1041.</p> <p>⁶ <i>Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i>, 2014 WL 1309092 (D. Minn. March 31, 2014).</p> <p>⁷ <i>Mountain West Holding Company, Inc. v. State of Montana; Montana DOT, et al.</i> U.S. District Court, District of Montana (Billings), 2014 WL 6686734 (D. Mont. Nov. 26, 2014), <i>appeal pending</i> in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003.</p> <p>⁸ <i>M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al.</i>, 2013 WL 4774517 (D. Mont.) (September 4, 2013).</p> <p>⁹ <i>Gross Seed Company v. Nebraska Department of Roads</i>, 345 F.3d 964 (8th Cir. 2003), <i>cert. denied</i>, 541 U.S. 1041.</p> <p>¹⁰ <i>Western States Paving Co. v. Washington State DOT</i>, 407 F.3d 983 (9th Cir. 2005), <i>cert. denied</i>, 546 U.S. 1170 (2006).</p> <p>See Appendix B for complete discussion of these cases.</p>			

The legal challenges have focused on implementation of race- and gender-conscious program measures such as DBE contract goals. This is important background for the Disparity Study.

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

- A. The Federal DBE Program;
- B. Similar state and local programs in the United States; and
- C. Legal standards that race- and gender-conscious programs must satisfy.

A. The Federal DBE Program

The Federal DBE Program includes a number of requirements for state and local governments implementing the program. Three important requirements are:

- **Setting overall goals for DBE participation in USDOT-funded contracts.** (49 CFR Section 26.45)
- **Meeting the maximum feasible portion of the overall DBE goal through race- and gender-neutral means.** (49 CFR Section 26.51)
 - Race- and gender-neutral measures include removing barriers to the participation of businesses in general or promoting the participation of small or emerging businesses.¹
 - If an agency can meet its overall DBE goal solely through race- and gender-neutral means, it must not use race- and gender-conscious measures as part of its implementation of the Federal DBE Program.
- **Appropriate use of race- and gender-conscious measures, such as contract-specific DBE goals.** (49 CFR Section 26.51)
 - Because these measures are based on the race or gender of business owners, use of these measures must satisfy stringent court imposed legal and regulatory standards in order to be legally valid.²
 - Measures such as DBE quotas are prohibited; DBE set-asides may only be used in limited and extreme circumstances (49 CFR Section 26.43).
 - Some state DOTs have restricted eligibility to participate in DBE contract goals programs to certain racial, ethnic and gender groups based on the evidence of discrimination in the state’s transportation contracting industry. ODOT’s operation of the contract goals program for substantially underutilized DBEs at the time of this report is one example.

¹ Note that all use of the term “race- and gender-neutral” refers to “race-, ethnic- and gender-neutral” in this report.

² Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

Figure 2-2 summarizes approaches that state DOTs use to implement the Federal DBE Program:

- All state DOTs set an overall goal for DBE participation.
- All state DOTs use certain neutral measures to encourage DBE participation.
- Many state DOTs use race- and gender-conscious measures such as DBE contract goals to help meet their overall DBE goal.
- Some state DOTs limit participation in race- and gender-conscious measures such as DBE contract goals to those DBE groups for which there is sufficient evidence of discrimination in the state transportation contracting industry (sometimes called “underutilized DBE” or “UDBE” contract goals programs). Implementation of such contract goals programs requires approval of a waiver from USDOT.³ ODOT has implemented a contract goals program limited to certain DBE groups in recent years.
- At present, some states operate a solely neutral program.

Because an individual state DOT sometimes adjusts how it implements the Program, the examples discussed in this Chapter might change after release of this report.

Figure 2-2. Examples of state DOT implementation of the Federal DBE Program

	Set overall DBE goal	Neutral measures*	Race- and gender-conscious measures			Examples
			DBE contract goals	DBE set-asides	Eligible DBEs	
1. Combination of neutral and race- and gender-conscious measures	Yes	Yes	Yes	No	All firms that are certified as DBEs	Most state DOTs
2. DBE set-asides	Yes	Yes	Yes	Yes	All firms that are certified as DBEs	No state DOTs at time of report
3. Substantially underutilized DBE (SUDBE) contract goals	Yes	Yes	Yes Only SUDBEs count toward meeting contract goals	No	Only underutilized DBE groups	ODOT WSDOT California DOT until mid-2012 Colorado DOT in past
4. Entirely race- and gender-neutral program	Yes	Yes	No	No	No contract goals	Montana and Idaho DOTs at present
*Examples: outreach, technical assistance, removing barriers to bidding, small business enterprise programs.						

³ 49 CFR Section 26.15.

B. State and Local MBE/WBE Programs in the United States

In addition to USDOT-funded contracts, ODOT and other agencies award transportation contracts that are solely funded through state or local sources. The Federal DBE Program does not apply to those contracts.

Some state DOTs and other agencies throughout the country operate minority- and women-owned business programs for their non-federally-funded contracts. As examples, the North Carolina Department of Transportation and the Indiana Department of Transportation operate MBE/WBE programs that are similar to the Federal DBE Program.

The State of Oregon has a Minority Business Enterprise (MBE) Program and a Women Business Enterprise (WBE) Program. There is also an Oregon Emerging Small Business (ESB) Program, which is based on business size and age. Some local governments in Oregon apply similar programs as well.

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

The U.S. Supreme Court has established that government contracting programs with race-conscious measures must satisfy the “strict scrutiny” standard of constitutional review. Two key U.S. Supreme Court cases are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;⁴ and
- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the same standard of review for federal race-conscious programs.⁵

As described in detail in Appendix B, the strict scrutiny standard is very difficult for a government entity to meet. The strict scrutiny standard establishes a stringent threshold for evaluating the legality of race-conscious programs. Under the strict scrutiny standard, a governmental entity must have a strong basis in evidence that:

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

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

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).

Constitutionality of the Federal DBE Program. The Federal DBE Program has been held to be constitutional “on its face” in legal challenges to date, although a court may still find that some individual agencies implementing the program fail to meet this legal standard in their implementation of the Program. Appendix B discusses a number of important legal decisions in detail, including *AGC, San Diego Chapter v. California DOT*,⁶ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT*,⁷ *Northern Contracting, Inc. v. Illinois DOT*,⁸ *Sherbrooke Turf, Inc. v. Minn DOT*,⁹ *Gross Seed v. Nebraska Department of Roads, Western States Paving Co. v. Washington State DOT, Adarand Constructors, Inc. v. Slater*,¹⁰ *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*,¹¹ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*¹² and *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*¹³

The 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT* is important for this disparity study, as Oregon is within the jurisdiction of the Ninth Circuit.

- The Court upheld the constitutionality of the Federal DBE Program.
- However, because the Ninth Circuit found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored, its operation of the Program was not constitutional.

After that ruling, state departments of transportation within the Ninth Circuit operated entirely race- and gender-neutral programs until studies could be completed to provide information that would allow them to implement the Federal DBE Program in a narrowly tailored manner.¹⁴

The first court review of an agency’s implementation of the Federal DBE Program in the Ninth Circuit after the *Western States Paving* decision was in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.* The Ninth Circuit held Caltrans’ implementation of the Federal DBE Program to be constitutional, which is of particular significance to this study (see Appendix B).¹⁵

⁶ 713 F. 3d 1187 (9th Cir. 2013).

⁷ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the U.S. Supreme Court, pending. Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed* in *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

⁸ 473 F.3d 715 (7th Cir. 2007).

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

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).

¹¹ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

¹² *Mountain West Holding Company, Inc.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *appeal pending*.

¹³ *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending*.

¹⁴ Disparity studies have been conducted for state DOTs in each Ninth Circuit state — Alaska, Hawaii, Washington, Idaho, Montana, Oregon, California, Nevada and Arizona — as well as many local transit agencies and some airports in those states.

¹⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187 (9th Cir. 2013).

In *Mountain West Holding* and *M.K. Weeden*, two U.S. District Courts in Montana upheld the validity of the MDT DBE Program implementing the Federal DBE Program.¹⁶ The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁷

Constitutionality of state and local MBE/WBE programs. In addition to the Federal DBE Program, some state and local government minority business programs have been found to meet the strict scrutiny standard. Appendix B discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver* and *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.* (upheld in part)^{18, 19}, and *Kossman Contracting Co., Inc. v. City of Houston* (upheld in part).²⁰

As discussed in Appendix B, many local and state race-conscious programs have been challenged in court and have been found to be unconstitutional. Appendix B discusses the *Western States Paving* decision as well as examples where courts found that operation of a state or local MBE/WBE program did not meet the strict scrutiny standard.

Summary. Court decisions regarding challenges to the Federal DBE Program and to state and local MBE/WBE programs inform the methodology Keen Independent uses in this disparity study and how agencies such as ODOT should interpret the results.

¹⁶ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

¹⁷ *Mountain West Holding* 2014 WL 6686734 (D. Mont. 2014), *appeal pending*.

¹⁸ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

¹⁹ Program upheld with regard to African American- and Native American-owned subcontractors but held invalid for inclusion of other groups. *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.*; 615 F.3d 233 (4th Cir. 2010).

²⁰ *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016) (upheld Houston's MBE/WBE Program with regard to minority- and women-owned businesses, but held invalid as to inclusion of Native American owned businesses).

CHAPTER 3.

ODOT Transportation Contracts

Many components of the 2016 Disparity Study require ODOT contract and subcontract data as building blocks for the analysis. When designing the availability research, for example, it is important to understand the geographic area from which ODOT draws contractors and consultants and the types of work involved in ODOT and local agency transportation contracts. The utilization and disparity analyses in the 2016 Disparity Study are based on information from ODOT prime contracts and subcontracts.

Before conducting other analyses, Keen Independent collected information for ODOT transportation contracts for the October 2010 through September 2014 study period. Chapter 3 describes the study team's process for compiling and merging these data. Chapter 3 consists of four parts:

- A. Overview of ODOT transportation contracts;
- B. Collection and analysis of ODOT contract data;
- C. Types of work involved in ODOT contracts; and
- D. Location of businesses performing ODOT work.

Appendix C provides additional detail concerning collection and analysis of contract data.

A. Overview of ODOT Transportation Contracts

ODOT uses FHWA and state funds to build and maintain transportation projects. The 2016 Disparity Study also includes contracts awarded by cities, counties, other local agencies and tribal entities using FHWA funds passed through ODOT.

- Construction projects include building new highway segments and interchanges, widening and resurfacing roads, and building and improving bridges. The largest construction contract in the study period was the \$141 million Sellwood Bridge project.
- Engineering-related work includes design and management of projects, planning and environmental studies, surveying and other transportation-related consulting services.¹

The 2016 Disparity Study focuses on highway-related contracts using FHWA or state monies and does not include contracts using funds from the Federal Transit Administration (FTA), Federal Aviation Administration (FAA) or National Highway Transportation Safety Administration (NHTSA). In total, the study team examined about \$1.9 billion in highway-related contract dollars over the study period.

¹ Throughout the report, Keen Independent discusses construction and engineering-related contracts based on type of work performed, not based on ODOT contracting department or ODOT data source. For example, not all ODOT contracts related to construction are awarded through the Construction Contracts Unit.

A single ODOT project can involve many types of businesses, as described below.

Prime contracts, subcontracts, trucking and materials supply. A typical construction project includes a prime contractor and a number of subcontractors. Trucking companies and materials suppliers are often involved in construction projects as well. Some subcontractors on ODOT construction projects further contract out work to what is known as a “second-tier” or “lower-tier” subcontractor. Keen Independent examined ODOT contract information for each level of subcontractor.

Many ODOT projects have an engineering phase prior to construction that requires work performed by engineering companies and related firms. The engineering prime consultant retains the specialized subconsultants needed to complete these contracts. ODOT sometimes contracts with engineering companies through price agreements, also known as agreements to agree, and when specific work is needed, ODOT issues work order contracts to those firms. Other times ODOT enters into direct contracts with engineering companies and related firms. Keen Independent included engineering work order and direct contracts in this analysis.

For both construction and engineering contracts, Keen Independent separated the contract dollars going to subcontractors (and truckers and suppliers) from the dollars retained by the prime contractor. Keen Independent calculated the total dollars going to the prime contractor by subtracting subcontractor, trucker and supplier dollars from the total contract value. This step was important for both the availability analyses and the utilization analyses performed in the 2016 Disparity Study.

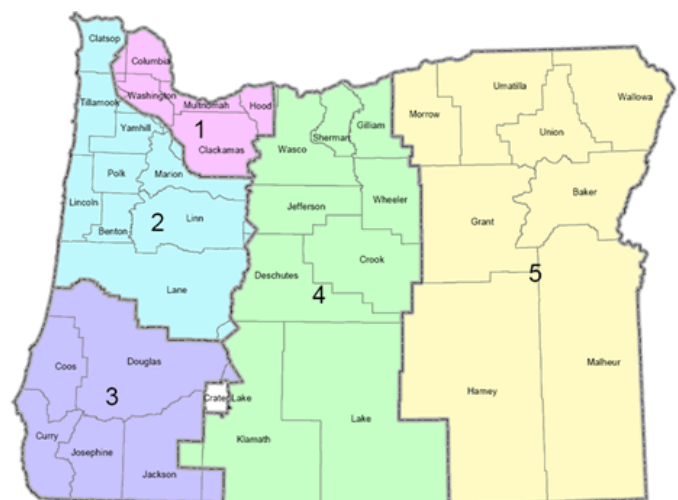
ODOT and local agency contracts. The 2016 Disparity Study includes ODOT contracts and those for local agencies that use ODOT-administered funds. Through ODOT’s Statewide Programs Unit and the local agency Certification Program, FHWA funds for transportation projects go to cities, counties, regional transportation commissions, other local agencies and tribal entities.

Transportation-related contracts. The study focused on transportation construction and engineering contracts including the acquisition of real property. The study team excluded any contracts to not-for-profit entities or government agencies.

Regions. Based on ODOT and industry input, Keen Independent examined geographic location of contracts based on the five ODOT regions shown in Figure 3-1. The region for a contract corresponds to the physical location of the project, not the address of the contractor.

Keen Independent coded statewide assignments and work not in a single physical location as “statewide.”

Figure 3-1.
Study regions



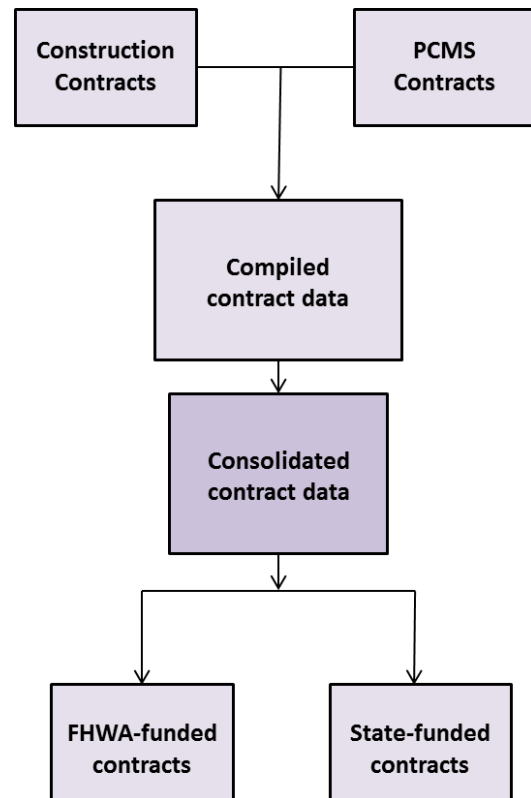
B. Collection and Analysis of ODOT Contract Data

As shown in Figure 3-2, Keen Independent collected data on ODOT's contracts from multiple sources. Data for most ODOT construction contracts came from ODOT's construction contract database. Data for Engineering-related contracts came from ODOT's Purchasing and Contract Management System (PCMS). Certain data on firms receiving ODOT work were also collected from the ODOT Office of Civil Rights databases. Contracts for local agencies awarded with funds administered through the Certification Program Office, Statewide Program Unit were included in ODOT's construction contract database.

ODOT contract records provided information about award date, dollars, location (region), general description of the work, whether or not the contract was FHWA- or state-funded, and whether DBE contract goals applied. Keen Independent used consistent methods to collect information on FHWA- and state-funded contracts.

Keen Independent merged contracts from different sources into one database, which the study team reviewed for duplicate records and then separated by funding source.

Figure 3-2.
Collection of ODOT contract data



Study period. Keen Independent examined contracts awarded from October 1, 2010 through September 30, 2014.

- **Study period start date.** The previous disparity study completed for ODOT in 2011 examined contracts through September 30, 2010. To avoid a gap in the analysis of ODOT contracts, the study period for the Keen Independent research began with contracts awarded in October 2010.
- **Study period end date.** Because Keen Independent began compiling contract data in early 2015, it was appropriate to choose the close of the previous state fiscal year (September 30, 2014) as the study period end date. However, for those pre-October 1, 2014 contracts, Keen Independent was able to capture subcontracts awarded on those in late 2014 and the first half of 2015. This step ensures that the contract information, including subcontracts, is entirely or substantially complete even for contracts awarded near the end of the study period.

Awarded amount versus payment amounts. To the extent possible, the dollar amounts used correspond to the total dollars paid or expected to be paid to the firm for services on that contract or subcontract. In most cases, Keen Independent collected and analyzed data on awarded amounts for each contract. The study team compared contract award amounts to payment amounts on contracts completed during the study period. The difference between the two amounts was minimal. When the participation of DBE and potential DBEs was examined, there was also little difference between contract amount and payment amount.

Definition of FHWA-funded and state-funded contracts. When there was any amount of FHWA-funding expected for a contract, ODOT treated that contract as FHWA-funded. “State-funded” contracts are those with no federal funding. Keen Independent’s analysis followed this designation of FHWA- and state-funded contracts.

Data sources for local agency contracts. ODOT maintains information about certified local agency projects funded through the ODOT Certified Program Office, Statewide Program Unit.

Limitations concerning contract data. As discussed in Appendix C, ODOT consistently collects data for contracts and subcontracts. However, prime contractors do not always use subcontracts to procure certain services such as trucking or to acquire supplies. For these types of work, much of the information in the ODOT data is for DBEs used to meet a contract goal. Keen Independent treated these trucking and supplier procurements by the prime contractor as “subcontracts” in the results of the utilization analyses. This limitation has a minor effect on overall results in Chapter 8 regarding the share of overall “subcontract” dollars going to DBEs and minority- and women-owned firms. However, there was not sufficient information in the study to examine trucking or supplier dollars going to DBEs or minority- and women-owned firms as a share of total trucking or supplier dollars when conducting the overconcentration analysis in Chapter 8.

C. Types of Work Involved in ODOT Contracts

Keen Independent’s analysis included 2,219 transportation-related contracts and work order contracts totaling \$1.9 billion over the October 2010 through September 2014 study period. There were 5,808 subcontracts identified for these contracts. The total number of prime contracts and subcontracts was 8,027. Figure 3-3 presents the number and dollar value of contracts in FHWA- and state-funded contracts.

Figure 3-3.
Number and dollars of ODOT and local agency transportation contracts and subcontracts, October 2010–September 2014

	ODOT	Local Agency	Total
Number of contracts			
FHWA-funded	5,638	610	6,248
State-funded	1,779	0	1,779
Total	7,417	610	8,027
Dollars (by millions)			
FHWA-funded	\$ 1,405	\$ 184	\$ 1,589
State-funded	337	0	337
Total	\$ 1,742	\$ 184	\$ 1,926

Note: Numbers may not add due to rounding
Source: Keen Independent from ODOT contract data.

The study team coded types of work involved in each prime contract and subcontract based upon data in ODOT contract records and, as a supplement, information about the primary line of business of the firm performing the work. Keen Independent developed the work types based in part on the work type descriptions used by ODOT as well as Dun & Bradstreet, the leading commercial provider of business information in the United States.

Contract dollars by type of work for FHWA- and state-funded contracts. Figure 3-4 on the following page presents information about contract dollars for 35 different types of prime contract and subcontract work. Dollars for prime contracts are based on the contract dollars retained (i.e., not subcontracted out) by the prime contractor or prime consultant.

Figure 3-4.

ODOT and local agency FHWA- and state-funded transportation prime contract and subcontract dollars by type of work, October 2010–September 2014

Type of work	FHWA-funded		State-funded		Total	
	Dollars (1,000s)	Percent	Dollars (1,000s)	Percent	Dollars (1,000s)	Percent
Bridge and elevated highway construction	\$277,977	17.5 %	\$85,297	25.3 %	\$363,274	18.9 %
Asphalt , concrete or other paving	280,249	17.6	33,913	10.1	314,162	16.3
General road construction and widening	251,264	15.8	19,158	5.7	270,421	14.0
Engineering	129,886	8.2	48,825	14.5	178,711	9.3
Excavation, site prep, grading and drainage	115,238	7.3	33,553	10.0	148,791	7.7
Electrical work including lighting and signals	60,518	3.8	7,960	2.4	68,477	3.6
Drilling and foundations	54,152	3.4	7,584	2.2	61,736	3.2
Temporary traffic control	47,529	3.0	3,911	1.2	51,440	2.7
Landscaping and related work including erosion control	30,369	1.9	9,884	2.9	40,253	2.1
Installation of guardrails, fencing or signs	27,186	1.7	7,986	2.4	35,172	1.8
Other concrete work	30,518	1.9	3,331	1.0	33,849	1.8
Striping or pavement marking	31,317	2.0	1,662	0.5	32,979	1.7
Painting for road or bridge projects	27,663	1.7	1,220	0.4	28,884	1.5
Transportation planning	16,890	1.1	10,702	3.2	27,592	1.4
Concrete flatwork (including sidewalk, curb and gutter)	18,753	1.2	8,116	2.4	26,869	1.4
Structural steel work	20,808	1.3	2,280	0.7	23,088	1.2
Fence or guardrail materials	21,299	1.3	640	0.2	21,939	1.1
Pavement surface treatment (such as sealing)	18,691	1.2	2,130	0.6	20,821	1.1
Pavement milling	17,435	1.1	255	0.1	17,690	0.9
Inspection and testing	9,351	0.6	6,873	2.0	16,225	0.8
Concrete pumping	12,717	0.8	152	0.0	12,869	0.7
Environmental consulting	6,975	0.4	3,768	1.1	10,743	0.6
Surveying and mapping	8,851	0.6	1,629	0.5	10,480	0.5
Aggregate materials supply	4,084	0.3	5,717	1.7	9,801	0.5
Goods - Steel	7,558	0.5	123	0.0	7,681	0.4
Concrete cutting	6,350	0.4	756	0.2	7,106	0.4
Trucking and hauling	4,775	0.3	1,409	0.4	6,184	0.3
Construction management	3	0.0	5,586	1.7	5,589	0.3
Wrecking and demolition	5,289	0.3	172	0.1	5,462	0.3
Underground utilities	3,660	0.2	782	0.2	4,442	0.2
Petroleum	3,188	0.2	0	0.0	3,188	0.2
Goods - Traffic or highway signs	0	0.0	458	0.1	458	0.0
Other professional services	16,911	1.1	16,590	4.9	33,501	1.7
Other construction	18,447	1.2	1,915	0.6	20,362	1.1
Other goods	<u>3,272</u>	<u>0.2</u>	<u>2,766</u>	<u>0.8</u>	<u>6,037</u>	<u>0.3</u>
Total	\$ 1,589,174	100.0 %	\$ 337,103	100.0 %	\$ 1,926,277	100.0 %

Source: Keen Independent from ODOT contract data.

When prime contracts and subcontracts pertained to multiple types of work, Keen Independent coded the entire work element based on what appeared to be the predominant type of work in the contract or subcontract. For example, if a subcontract included fencing and landscaping, and it appeared that the work was predominantly fencing, the entire subcontract was coded as fencing.² Similarly, when a more specialized activity could not be identified as the primary area of work, these contracts were classified as general road construction and widening or bridge and elevated highway construction, as appropriate.

As shown in Figure 3-4, the top four general types of work account for almost 60 percent of ODOT FHWA- and state-funded transportation contract dollars.

- Prime contracts and subcontracts for bridge, tunnel and elevated highway construction accounted for about \$363 million of the FHWA- and state-funded contract dollars examined, including prime contracts and subcontracts. This work area accounted for 19 percent of the contract dollars examined.
- Asphalt, concrete and other paving accounted for \$314 million or 16 percent of FHWA- and state-funded prime contracts and subcontracts. (Note that a prime contract or subcontract coded as general road construction and widening work could include asphalt paving, but was entirely coded as road construction because it appeared to include a broad set of work types, or the description of the work was not specific to asphalt paving.)
- General road construction and widening accounted for \$270 million of FHWA- and state-funded prime contracts and subcontracts, or about 14 percent of the total.
- Engineering work accounted for the fourth largest dollar volume of FHWA- and state-funded work (\$179 million or 9 percent of the total). (Note that when contracts for engineering included subcontracts for other types of work such as surveying or testing, these subcontracts were subtracted from the total for engineering.)

Types of work that did not fit into the specific categories listed in Figure 3-4 were included in “other construction,” “other professional services,” or “other goods” as appropriate. Together, these “other” categories comprised 3 percent of FHWA- and state-funded contract dollars, as shown in Figure 3-4.

² Data concerning subcontract awards or payments were for the entire subcontract, not individual work elements.

D. Location of Businesses Performing ODOT Work

In this study, analyses of local marketplace conditions and the availability of firms to perform contracts and subcontracts focus on the “relevant geographic market area” for ODOT contracting. The relevant geographic market area was determined through the following steps:

- For each prime contractor and subcontractor, Keen Independent determined whether the company had a business establishment in Oregon or two counties in southwest Washington that are part of the Portland Metropolitan Area (Clark and Skamania counties) based upon ODOT vendor records and additional research.
- Keen Independent then added the dollars for firms with Oregon and the two Washington county locations and compared the total with that for companies with no establishments within Oregon or southwest Washington.

Based upon analysis of combined ODOT and local agency contract dollars from October 2010 through September 2014, firms with locations in Oregon and the two Washington counties obtained 88 percent of FHWA- and state-funded transportation contract dollars. This percentage is consistent with definition of relevant geographic market area as reviewed by courts (see Appendix B).

Figure 3-5.
Dollars of ODOT and local agency transportation prime contracts and subcontracts by location of firm, October 2010–September 2014

	Oregon and two Washington counties	Out of market area	Unknown	Total
Dollars (millions)				
FHWA-funded	\$ 1,407	\$ 164	\$ 19	\$ 1,589
State-funded	<u>295</u>	<u>32</u>	<u>10</u>	<u>337</u>
Total	\$ 1,702	\$ 196	\$ 29	\$ 1,926
Percent of total dollars				
FHWA-funded	89 %	10 %	1 %	100 %
State-funded	88	9	3	100
Total	88 %	10 %	2 %	100 %

Note: Numbers may not add due to rounding.

Source: Keen Independent from ODOT contract data.

Based on this information, Keen Independent determined that Oregon and two counties in Washington (Clark and Skamania) should be selected as the relevant geographic market area for ODOT transportation contracting. Therefore, Keen Independent’s availability analysis focused on firms with locations in Oregon and Clark and Skamania counties in Washington State. The quantitative analyses of marketplace conditions in Chapter 4 also included data for Oregon and the two Washington counties (or just Oregon if only state-wide data were available).

CHAPTER 4.

ODOT Operation of the Federal DBE Program

Chapters 1 and 2 of this report introduced the Federal DBE Program, including requirements that an agency receiving USDOT funds set an overall goal for DBE participation and employ certain measures that would help it meet that goal. As described in Chapter 2, agencies such as ODOT must narrowly tailor their implementation of the Program to the conditions within their transportation contracting marketplace.

Chapter 4 provides a more detailed review of Federal DBE Program requirements and ODOT's implementation of the Program, organized around:

- A. Setting an overall DBE goal;
- B. Role of race- and gender-neutral measures in meeting the goal;
- C. Types of race- and gender-neutral measures;
- D. Permissible use of race- and gender-conscious programs, principally DBE contract goals; and
- E. Other program elements, including data collection and reporting.

Keen Independent examines actions ODOT has taken to implement each of these requirements. This overview provides important background when considering other report information concerning:

- The overall DBE goal for future FHWA-funded contracts (Chapters 6 and 9);
- Need, effectiveness and opportunities related to continued and expanded neutral measures (Chapters 5, 8, 10 and 11);
- Information indicating whether race- and gender-conscious programs are needed, and if so, for which DBE groups (Chapters 5, 7, 8 and 10); and
- Other enhancements to ODOT's implementation of the Federal DBE Program (Chapter 11).

A. Setting an Overall Annual DBE Goal — 49 CFR Section 26.45

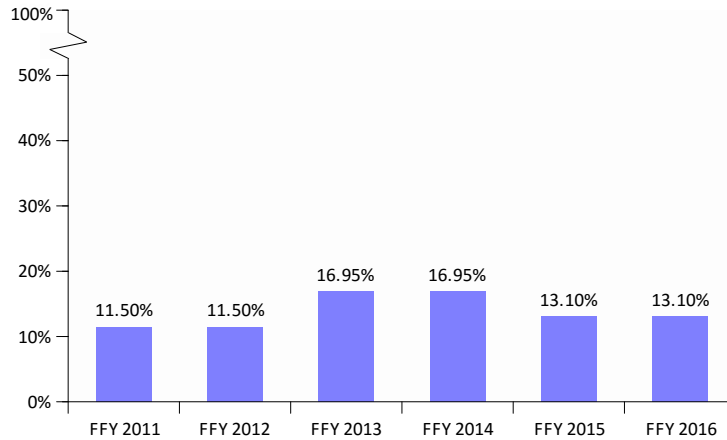
As part of implementing the Federal DBE Program, ODOT sets overall goals for DBE participation for USDOT-funded contracts. ODOT's overall DBE goal for FHWA-funded contracts for FFY 2015 and FFY 2016 is 13.10 percent, which FHWA has approved.

ODOT’s overall DBE goals since FFY 2011. Figure 4-1 shows ODOT’s FHWA-approved overall annual DBE goals for FHWA contracts since FFY 2011. They ranged from 11.50 percent to 16.95 percent over this time period.

Figure 4-1.
ODOT FHWA annual
DBE goals FFY 2011–FFY 2016

Note: ODOT proposed, but FHWA did not approve, an overall DBE goal of 12.29% for FFY 2014 through FFT 2016.

Source: ODOT Uniform Reports and other ODOT reports.



In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall annual DBE goals. Agencies such as ODOT need to develop and submit overall annual DBE goals every three years. ODOT’s next three-year goal for its FHWA-funded contracts will be for federal fiscal years 2017 through 2019, which begins October 1, 2016. It must submit its proposed goal for FHWA approval by August 1, 2016.

Two-step process to set the overall DBE goal. There is a two-step process for setting an overall DBE goal. Calculating the “base figure” is the first step, which Chapter 6 of this report provides. “Step 2 adjustments” can be made to develop the final overall DBE goal, which Chapter 9 explains. Keen Independent’s process follows the instructions given in 49 CFR Section 26.45 and additional USDOT guidance.¹

ODOT must also provide for consultation and publication of its proposed overall DBE goal. Consultation must include stakeholders, and publication must be on the ODOT website and may include other means as well, as described in 49 CFR Section 26.45(g).

B. Role of Race- and Gender-Neutral Measures in Meeting the Goal

As discussed in Chapters 1, 2 and 10, ODOT must meet the maximum feasible portion of its overall annual DBE goal through the use of race- and gender-neutral means of facilitating DBE participation (see 49 CFR Section 26.51).

¹ Tips for Goal-Setting in the Federal Disadvantaged Business Enterprise (DBE) Program. (2014, December 22). Available at <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

Projecting the portion of the overall DBE goal to be met through neutral means. Federal regulations require agencies such as ODOT to project the portion of their overall DBE goal that they expect to meet through neutral means. After establishing its overall DBE goal, ODOT must project the portion of the goal to be achieved through such means.

Chapter 10 of this report discusses different approaches to making this projection and provides information that ODOT can use regarding the three fiscal years beginning FFY 2017.

ODOT's projections for FFY 2015 and FFY 2016. The ODOT projection for FFY 2015 and FFY 2016, which FHWA approved, was for ODOT to:

- Meet 7.9 percentage points of its 13.1 percent overall goal through neutral means; and
- Meet the remaining portion, 5.2 percentage points, through race- and gender-conscious means (DBE contract goals).

To make this projection, ODOT examined the race-neutral DBE participation on its FHWA-funded contracts over a number of years (using the median annual race-neutral participation for those years). Chapter 10 analyzes new information on race-neutral participation, including results from more comprehensive data than ODOT has had in the past.

C. Types of Race- and Gender-Neutral Measures

Examples of neutral measures appear in a number of different parts of federal regulations governing the Federal DBE Program:

- **Fostering small business participation.** Federal regulations in 49 CFR Section 26.39 outline nine different groups of examples of neutral measures, which Keen Independent reviews in detail.
- **Business Development Program.** Regulations in 49 CFR Section 26.35 and Appendix D to Part 26 describe business development programs (BDPs), which are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program.
- **Mentor-protégé program.** Such programs provide mentorship of DBEs by other firms or groups.
- **Prompt payment mechanisms.** Prompt payment of subcontractors is a neutral measure required under 49 CFR Section 26.29.

The following discusses ODOT's activities as well as its partners' programs related to each of the above neutral measures.

Fostering small business participation — 49 CFR Section 26.39. When implementing the Federal DBE Program, ODOT must include a measure to structure contracting requirements to facilitate competition by small businesses, "taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may

preclude small business participation in procurements as prime contractors or subcontractors.”² The Final Rule effective February 28, 2011 added further requirements for transportation agencies to foster small business participation in their contracting.

Federal regulations in 49 CFR Section 26.51(b) provide examples of race-neutral means of facilitating DBE participation, summarized below:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications and delivery schedules in ways that facilitate participation by DBEs and other small businesses;
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing;
3. Providing technical assistance and other services;
4. Carrying out information and communications programs on contracting procedures and specific contract opportunities;
5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small business, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of a DBE directory; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Federal regulations also include as acceptable program measures:

- Race- and gender-neutral small business set-asides for prime contracts under a stated amount (e.g., \$1 million). Keen Independent discusses these types of programs under Point #6 from the above list.
- On prime contracts that do not include DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all of the work involved.

Beyond this list, there are several other examples of neutral measures identified in the Federal DBE Program such as prompt payment mechanisms, establishing mentor-protégé programs and other means, which are also discussed below.

² 49 CFR Section 26.39(a).

The study team's review of ODOT neutral initiatives identified efforts across each of these areas. In addition, other groups in Oregon provide services that ODOT leverages to provide assistances to DBEs and other small businesses.

1. Arranging aspects of contracts in ways that facilitate participation by DBEs and other small businesses. For its construction contracts, ODOT has an established, consistent schedule and process for advertisement and bid submission (9 a.m., Thursdays). ODOT also has a consistent way of assembling bids, quantities and specifications for construction projects. This standardization of the process and schedule is beneficial to prime contractors and subcontractors. Occasionally, ODOT has a special bid opening for a non-routine project on another day of the week, which is scheduled well in advance. The 2016 bid opening schedule is published on ODOT's Construction Contracts Unit website.

Throughout the organization, ODOT examines opportunities to unbundle contract elements to provide more opportunities to small businesses. ODOT has developed a Small Contracting Program that streamlines bidding and project delivery for construction contracts less than \$100,000 and engineering-related and other services contracts less the \$150,000. As discussed in Chapter 8, the Small Contracting Program increases participation of minority- and women-owned firms as prime contractors and consultants.

ODOT also works with local public agencies to encourage them to consider how unbundling contracts can benefit small business participation.

2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing. ODOT partners with agencies such as the Northwest Small Business Transportation Resource Center (NW SBTRC) to provide bonding education programs. ODOT helped to plan and organize the training series in 2012 and 2013 and the follow-up workshops in 2015.

ODOT small business and DBE training provides information about opportunities to receive financing assistance through other organizations. A major component of this assistance is U.S. Small Business Administration loan programs offered through local banks and other private and not-for-profit organizations.

- For example, the Oregon Association of Minority Entrepreneurs (OAME) offers small business financing (including accounts receivable and term microloans) assistance in presenting loan packages to outside financing sources and technical support.
- The Oregon Capital Access Program (CAP) helps banks and credit unions make commercial loans to small businesses and provide capital for start-up or expansion. Lenders build a loan-loss reserve each time they enroll a loan. Contributions to the loan-loss reserve account are matched by CAP.
- The USDOT has a Short Term Lending Program (STLP) that enables DBE- and SBA-certified businesses to access the financing they need to participate in transportation-related contracts. The STLP allows for a maximum loan amount of \$750,000. While the line of credit normally covers a one-year period, the applicant has the option of

requesting one or more renewals; the line of credit cannot exceed five years.³ NW TRBC also delivers this service. ODOT has conducted outreach to publicize this program and has assisted with confirmation of applicant information.

- There are many other organizations throughout the state that assist minority- and women-owned firms and other small businesses regarding financing. The 2010 ODOT Small Business Resources Guide identified more than 50 organizations. ODOT also provides resource links on its website.

ODOT can also waive certain bond requirements for small public improvement contracts. In April 2012, the Director reissued an exemption for ODOT public improvement contracts valued between \$50,000 and \$100,000 from bid security, performance, and payment bonds. Public works bonds regarding payment of wages are not covered under this exemption, but certified DBEs and MWESBs can obtain an exemption from providing a public works bond for the first four years of their certification.

3. Providing technical assistance and other services. ODOT has a series of different technical assistance programs delivered through Small Business Development Centers (SBDCs) in Oregon. ODOT pays for all but \$200 of the enrollment fee for certified firms (including certified ESBs) to attend these classes. Programs include the Small Business Management, ODOT Mentor-Protégé, DBE Boot Camp and DBE Business Development Program services. ODOT has also partnered with Business Diversity Institute, Inc. (BDI), the Metropolitan Contractor Improvement Partnership (MCIP), the Hispanic Metropolitan Chamber and other groups to provide small business training.

Additionally, ODOT sponsors the Turner School of Construction Management for Small, Women-Owned and Minority-Owned Businesses that is offered at Turner's offices. Since 2013, ODOT has sent nine DBE business owners to the University of Washington Foster School of Business Minority Business Executive Program.

Examples of other local sources of assistance include the following.

- **Chambers of commerce.** There are more than 80 chambers of commerce in the state, including minority and women's business organizations, that offer training and networking opportunities. There are membership organizations focusing on businesses owned by Native Americans, Asian Pacific Americans, Korean Americans, Philippine Americans, Hispanic Americans, African Americans and others.
- **Trade associations and professional groups.** There are many trade associations and professional groups related to transportation-related construction and professional services in Oregon. Organizations such as the Oregon Chapter of the Associated General Contractors of America (AGC) serve a broad range of firms engaged in transportation construction and other heavy construction. The American Council of Engineering Companies of Oregon (ACEC) is one example of a trade association serving engineering companies in the state. There are associations of minority

³ Short Term Lending Program. (2015, January 5) Retrieved August 28, 2015, from <http://www.transportation.gov/osdbu/financial-assistance/short-term-lending-program>

contractors with Oregon chapters, including the National Association of Minority Contractors (NAMCO) and associations of women business owners with Oregon locations (e.g., National Association of Women in Construction). There are also local organizations such as the Oregon Association of Minority Entrepreneurs (OAME) that help local small businesses.

These types of organizations offer a broad range of training, other technical assistance and networking opportunities to transportation-related construction and engineering companies in Oregon. ODOT has partnered with many of them.

- **Small business assistance organizations.** Examples of small business assistance organizations are provided below.
 - There are 19 centers across the state in the Oregon Small Business Development Center Network. These centers provide business counseling, planning assistance, help concerning financing, classes and assistance bidding on government contracts.
 - SCORE (Service Corps of Retired Executives) is a not-for-profit organization that partners with the U.S. Small Business Administration to provide general business assistance through locations throughout the country. SCORE has offices in communities throughout Oregon where it offers mentoring, business counseling, and workshops on topics including the basics of starting a business, how to administer and manage a business, marketing and social media, and business related computer skills and tools.
 - Business Oregon is Oregon's state economic development agency. It offers many services including COBID certification, planning services, grants, incentives and finance programs.
 - The Oregon Entrepreneurs Network (OEN) connects peers and mentors. They also provide startup funding opportunities, training and educational opportunities.
- **Small business incubators.** Business incubators offer workspace for emerging businesses and also training, mentoring, networking and financing assistance. There are business incubators located in many of the larger communities in Oregon

The groups mentioned above are just examples of trade associations, professional groups and small business assistance organizations in the state. The 2010 ODOT Small Business Resources Guide identified nearly 50 organizations that provide such assistance.

4. Carrying out information and communications programs on contracting procedures and specific contract opportunities. ODOT has ongoing efforts to provide information on contracting procedures and contract opportunities. Examples of activities include the following:

- ODOT participates in Connect 2 Oregon, which provides training to vendors on government contracting.
- By visiting ODOT's website, firms interested in working as prime contractors or subcontractors on ODOT construction contracts can obtain:
 - Information about currently available construction projects;
 - Information about future projects;
 - Lists of companies that are planholders for contracts out for bid (especially useful for subcontractors and suppliers); and
 - Lists of firms that are prequalified with ODOT (also useful to subcontractors and suppliers).
- Goods and services vendors can register with the Oregon Procurement Information Network (ORPIN), the State of Oregon's online system used by the ODOT Procurement Office (and other state and local agencies) to advertise solicitations to the public for contracts, except for large highway and bridge construction contracting. After vendors identify the types of goods and services they provide in ORPIN, they are automatically sent an email notification of those bid opportunities.
- ODOT's Electronic Bidding Information Distribution System (eBIDS) is an online tool that enables contractors, suppliers and other interested parties to locate, view and download bid-related documents for design-bid-build highway and bridge construction projects that ODOT currently has advertised to bid. ODOT eBIDS provides free downloading of bid booklets, addenda, clarification letters, plans, specifications and bid reference documents. ODOT vendors may also self-register as prime or informational planholders on these projects, and identify other firms that have registered.
- Businesses interested in construction contracts can also obtain information from the ODOT Procurement Office, Construction Contracts Unit webpage. The page lists upcoming construction projects and includes an option to receive email updates when the page is updated.
- The ODOT Office of Civil Rights issues monthly emails announcing upcoming highway construction opportunities and other events.
- ODOT provides different list of construction prime contractors on its Procurement Office webpage (which is helpful to potential subcontractors).
- The Office of Civil Rights webpage includes a searchable database that includes a contract letting forecast for the upcoming six months.

- The ODOT Office of Civil Rights features teaming and training opportunities, including meet-the-primers events.
- ODOT encourages online bidding across its contracting and procurement. This can also make it easier for small businesses to easily submit bids and proposals.
- To communicate bid opportunities on local agency contracts, ODOT's Statewide Programs Unit webpage maintains contact information for ODOT Local Agency Liaisons as well as links to listings of Oregon city and county websites.
- In 2005, the American Council of Engineering Companies (ACEC) and ODOT established a partnership agreement that identifies issues and resolutions as well as partners on communication and collaboration protocols. Several standing committees undertake specific work assignments. Meetings are held bi-monthly. The group also holds an annual partnering conference.
- The Oregon chapter of the Association of General Contractors partners with ODOT to hold an annual industry meeting. AGC's Heavy-Highway Council (the Industry Leadership Team) meets with ODOT monthly. As with the ACEC partnership, this team creates subcommittees and work groups to address industry-related issues.
- ODOT's DBE Program staff trains internal staff, consultants, constructors and local public agency staff on DBE utilization and compliance. ODOT also maintains a complaint process related to DBE issues.
- ODOT participates in many tradeshow and other outreach events in partnership with chambers and trade associations;

Industry associations and other groups also provide such assistance.

5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses. Many of the small business services providers and other organizations previously mentioned provide services related to business management, recordkeeping, finances and accounting. ODOT provides additional workshops and supports other small business management training. ODOT's Small Business Resource Guide identified more than 50 organizations providing training and assistance with issues such as accounting.

6. Providing services to help DBEs, and other small business, improve long-term development. The Emerging Small Business (ESB) Program creates contracting opportunities for Oregon's small business community and assists ESBs in overcoming barriers to participating in public contracting procurement programs. Oregon independent firms with average gross annual receipts over the past three years under a certain threshold, qualify for the program. (Many DBEs are also ESBs.)

The ESB program identifies contracting opportunities that are small, not technically complex and are relatively short in duration. Under this program, ODOT can set-aside contracts for bidding by ESB-

certified firms. Most of the projects selected for the ESB program are advertised on ORPIN. Local agencies such as the City of Portland and Port of Portland operate ESB programs as well.

ESB firms also qualify to participate in the ODOT Office of Civil Rights' Project-Specific Mentor-Protégé Program. ESBs must perform ODOT-related work such as highway- or facility-related construction, architecture, engineering or related professional services and have an active contract or subcontract on an ODOT project. Primes and subcontractors on an active ODOT-funded project commit to participate in the mentor-protégé team for the duration of the project contract. The mentor-protégé relationship is facilitated by the Small Business Development Center. Members of the team (mentor, protégé, SBDC facilitator and ODOT ESB Manager) meet monthly to develop and implement a plan to assist the protégé in targeted areas.

The Small Contracting Program also provides opportunities for DBEs and other small businesses to develop prime contractor relationships with ODOT.

7. Programs to assist new, start-up firms. Many of the programs discussed above, whether operated by ODOT or other groups, apply to new businesses.

8. Ensuring distribution of a DBE directory. The State of Oregon Certification Office for Business Inclusion and Diversity (COBID) provides a directory of DBE firms. ODOT provides a link to the searchable online DBE directory on its website, which also includes firms certified as MBE/WBE/ESBs.

9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media. Activities include the following:

- ODOT training includes topics such as e-commerce and electronic bidding.
- ODOT's Business Resources Guide provides information about many organizations that assist small businesses with marketing, including e-commerce. There were more than 40 organizations in the 2010 ODOT Small Business Resources Guide that provide technology training. As with other training, ODOT can provide reimbursement of the costs of technology training, with certain limits.
- ODOT sponsors Business Diversity Institute, Inc. (BDI), which provides electronic media-related training at some of its Breakthrough Breakfast and MED Week workshops.
- ODOT's AGC and ACEC annual conferences present sessions on emerging technologies, which DBEs are encouraged to attend.
- ODOT's Procurement Construction Contracts Unit has published detailed guidance on how to use eBIDS, offered training around the state after it launched, and continues to provide technical assistance on its use.

Summary. The study team's review of neutral initiatives identified efforts across the examples listed in 49 CFR Section 26.51(b).

Business Development Program — 49 CFR Section 26.35 and Appendix D to Part 26. Business development programs (BDPs) are programs designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. Agencies such as ODOT may establish a BDP as part of their implementation of the Federal DBE Program.

As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE.

ODOT has contracted with SBDCs to deliver DBE Boot Camp to provide the business development program element. ODOT is in the process of transitioning from the boot camp program (short course) to a more spread out format with the DBE Business Development Program, also offered in part through SBDCs, and may supplement the SBDC services with other support services through other providers. New ODOT programs were under development at the time of this report.

Mentor-protégé program. ODOT has been a significant supporter of the mentor-protégé programs administered by the Port of Portland. The Port has had a mentor-protégé program for MBE/WBEs in place for 15 years. According to the Port, there are 100+ graduates of the program to date. Many of the MBE/WBE firms doing work with the Port and ODOT today are current participants in the program or past graduates.

Protégés meet with their mentors and the Port once each month for at least for 90 minutes. The Port also assists with back-office infrastructure of companies, including training and other help concerning bookkeeping, marketing and IT. On average, it spends \$15,000 per year on each protégé.

The program also involves developing three-year strategic plans and relationship building. The Port directs firms to Albina Opportunities Corp. for capital needs. According to Port staff, mentors give their time freely, and seem willing to participate. They do it, in part, for “goodwill from the Port.”

There are other organizations in Oregon that offer general business assistance, including mentoring, as discussed elsewhere in this chapter.

Prompt payment mechanisms — 49 CFR Section 26.29. The Federal DBE Program (49 CFR Section 26.29) requires prompt payment of subcontractors. On USDOT-funded contracts, prime contractors are required to pay subcontractors for satisfactory performance of work no later than 30 days from their receipt of payment from the agency. There are parallel requirements for release of retainage to subcontractors. It is a current point of emphasis from USDOT.

Oregon has a ten-day prompt payment statute for prime contractor payment of subcontractors, including material suppliers, on public improvement contracts. Within ten days of receiving payment from the agency, prime contractors on construction contracts are required to pay subcontractors for satisfactory performance. This ten-day payment requirement applies to first-tier subcontractors and

their subcontractors. By state law, prime contractors and first-tier subcontractors must pay interest on any payments that are more than 30 days after contractor receipt of payment.⁴

In addition, state statute requires ODOT to promptly pay contractors on public improvement projects and pay late interest on payments that are more than 30 days after receipt of invoice.

In November 2012 ODOT convened a subcommittee of agency, prime, and small business subcontractors to address concerns identified during the 2011 disparity study about subcontractors not getting timely payment of retainage. The committee reviewed several options, including whether to disallow retainage, and the quarterly release was the agreed upon solution.

ODOT instituted a quarterly release of retainage process for completed pay items in 2013. Each quarter, ODOT reviews a contract for completed pay items, and releases retainage for those items. Once the prime contractor receives this retainage payment, it has 10 days to release corresponding retainage to its subcontractors.

Overall assessment of neutral efforts. Review of current race- and gender-neutral initiatives shows considerable ODOT efforts alone and in partnership with others. Much of ODOT's assistance is highly individualized to the specific needs of a DBE based on information developed in a formal assessment and business plan.

D. Use of Any Race- and Gender-Conscious Measures

The Federal DBE Program outlines proper consideration and use of race- and gender-conscious measures such as DBE contract goals.

DBE certification — 49 CFR Part 26 Subpart D. The State of Oregon Certification Office for Business Inclusion and Diversity (COBID) is the sole certifying agency in Oregon. It has designed its DBE certification process to comply with 49 CFR Part 26 Subpart D. It uses USDOT forms and follows federal regulations in certifying firms as DBEs within the state.

Federal regulations in 49 CFR Section 26.31 requires maintenance of DBE directory to include address, phone number and the types of work the firm has been certified to perform as a DBE, using NAICS codes. COBID maintains a searchable DBE directory on its website. It appears to meet and exceed the requirements in 49 CFR Section 26.31, as it has more detailed work types listed for each firm and provides fax number and email address when available. The DBE directory is searchable by business name, work type, NAICS code and company representative.

Use of DBE contract goals — 49 CFR Section 26.51(d and e). The Federal DBE Program requires agencies to establish contract goals to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral means, as noted in 49 CFR Section 26.51(d).

⁴ ORS 279C.525(2).

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

- Contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set a contract goal on every FHWA-funded contract;
- Agencies should set a goal for a specific contract based on factors such as the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract;
- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that the agency projects being unable to meet through race- and gender-neutral means; and
- An agency's contract goals must provide for participation by all DBE groups eligible for race- and gender-conscious measures, and must not be subdivided into group-specific goals.

ODOT appears to operate a DBE contract goals program in accordance with each of these instructions.

Federal regulations allow for an agency to require information regarding compliance with the DBE contract goal at time of bid or proposal, or up to seven days after bid opening (to be reduced to five days beginning January 1, 2017).⁵ The regulations provide for some flexibility for what a proposer needs to provide under negotiated procurements such as design-build contracts.⁶ Regulations also establish procedures for calculating the value of the DBE participation for specific types of subcontractors and suppliers.⁷ For example, only if a DBE performs a “commercially useful function” can it be counted toward the goal.

Once the prime contractor has identified a DBE subcontractor to meet a contract goal, it may not terminate that DBE or substitute another DBE without the agency's prior consent. An agency may only give such consent if there is good cause for terminating the listed DBE (federal regulations provide direction on what constitutes “good cause”)⁸

ODOT use of DBE contract goals. In April 2006, ODOT suspended its use of DBE contract goals after FHWA directed state DOTs in the Ninth Circuit to do so until they completed a disparity study. ODOT reinstated the use of race- and gender-conscious goals in FFY 2009, but only for certain DBE groups and only for construction contracts (under an FHWA-approved “waiver”). ODOT reinstated setting DBE contract goals for architecture and engineering (A&E) contracts in April 2013. At the time of this study, ODOT continued to operate the DBE contract goals program in this way, with periodic changes in the DBE groups eligible to meet contract goals under an FHWA-approved waiver.

⁵ 49 CFR Section 26.53(b)(3)(i).

⁶ 49 CFR Section 26.53(b)(3)(ii).

⁷ 49 CFR Section 26.55.

⁸ 49 CFR Section 26.53(f)(1).

At the time of this report, the following DBE groups were eligible to meet DBE contract goals:

- For construction contracts, DBEs owned by African Americans and Subcontinent Asian Americans were eligible to be counted toward a DBE contract goal; and
- For A&E contracts, DBEs owned by women, African Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans were eligible to be counted toward a DBE contract goal.

ODOT staff and some business owners interviewed in the study reported that limiting DBEs to two groups to meet contract goals for construction contracts makes it difficult for the Program to be effective. ODOT is somewhat limited in setting goals as the types of work involved might not match availability within the two groups of DBEs, and there is less competition among DBEs than might be ideal. ODOT staff and others described a number of projects where poor work or other behavior by the DBE caused major problems with certain construction projects.

ODOT current process for setting goals for specific contracts. ODOT sets DBE contract goals on certain FHWA-funded construction and A&E contracts.

- ODOT sets goals on construction contracts of \$1 million or more. ODOT's previous goal-setting process was to not include a DBE goal if a project was shorter than 90 days. Currently, ODOT considers a short project schedule as one factor in determining a contract goal. In the past, sometimes ODOT would not set a goal because it was in a rural location. However, according to ODOT staff, to increase participation and encourage broader opportunities around the state, ODOT has become more flexible in how it sets DBE contract goals, even in rural locations.
- To establish a goal for a construction contract, ODOT staff first review the engineer's estimate for different types of work. ODOT then examines DBEs that are available for the work. According to staff, the highest DBE contract goal ODOT has set on a construction contract in recent years has been 10 percent. Many projects have had contract goals in the range of 1 to 4 percent. One manager from a local public agency that implements ODOT's program said that ODOT's goals were much lower than that agency's goals on its own similar contracts.
- Over the past two years, ODOT has set higher DBE contract goals so that it can meet its overall DBE goal and encourage use of DBEs in a broader range of work types. Prime contractors have reported to ODOT staff that they tend to meet DBE contract goals by using disciplines that are the least risky to the project. Use of higher goals on select projects are intended to make it difficult for prime contractors to meet the contract goal by only awarding DBEs low risk work, such as flagging and trucking.

- ODOT sets goals on A&E contracts of \$100,000 or more. ODOT considers the amount of work that can be subcontracted when setting the goal. A typical DBE goal on an A&E contract might be 8.5 percent if there are five or more disciplines in the work; a lower goal could be set if there are fewer disciplines. ODOT has recently convened a DBE goal setting committee for consulting contracts to develop DBE-related evaluation criteria for the proposal process and to reevaluate DBE goal sizes and commitment review processes.

ODOT process for determining whether a bidder had met the goal or shown good faith efforts to meet the goal. ODOT required bidders on construction contracts to identify DBEs, their scope of work and their dollar commitments at time of bid. Sub-tier subcontractors can count toward a goal in the same way as first-tier subcontractors.

For construction contracts, bidders submit a DBE Commitment Certification and Utilization Form with the bid. ODOT reviews this information to determine whether the contract goal was met and the committed DBEs are able to perform the bid items listed. The awarded contractor provides a Committed DBE Breakdown and Certification Form, signed by the DBE, within 10 calendar days of notification of award and prior to contract execution. ODOT also receives subcontract agreements and a DBE Work Plan Proposal for DBEs used on a project prior to when they perform the work.

For A&E contracts, ODOT's current process is that the final commitments to DBEs do not need to come in before the proposal. ODOT does not consider DBE participation in the points it awards when evaluating proposals; there is a pass-fail requirement for a proposer to submit a Subcontractor Solicitation and Utilization Report with their proposals. Prior to contract execution, the awarded contractor must submit a Committed DBE Breakdown and Certification form, signed by the DBE, showing scope of work and dollar value for each DBE subcontractor committed to meet the goal.

When counting DBE participation, federal regulations require that certain contract roles not count full value toward meeting a DBE contract goal. Section 26.55 of 49 CFR describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. ODOT complies with these crediting requirements when determining how much credit to allow a prime contractor toward meeting a contract goal and when reporting overall DBE participation to FHWA.

Good faith effort procedures — 49 CFR Section 26.53. A bidder or proposer can comply with a DBE contract goal by documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in doing so. If an agency determines that a bidder or proposer did not make good faith efforts to meet the contract goal, it must provide that bidder or proposer an opportunity for administrative reconsideration.

USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Section 26. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. ODOT's implementation of DBE contract goals includes good faith efforts procedures. ODOT also has an administrative reconsideration process for any bidder that wishes to appeal a negative good faith efforts review, as required in the Federal DBE Program.

In recent years, bidders on ODOT construction contracts with DBE contract goals typically complied with the contract goals program by showing DBE participation that met the goal. There have been only two or three construction contracts where good faith efforts submissions were necessary in recent years, according to ODOT staff. Based on communication from ODOT staff, ODOT monitoring of contracts found that prime contractors were able to meet those commitments.

ODOT staff report that some contractors and consultants have been confused as to how to meet a DBE contract goal; some would show MWESB subconsultants rather than DBEs, for example. Sometimes ODOT has agreed that consultants made adequate good faith efforts on A&E contracts. However, ODOT has mostly found bidders and proposers commit sufficient work to eligible DBEs to meet the assigned contract goals.

Monitoring and compliance. Agencies must monitor that the work prime contractors commit to DBE subcontractors at contract award (or through contract modifications) is actually performed by those DBEs. Prime contractors can only terminate DBEs for “good cause,” and with written consent from the awarding agency. USDOT describes the requirements in 49 CFR Section 26.37(b).

ODOT follows Federal DBE Program monitoring and compliance requirements:

- ODOT staff monitor DBE payments made to DBE firms and compares payments to contract award commitments. ODOT requires contractors to submit monthly Paid Summary Reports showing the amounts paid to their subcontractors. When monitoring whether committed DBE subcontractors are actually used on projects, ODOT has occasionally needed to withhold payment from a prime contractor for not meeting their DBE commitments for that project. However, ODOT does not impose penalties on prime contractors for not meeting a DBE contract goal when there is work that a DBE subcontractor did not perform through no fault of the prime contractor.
- When monitoring the project, ODOT will only give a prime contractor credit for DBEs that meet the Commercially Useful Function (CUF) requirements, per ODOT’s review.
- ODOT’s monitoring includes review of commercially useful function (CUF). ODOT staff prepare a Commercially Useful Function (CUF) report for each DBE on a project to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed.
- ODOT also has DBE termination and substitution review procedures. ODOT has received requests from prime contractors to terminate a DBE subcontractor on a project. ODOT will obtain the DBE’s perspective on the situation before making a decision, and will review whether the prime contractor has “good cause” to terminate in accordance with the regulations.
- ODOT staff are also responsible for informing the USDOT of any false, fraudulent or dishonest conduct in connection with the program.

Flexible use of any race- and gender-conscious measures — 49 CFR Section 26.51(f). Agencies must exercise flexibility in any use of race- and gender-conscious programs. For example, if ODOT uses DBE contract goals and determines that its DBE utilization is exceeding its overall DBE goal in a particular fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a particular fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet the overall goal.

Analysis of reasons for not meeting overall DBE goal — 49 CFR Section 26.47(c). Another addition to the Federal DBE Program made under the Final Rule effective February 28, 2011 requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goals for that year. An agency must:

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

As ODOT's DBE participation has not met its overall DBE goal in recent years, it has had to submit a Shortfall Analysis and Action Plan describing reasons that it did not meet the overall goal and how it planned to do so in the next fiscal year.

Shortfall in FFY 2014. ODOT's Shortfall Report for FFY 2014 included the following reasons for not meeting the overall DBE goal for that year:

- High overall goal that was based in part on "potential DBEs," which included firms that were not DBE certified but might be;
- ODOT's lack of reporting of DBE participation on engineering-related contracts, even though the goal was based in part on availability analysis for those contracts;
- Insufficient DBE participation as subcontractors, primarily because eligibility for the DBE contract goals program for construction contracts was limited to African American- and Subcontinent Asian American-owned DBEs; and
- Low level of DBE participation as prime contractors.

Based on this assessment, ODOT took the following actions for FFY 2015:

- ODOT adjusted the overall goal that better reflected what was achievable given DBE availability for ODOT work. (FHWA approved the new goal of 13.1 percent DBE participation.)

- ODOT also began setting higher DBE contract goals to assist ODOT in meeting the overall goal. ODOT began using a DBE Goal Planning worksheet for construction contracts to help it identify projects for DBE contract goals and the levels of goals for those projects necessary to meet the race-conscious portion of ODOT's overall DBE goal. The Office of Civil Rights improved communications with Area Managers in each of ODOT's Regions to more accurately forecast DBE goal sizes on projects in each Region. ODOT also communicated the new practice to prime contractors and provided more intra-year DBE tracking information to key trade groups.
- As in previous years, ODOT encouraged DBEs to participate as prime contractors in ODOT projects. ODOT continued to provide DBEs with information about contracting opportunities. It also continued to offer technical assistance to DBEs (primes and subcontractors) through the DBE Business Development Program and other efforts.
- ODOT also changed its internal procedures to remove barriers to non-committed DBEs to participate on its projects as suppliers, truckers and specialty contractors on the same basis as non-DBE suppliers, truckers and specialty contracts. This required changes in boilerplate Special Provisions, which were implemented in October 2014.

Shortfall in FFY 2015. ODOT's DBE participation of 6.01 percent in FFY 2015 also fell short of its 13.1 percent DBE goal for that year, which requires a Shortfall Report for that year. In fall 2015, ODOT submitted a request to modify its program waiver to re-include all DBE groups as eligible to meet DBE contract goals for construction contracts. ODOT believes re-including all DBE groups as eligible to meet contract goals would help increase overall DBE participation. ODOT is also continuing to refine its DBE goal forecasting process, reevaluating some projects for higher goals, and identifying additional outreach and "meet the primes" networking opportunities across the state, including mandatory pre-bid meetings on certain large projects.

Prohibition of DBE quotas and prohibition of set-asides for DBEs unless in limited and extreme circumstances — 49 CFR Section 26.43. DBE quotas are prohibited under the Federal DBE Program. DBE set-asides are only to be used in extreme circumstances. ODOT does not use DBE quotas in any way in its administration of the Federal DBE Program.

Overconcentration — 49 CFR Section 26.33. Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. If an agency does identify overconcentration, examples of appropriate measures include the use of incentives, technical assistance, business development programs and mentor-protégé programs to assist DBEs in performing work outside of the specific field in which the agency has determined that non-DBEs are unduly burdened. An agency can also consider varying its use of contract goals to ensure that non-DBEs are not unfairly prevented from competing for subcontracts. Any determination of overconcentration and measures to address it must receive approval from FHWA.

Chapter 8 of this report further examines this issue based on data collected in this disparity study.

Complaint procedure. ODOT maintains a complaint procedure for DBEs experiencing difficulties or other firms wishing to provide information to ODOT.

E. Statements, Reporting and Recordkeeping

There are number of requirements under 49 CFR Part 26 related to required statements and assurances, reporting and recordkeeping. They include the following, presented in the same order as found in the federal regulations.

Policy statement — 49 CFR Section 26.2. ODOT has a signed and dated policy statement expressing its commitment to the DBE Program.

Reporting to DOT — 49 CFR Section 26.11 (b). ODOT must periodically report DBE participation in its transportation-related construction and engineering contracts to FHWA. ODOT compiles information on DBE commitments/awards and on DBE payments and timely submits Uniform Reports of DBE Awards or Commitments and Payments to FHWA every six months. ODOT had not included non-construction contracts in these reports until federal fiscal year 2015, however.

ODOT must also develop a bidders list of businesses that are available for its transportation contracts. The bidders list must include the following information about each available business:

- Name;
- Address;
- DBE status;
- Type of work performed;
- Age of business; and
- Annual gross receipts (within a selected range).

This information is required to help agencies such as ODOT develop accurate data about the universe of DBE and non-DBE firms that seek to work on contracts.

ODOT collects information from the following sources:

- ODOT has a database of contractors submitting bids on construction contracts and their DBE or MWESB certification (but not data such as age or gross receipts);
- Bidders on construction contracts are also to provide ODOT with a list of firms from which they obtained subcontract quotes; and
- ODOT maintains lists for other types of contracts, such as firms interested in receiving information about engineering contract opportunities.

COBID maintains information about race, ethnicity or gender ownership of firms and the types of work they perform in the DBE Directory. ODOT Office of Civil Rights receives this information through a nightly database upload.

The information Keen Independent prepared from the detailed availability interviews can supplement ODOT information to provide age, gross receipts and other firm information in a consistent list.

Assurances — 49 CFR Section 26.13. ODOT must make certain required assurances in its agreements with FHWA, and does so.

Program updates — 49 CFR Section 26.21. ODOT has submitted a DBE Program document for approval to FHWA and periodically updates this document.

DBE Liaison Officer — 49 CFR Section 26.25. At present, the Manager of the Office of Civil Rights is the DBE Liaison Officer for ODOT.

DBE financial institutions — 49 CFR Section 26.27. ODOT is required to investigate services offered by financial institutions owned and controlled by socially- and economically-disadvantaged individuals. In its March 2014 update of its DBE Program Plan, ODOT reported that it had not identified any minority-owned financial institutions in Oregon.

F. Summary

The Federal DBE Program requires agencies receiving USDOT funds to set an overall DBE goal and meet the maximum feasible portion of that goal through the use of race- and gender-neutral means. As necessary and appropriate, agencies such as ODOT must use DBE contract goals to meet any portion of the overall goal that cannot be met through neutral means.

ODOT is operating the Federal DBE Program for its FHWA-funded contracts in this fashion, and has monitoring and compliance elements to ensure its proper operation.

The 2016 Disparity Study will provide new information for ODOT to:

- Set its overall DBE goal for FHWA-funded contracts for FFY 2017 through FFY 2019 (Chapter 9);
- Examine any additional race-neutral opportunities to encourage DBE and other small business participation in its contracts (Chapter 11);
- Project the portion of its overall DBE goal to be met through neutral means (Chapter 10);
- Assess whether any race- and gender-neutral measures such as DBE contract goals are needed (relevant information in Chapters 5, 7, 8 and 10 as well as supporting appendices); and
- If use of DBE contract goals is needed to meet the overall DBE goal, assess which DBE groups might be eligible to participate in the contract goals program (Chapters 5, 7, 8 and 10 and supporting appendices).

CHAPTER 5.

Marketplace Conditions

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, barriers to the formation of minority-owned construction businesses, and barriers to entry.”¹ Congress found that discrimination has impeded the formation and expansion of qualified minority- and women-owned businesses (MBE/WBEs).

As part of the Disparity Study, Keen Independent conducted quantitative and qualitative analyses of conditions in the Oregon marketplace to examine whether barriers that Congress found on a national level also appear in Oregon. The study team analyzed whether barriers exist in the Oregon construction and engineering industries for minorities, women, and MBE/WBEs, and whether such barriers might affect opportunities on ODOT and local agency transportation contracts.

Understanding current marketplace conditions is important as ODOT determines its overall goal for DBE participation in FHWA-funded contracts and projects the portion of its overall goal to be met through neutral means.

Keen Independent organized Chapter 5 to provide some of the historical context in which market conditions affecting minorities and women have evolved, as well as examine current conditions in the Oregon marketplace:

- A. Historical context in Oregon;
- B. Entry and advancement;
- C. Business ownership;
- D. Access to capital, bonding and insurance;
- E. Success of businesses; and
- F. Summary.

Chapter 5 also summarizes the analysis of input from about 400 individuals representing businesses, other government agencies, trade associations and other groups throughout the state.

- The Keen Independent study team conducted in-depth personal interviews and focus groups involving 80 businesses, trade organizations and local public agencies. The study team also conducted interviews and focus groups with ODOT staff. There were comments from 275 businesses through telephone and online availability surveys from May through October 2015.
- ODOT held public meetings in Bend, Roseburg, Salem and Portland in February 2015 and asked for written comments concerning the Disparity Study.

¹ *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d, 970 (8th Cir. 2003) (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167–76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 992 (9th Cir. 2005).

- The study team developed a website, an email address and dedicated telephone hotline for the study that asked any interested individuals to provide comments. Input received through these and other efforts is included as well.
- ODOT held five more public meetings and provided opportunities for comment on the draft 2016 Disparity Study report in April 2016. Keen Independent incorporated this additional information into the final report.

Appendices E through H present detailed quantitative information concerning conditions in the Oregon marketplace. Appendix I discusses data sources.

Appendix J provides a summary of the qualitative information collected in the study.

A. Historical Context in Oregon

While discrimination has not been limited to Oregon, and is a part of a larger discussion of race, ethnicity and gender in this country, the following provides some historical context for more current information concerning any race or gender discrimination affecting the Oregon transportation contracting industry. It provides an overview and some examples of the events and policies that negatively affected minorities and women; however, it is not intended to provide a comprehensive historical narrative on all groups, or the subsequent efforts of the men and women of all backgrounds to right these wrongs.

Overview. Oregon has a very long history of government-sponsored and other discrimination against minorities and women, dating from the establishment of Oregon as a state in 1859. Some measures even involved forced labor on state roads: an 1862 poll tax required that all Chinese, African Americans and Hawaiians in Oregon pay an annual tax of two dollars; if they could not pay this tax, the penalty was to maintain state roads for 50 cents a day.²

Examples of historic discrimination against minority groups in Oregon. The following provides just a few examples for some of the racial and ethnic minority groups in Oregon.

- **African Americans.** Oregon was the only free state accepted in the Union with an exclusionary clause in the state constitution. Oregon's Bill of Rights prohibited African Americans to be in the state, own property and make contracts. The passage of the Fourteenth Amendment granted citizenship to African Americans; however, the exclusionary laws in Oregon remained intact and continued to deem it illegal for African Americans to live in Oregon.³

² Bancroft, H. (1888). *History of Oregon, Vol. II 1848-1888*. San Francisco, CA: The History Company, Publishers.

³ Rector, E. (2010, May 16). *Looking back in order to move forward. An often untold history affecting Oregon's past, present and future*. Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

Although voters repealed these laws in 1926 and removed racist language in 2002 from the state's constitution, there is a long history of exclusionary practices aimed at African Americans in Oregon concerning employment, union membership, marriage, education, housing and many other aspects of daily life.^{4, 5, 6} For example, although unofficial, there were “Sundown Laws” in certain Oregon communities well into the 1970s that warned people of color to be out of town by sundown.⁷

- **Chinese Americans.** There was a large amount of Chinese immigration to Oregon in the decades after statehood. Oregon enacted anti-Chinese landholding, taxation and suffrage provisions in its constitution for fear of business competition.⁸ The increase in Chinese residents brought social tensions and violence, including massacres of Chinese people in Oregon.⁹ By the 1880s and for many years thereafter, the United States prohibited entry of Chinese immigrants to the country. Residential communities were segregated, children were banned from public schools and Chinese Americans faced many other forms of discrimination in Oregon well into the 1900s. Oregon's Cantonese Chinese population dropped from 10,390 in 1900 to 2,086 in 1940.¹⁰
- **Japanese Americans.** Recruitment of Japanese workers to Oregon largely began after prohibition of Chinese labor to the United States. Early Japanese American communities were highly segregated and, by U.S. law, Japanese immigrants could not marry citizens.¹¹ In 1923, the Oregon state legislature, which was dominated by members of the Ku Klux Klan at the time, passed multiple restrictive laws that targeted Japanese Americans among other groups.¹² For example, the Alien Land Law prevented first generation Japanese Americans from owning or leasing land and the Oregon Business Restriction Law permitted refusal of business licenses to first-generation Japanese Americans.¹³ Most Japanese living in Oregon at the outbreak

⁴ Nokes, G. (2015). *Black exclusion laws in Oregon*. Retrieved September 1, 2015, from http://oregonencyclopedia.org/articles/exclusion_laws/#.VeYdPPIVhBc

⁵ Rector, E. (2010, May 16). *Looking back in order to move forward: An often untold history affecting Oregon's past, present and future*. Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

⁶ Shaw, P. (2012, November 28). *Why Aren't There More Black People in Oregon?* Retrieved September 11, 2015, from <http://www.portlandoccupier.org/2012/11/28/why-arent-there-more-black-people-in-oregon>

⁷ Rector, E. (2010, May 16). *Looking back in order to move forward: An often untold history affecting Oregon's past, present and future*. Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

⁸ Chung, S. F. (2011). *In pursuit of gold: Chinese American miners and merchants in the American west*. Chicago, IL: University of Illinois Press; Grantham, A. (2015). *Expulsion of Chinese from Oregon City, 1886*. Retrieved September 8, 2015 from http://oregonencyclopedia.org/articles/expulsion_of_chinese_from_oregon_city_1886/#.Ve9nbflVhBc

⁹ Lee, D. (2015). *Chinese Americans in Oregon*. Retrieved September 3, 2015, from http://oregonencyclopedia.org/articles/chinese_americans_in_oregon/#.Veh0CPIVhBd

¹⁰ *Ibid.*

¹¹ Katagiri, G. (2015). *Japanese Americans in Oregon*. Retrieved September 3, 2015, from http://oregonencyclopedia.org/articles/chinese_americans_in_oregon/#.Veh0CPIVhBd

¹² Rector, E. (2010, May 16). *Looking back in order to move forward: An often untold history affecting Oregon's past, present and future*. Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

¹³ *Ibid.*

of World War II were removed to internment camps and eventually relocated to other states. Although many in Oregon campaigned after the war to discourage their return, 70 percent of the 4,000 Japanese from Oregon did. Interned Japanese Americans returned to vandalized homes and boycotts of their businesses, or loss of their property altogether.^{14, 15}

- **People from India.** The Pacific Northwest, including Oregon, saw immigration from India in the 1890s and early 1900s. Men from India were attracted to jobs in the lumber and railroad industries. They also fled political conflict in British Colonial India, with immigrants to Oregon participating in the Indian independence movement. There was substantial violence against Indians by whites who believed they were unfairly competing for jobs. Beginning with riots in 1907 in Bellingham, Washington, there were waves of violence against East Indians that extended into Oregon, including a 1907 killing in Boring and attacks in 1910 against Indians in the St. Johns neighborhood of Portland. The United States' 1917 Immigration Act outlawed immigration from India along with many other Asian countries. The Oregon constitution also prohibited Indians from becoming citizens or voting.^{16, 17}
- **Mexican Americans.** Oregon's railroads and agricultural industry encouraged Mexican workers to fill jobs during World War I.¹⁸ However, U.S. policies changed in the 1930s and many Mexican nationals and Mexican American citizens were deported from the country. Because of "whites-only" employment policies and other discrimination, the only job open to many Latinos was hard labor in orchards and fields. There were many other forms of discrimination as well. For example, in 1935, Oregon law determined Mexican students who had observable Indian blood, based on skin color, were to be officially segregated in schools; this law provided that "White Mexicans" were exempt as they were the fair-skinned descendants of Spanish.¹⁹

¹⁴ Rector, E. (2010, May 16). *Looking back in order to move forward: An often untold history affection Oregon's past, present and future.* Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

¹⁵ Collisson, C. (2015). *Japanese American Wartime Incarceration in Oregon.* Retrieved September 8, 2015, from http://oregonencyclopedia.org/articles/japanese_internment/#.VeYxcPIVhBc

¹⁶ Koritala, S. *A historical perspective of Americans of Asian Indian origin 1790-1997.* Retrieved January 4, 2016, from http://www.infinityfoundation.com/mandala/h_es/h_es_korit_histical.htm

¹⁷ Ogden, J. (2016). *East Indians of Oregon and the Ghadar Party.* Retrieved January 4, 2016, from http://www.oregonencyclopedia.org/articles/east_indians_of_oregon_and_the_ghadar_party/#.VoqrQvZlIcs

¹⁸ Garcia, J. (2015). *Latinos in Oregon.* Retrieved December 31, 2015, from http://oregonencyclopedia.org/articles/hispanics_in_oregon/#.VoW72vkrJpg

¹⁹ Rector, E. (2010, May 16). *Looking back in order to move forward: An often untold history affection Oregon's past, present and future.* Portland, OR: Oregon Center for Education Equality. Retrieved September 14, 2015, from <https://www.portlandoregon.gov/bps/article/412697>

- **Native Americans.** As with the nation as a whole, Oregon’s early history was marked by killing and dislocation of Native peoples throughout the state. Federal policy against tribal self-determination in the 1950s has had a particular impact on Oregon, with 62 tribes and bands “terminated” in the state, which is more than one-half of the total terminated tribes in the United States. Termination has had severe negative effects on Native peoples in Oregon.^{20, 21}

Examples of discrimination against women. There has also been a history of discrimination against women since Oregon’s founding. State laws and practices prohibiting women from owning property, voting and choosing certain professions were slowly removed over many decades. As recently as 1956, the Oregon Supreme Court upheld state law regulating the gender of people who could participate in certain occupations or events.²² Before federal legislation in the 1970s, it was common for women in Oregon to face discrimination from landlords and lenders.²³

Summary effects of historic discrimination in Oregon. Even though societal discrimination from decades past cannot form the legal basis for ODOT’s implementation of any race- and gender-conscious programs within the Federal DBE Program,²⁴ such discrimination has shaped the composition of the Oregon population, has had an inter-generational impact still evident today, and may currently limit opportunities for minorities and women to succeed in Oregon’s transportation contracting industry. Although it may have changed in form, instances of discrimination against people of color and women in Oregon continues today based on many accounts reviewed as part of this study. For example, a 2011 and a 2015 Fair Housing Council of Oregon audit found barriers in the housing market for black and Latino renters in Portland. Out of 50 tests, 64 percent of property owners discriminated against them.^{25, 26}

The broad assessment above provides context for Keen Independent’s analysis of entry into and business ownership within the construction and engineering industries, access to capital and success of businesses.

B. Entry and Advancement

Several studies throughout the United States have indicated that race and gender discrimination has affected the employment and advancement of certain groups in the construction and engineering industries. The study team therefore examined the representation of minorities and women among all workers in the Oregon construction and engineering industries and, in construction, the

²⁰ Quigley, K. *Introduction to Oregon’s Indian Tribes*. Retrieved January 2, 2016, from <http://bluebook.state.or.us/national/tribal/tribalintro.htm>

²¹ Fixico, D. (2016). *Termination and Restoration in Oregon*. Retrieved January 5, 2016, from http://oregonencyclopedia.org/articles/termination_and_restoration/#.VovhNPZljes

²² *State v. Hunter*, 208 Or. 282, 300 P.2d 455 (1956).

²³ Fair Housing Council of Oregon. *Sex Discrimination*. Retrieved December 31, 2015, from <http://www.fhco.org/discrimination-in-oregon/protected-classes/sex>

²⁴ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

²⁵ Hannah-Jones, N. (2011). Portland housing audit finds discrimination in 64 percent of tests; city has yet to act against landlords. *The Oregonian*.

²⁶ Schmidt, B. (2015). Portland housing audit shows blacks, Latinos face discriminatory barriers. *The Oregonian*.

advancement of minorities and women into supervisory and managerial roles. Appendix E presents detailed results.

As summarized below, quantitative analyses of the Oregon marketplace — based primarily on data from the 2000 U.S. Census and the 2008-2012 American Community Survey (ACS) — showed that, in general, certain minority groups and women appear to be underrepresented among all workers in the Oregon construction and engineering industries. In addition, minorities and women appeared to face barriers regarding advancement to supervisory or managerial positions.

Because individuals who form construction and engineering businesses tend to work in those industries before starting their own businesses, any barriers related to entry or advancement in the construction and engineering industries may prevent some minorities and women from starting businesses in those industries.

Quantitative information concerning entry into construction and engineering industries in Oregon. Keen Independent’s analyses suggest that certain minority groups and women are encountering barriers to entry in the construction and engineering industries in Oregon:

- Fewer African Americans worked in the Oregon construction industry than what might be expected based on representation in the overall workforce and analysis of educational requirements in the industry.
- Fewer Asian Americans worked in the Oregon engineering industry than what might be expected based on analyses of workers 25 and older with a four-year college degree.
- Women accounted for a very small portion of the Oregon construction and engineering workforce compared with other industries.

Quantitative information concerning advancement in the Oregon construction industry. Any barriers to advancement in the Oregon construction industry may also affect the number of business owners among those groups. When Keen Independent examined advancement in the Oregon construction industry, analyses suggest:

- Representation of minorities and women was much lower in certain construction trades (including first-line supervisors) compared with other trades.
- Compared to non-minorities working in the construction industry, Hispanic Americans were less likely to be managers.

Qualitative information about entry and advancement. Keen Independent collected qualitative information about entry and advancement in the Oregon construction and engineering industries through surveys, interviews and stakeholder comments as described at the beginning of Chapter 5.

Many business owners reported they worked in the construction or engineering industry before starting their businesses. Interviewees indicated that construction and engineering companies are typically started by individuals with connections to the construction or engineering industries. Therefore, construction and engineering business ownership rates in Oregon are likely affected by barriers that exist in the Oregon market to becoming employed in the construction or engineering industry.

Some minority, female and white male interviewees described workplace conditions that are unfavorable to women and minorities in the Oregon construction industry. One owner of a DBE-certified specialty construction firm commented that the chance of minority workers to be promoted on the job is “slim to none.” Several interviewees talked about sexual harassment on job sites.

Effects of entry and advancement on the Oregon transportation contracting industry. If there are barriers for minorities and women entering and advancing within the Oregon construction and engineering industries, there could be substantial effects on the number of minority- and women-owned construction and engineering-related businesses.

- Typically, employment and advancement are preconditions to business ownership in the construction and engineering industries. Because certain minority groups and women appear to be underrepresented in the Oregon construction and engineering industries — both in general and as supervisors and managers — it follows that such underrepresentation may reduce the number of minorities and women starting businesses, reducing overall MBE/WBE availability in the local transportation contracting industry.
- Underrepresentation of certain minority groups and women in the Oregon construction and engineering industries — particularly in supervisory and managerial roles — may perpetuate any beliefs or stereotypical attitudes that MBE/WBEs may not be as qualified as majority-owned businesses. Any such beliefs may also be making it more difficult for MBE/WBEs to win work in Oregon, including work with ODOT and local agencies.

C. Business Ownership

National research and studies in other states have found that race, ethnicity and gender also affect opportunities for business ownership, even after accounting for race- and gender-neutral factors. Figure 5-1 summarizes how courts have used information from such studies — particularly from regression analyses — when considering the validity of an agency’s implementation of the Federal DBE Program.

Quantitative information about business ownership. The study team used U.S. Bureau of the Census data from 2008-2012 to examine whether there are differences in business ownership rates between minorities and non-minorities and between women and men in the Oregon construction and engineering industries. In most cases, there were race and gender differences.

Keen Independent used regression analyses to examine whether those racial and gender differences in business ownership rates persisted after accounting for other personal characteristics. The regression models that the study team developed showed that Hispanic Americans, Native Americans and women working in the Oregon construction industry are less likely to own businesses than non-Hispanic whites and males, even after accounting for various personal characteristics including education, age and the ability to speak English.

African Americans, Native Americans and women working in the Oregon engineering industry are less likely to own businesses after accounting for certain personal characteristics.

Appendix F presents detailed results from the quantitative analyses of business ownership rates.

Qualitative information about business ownership.

Keen Independent collected qualitative information about business ownership in the Oregon construction and engineering industries through in-depth interviews, availability interviews, public hearings and other means.

Interviewees indicated that the Great Recession that began in 2007 made it extremely difficult for any owner of a construction or engineering firm to stay in business in Oregon, let alone start a new firm. Companies that were primarily working in the private sector had to quickly turn to compete for public sector work or go out of business. The result was extreme price pressure in the industry. Many companies did not survive, which created a ripple effect of unrecovered invoices for firms that remained. Larger and better-capitalized firms fared better during the downturn, according to interviewees.

Minority, women and white male owners of small businesses in the industry reported many of the same challenges. Many faced financial barriers at start-up and beyond. As examined later in Chapter 5 (and in Appendix H), relatively few minority- and women-owned firms in the Oregon marketplace are large. However, some interviews indicated that the Great Recession was even more difficult for minority- and women-owned firms.

Effects of disparities in business ownership rates for minorities and women on the transportation contracting industry. The disparities in business ownership rates for certain minority groups and women in the construction and engineering industries mean that there are fewer minority- and women-owned firms in the transportation contracting marketplace than there would be if there were a level playing field for minorities and women in the Oregon marketplace. Results suggest that the relative MBE/WBE availability for ODOT construction and engineering work may have been depressed. Compared with what they might be but for the effects of past discrimination, the availability benchmark for minority- and women-owned firms might be lower and the overall DBE goal might be lower when only considering current availability.

Figure 5-1.
Use of regression analyses of business ownership in defense of the Federal DBE Program

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

D. Access to Capital, Bonding and Insurance

Access to capital represents one of the key factors that researchers have examined when studying business formation and success. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to start businesses. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start or expand a business.

There is evidence that minorities and women face certain disadvantages in accessing the capital necessary to start, operate and expand businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Keen Independent examined whether minority and female business owners (and potential business owners) have access to capital — both for their homes and for their businesses — that is comparable to that of non-minorities and men. In addition, the study team examined information about whether minority- and women-owned firms face any barriers in obtaining bonding and insurance.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses.

Keen Independent analyzed 2008-2012 American Community Survey (ACS) data to determine if there were any differences in homeownership in Oregon by racial and ethnic groups. The study team examined the potential impact of race and ethnicity on mortgage lending in Oregon based on Home Mortgage Disclosure Act (HMDA) data for 2007 and 2013. Results from examination of these two data sources were as follows.

- **Homeownership rates.** Relatively fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Oregon own homes compared with non-Hispanic whites. These differences in homeownership rates were present prior to the Great Recession and persisted in 2008 through 2012.

Mortgage lending. In 2007, high-income African Americans, Hispanic Americans, Native Americans, and Native Hawaiian and other Pacific Islanders applying for home mortgages in Oregon were more likely than high-income non-Hispanic whites to have their applications denied. Disparities were also evident for Hispanic Americans and Native Americans in 2013.

Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending is one example of such types of discrimination through fees associated with various loan types. Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. There is national evidence that predatory lenders disproportionately targeted minorities with subprime loans, even when applicants could qualify for prime loans. Analysis of data for 2007 for Oregon indicates that a relatively high share of conventional home purchase loans and conventional home refinance loans were subprime for African Americans, Hispanic Americans,

Native Americans, and Native Hawaiians and other Pacific Islanders. Although the use of subprime loans dropped by 2013, a substantially greater percentage of conventional home purchase loans for Hispanic Americans were still subprime.

In conclusion, there is substantial quantitative evidence of disparities in homeownership and home mortgage lending for racial and ethnic minorities in Oregon. Any past discrimination against minorities that affected the ability to purchase and stay in homes could have long-term impacts on the home equity available to start and expand businesses, the ability of minority business owners to access business credit, and access to bonding for construction business owners.

Quantitative information about business credit. Business credit is also an important source of funds for small businesses. Any race- or gender-based barriers in the application or approval processes of business loans could affect the formation and success of MBE/WBEs.

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board's Survey of Small Business Finances (SSBF) — the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The Pacific region is the level of geographic detail of SSBF data most specific to Oregon, and 2003 is the most recent information available from the SSBF. (More recent national data are consistent with 2003 SSBF results.)

Business loan approval rates. Keen Independent examined business loan approval rates in the Pacific region in 2003. Results include the following:

- Twice as many minority- and women-owned small businesses were denied loans than non-Hispanic male-owned small businesses.
- There are statistically significant disparities in loan approval rates for African American-owned small businesses compared with similarly-situated non-Hispanic white-owned firms.

Applying for loans. Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. The SSBF includes a question that gauges whether a business owner did not apply for a loan due to fear of loan denial.

- Among small business owners who reported needing business loans, minority and female business owners in the Pacific region were substantially more likely than non-Hispanic white men to report that they did not apply due to fear of denial.
- Compared with similarly-situated non-minorities, the study team identified statistically significant disparities in the rate at which African Americans reported not applying for loans due to fear of denial.

Loan values and interest rates. Keen Independent also examined 2003 SSBF data on the average business loan values and interest rates paid by small businesses that received loans.

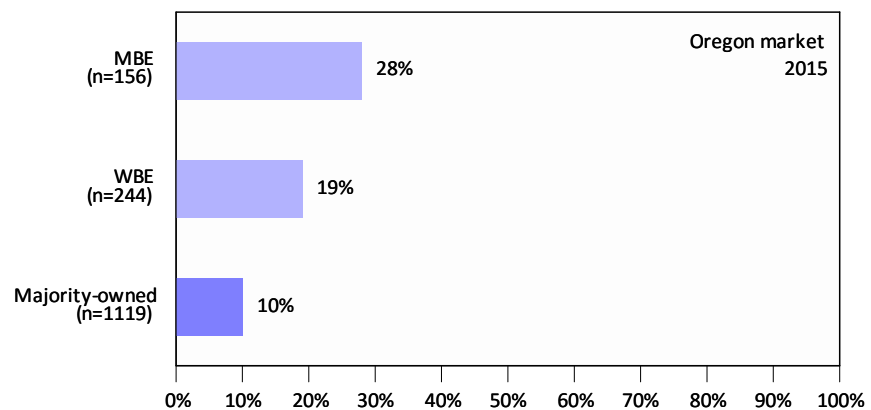
- The mean value of approved loans for minority- and female-owned businesses in the Pacific region was substantially lower than for non-Hispanic white male-owned firms.
- There is some evidence that minority- and women-owned small businesses in the Pacific region paid higher interest rates on their business loans than non-minority male-owned small businesses (however, the difference was not statistically significant). Such a disparity in interest rates is consistent with national data.

Experiences of MBEs, WBEs and majority-owned businesses in the Oregon transportation construction and engineering industries. As part of availability surveys the study team conducted in summer 2015, Keen Independent asked several questions related to potential barriers or difficulties in the local marketplace. The interviewer introduced these questions with the following: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as you answer these questions.”

The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” Minority-owned firms were more than twice as likely as majority-owned firms to report that they had such difficulties. As shown in Figure 5-2, 28 percent of MBEs reported difficulties obtaining lines of credit or loans, compared with 10 percent for majority-owned firms. About 19 percent of WBEs reported that they had experienced difficulties obtaining lines of credit or loans.

These results appear to be consistent with the other data summarized in Chapter 5 concerning greater difficulties concerning access to financing for minority- and women-owned firms.

Figure 5-2. Percent responding “yes” to, “Has your company experienced any difficulties in obtaining lines of credit or loans?” for MBEs, WBEs and majority-owned firms in transportation contracting industry



Source:
2015 Availability
Interviews.

Quantitative information about bonding and insurance. Keen Independent also examined whether businesses face difficulties obtaining bonding and insurance as part of the availability interviews.

Bonding. Keen Independent asked firms completing availability interviews the following two questions:

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

Among the one-half of firms that had obtained or tried to obtain a bond for a project, 23 percent of MBEs and 20 percent of WBEs indicated difficulties obtaining bonds needed for a project compared with 9 percent of majority-owned firms.

Insurance requirements. The study team also asked, “Have any insurance requirements on projects presented a barrier to bidding?” Again, insurance requirements appear to present a barrier to relatively more minority- and women-owned firms than majority-owned firms. Approximately 25 percent of MBEs and 18 percent of WBEs interviewed reported such difficulties compared with 11 percent of majority-owned firms.

Qualitative information about access to capital, bonding and insurance. Keen Independent collected qualitative information about access to capital, bonding and insurance for businesses in the Oregon transportation contracting industry through in-depth interviews, availability interviews and public hearings and other means.

Business financing. Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment), and surviving poor market conditions.

- Small business owners indicated that access to financing was a barrier in general and more specifically when starting and first growing. Many used personal or family resources to finance their businesses.
- Many business owners reported that obtaining financing continues to be a barrier for their businesses today.
- Some interviewees, including MBEs, WBEs and majority-owned firms, reported that slow payment on contracts and subcontracts led to an increased need for business capital and financing.

Some interviewees reported that it was more difficult for women and minorities to obtain financing.

- The white female owner of a DBE-certified construction business recalled gender discrimination while trying to obtain a loan. A bank loan officer told her, “Send your husband in on Monday, and we’ll get this [loan] finalized.” (She changed banks because of this and eventually received a loan.)

- A public meeting participant said, “There’s no access to capital, period. It just isn’t there.”

Also, if business size and personal net worth are affected by race or gender discrimination, such discrimination could also impact the ability to obtain business financing. This can have a self-reinforcing effect, as many interviewees noted the importance of business capital and credit to pursue larger construction and engineering contracts.

Bonding. For ODOT and local agency construction contracts, surety bonds are typically required to bid on projects. Sometimes prime contractors require subcontractors on a project to have bonds.

In order to obtain a bond, businesses must provide company history and evidence of financial strength to a bonding company. The bonding company uses this information to determine whether to issue a bond of a particular size. Consequently, any reduced access to capital may negatively impact the ability to obtain a bond. Bonding companies also use different ratios to calculate bonding capacity and they charge different rates based on a number of factors, which can affect the cost-competitiveness of a firm’s bids.

According to business owners and other individuals interviewed:

- Many MBEs, WBEs and other small construction companies cannot obtain the necessary bonding to bid on ODOT and other public contracts or certain sizes of contracts. There is evidence that companies lose contracts or are unable to compete for them because of bonding requirements. Bonding requirements may force them to operate as subcontractors on public contracts where primes are willing to “carry” the subcontractors.
- Bonding is linked to company assets, and according to some interviewees, a personal guarantee can be required.
- Some interviewees reported different treatment of minority- and women-owned firms by bonding companies. For example, a representative of a business assistance organization stated that bonding agents set bond amounts based on their “feel,” and noted that this creates disparity. She said that if an agent doesn’t like your “look,” he will give you a different ratio when calculating your bonding capacity.
- Interviewees explained the link between business and personal finances and bonding. Several minority and female business owners discussed the barrier that being required to provide a personal guarantee has for small businesses.
- Some business owners said that obtaining bonding was even more difficult during the Great Recession.

Access to insurance. Construction and professional services firms bidding or proposing on ODOT and local government contracts must meet those agencies’ insurance requirements. Provisions often apply to subcontractors and subconsultants.

The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to doing business. In general, interviewees reported that obtaining insurance is relatively easy. The barrier presented by insurance requirements is due to the cost, especially at high dollar limits or certain types of insurance.

If a small business owner decides that the premiums for a certain level of insurance are cost-prohibitive, it may preclude the firm from bidding on certain contracts, especially public sector contracts. Some minority- and women-owned firms reported losing work because of unnecessary or onerous insurance requirements for those contracts. For example:

- A representative of an MBE-certified engineering consulting firm reported, "... they want you to buy this insurance which is not required for any of our work, but you can't sign the contract until you have it ... so we basically did not sign [a local agency] contract because of that."
- The owner of a DBE-certified engineering company said, "In 2010 ... we could not find an insurance carrier who would provide professional liability insurance to a firm of our [small] size" He said that they lost work because of this.

The cost of insurance is a barrier to public sector work for some small businesses according to businesses interviewed in the study. Some professional services firms say it is their second largest expense after salaries.

Effects of access to capital, bonding and insurance on the transportation contracting industry.

Potential barriers associated with access to capital, bonding and insurance may affect business outcomes for MBE/WBEs compared to majority-owned firms.

- Well-capitalized businesses are, in general, more successful than other businesses.
- For ODOT and other public sector construction contracts, bonding and insurance are required to bid as a prime contractor. Interviewees report that these requirements affect subcontractors as well. Insurance also affects engineering-related prime consultants and subconsultants.
- A company must also have considerable working capital to complete an ODOT contract or subcontract, especially if there are delays in payment on that contract (which some businesses experience).
- Compared with majority-owned firms, MBE/WBEs in the Oregon transportation contracting industry are disproportionately small. Obtaining business financing, bonding and insurance is more of a barrier to small businesses than large businesses. The effect of such barriers is to make it less likely that a small firm can expand or successfully pursue public sector work.

- To obtain bonding, a company must have financial strength. Any barriers to accessing capital can affect a company's ability to obtain a bond of a certain size. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms.
- There is some quantitative evidence that minorities do not have the same personal access to capital as non-minorities, which affects personal financial resources. Personal net worth and financial history can affect access to business loans and bonding in Oregon.

E. Success of Businesses

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of majority-owned businesses in the Oregon transportation contracting industry. The study team examined business success in terms of participation in the public and private sector; relative bid capacity; business closure, expansion, and contraction; and business receipts and earnings. Appendix H provides details about these quantitative analyses of success of businesses. Keen Independent also collected and analyzed information from interviews with business owners and managers and others knowledgeable about the local contracting industry.

Quantitative analysis of participation in the public sector, contracting roles and bid capacity.

Keen Independent drew on information from availability interviews to examine any patterns of MBE/WBE and majority-owned business participation in the industry. Results suggest the following:

- Most firms in the transportation contracting industry pursue both public and private sector work depending on the type of work they do and market opportunities. This is true for MBEs and WBEs as well as majority-owned firms.
- About two-thirds of MBEs, WBEs and majority-owned firms bid or propose as prime contractors or prime consultants. Many firms also bid as subcontractors as well. Compared with majority-owned companies, relatively few MBEs or WBEs have been awarded contracts or subcontracts of \$1 million or more in size.
- Firms in different lines of work within the transportation industry tend to bid on different sizes of contracts (i.e., bridge contracts are larger than surveying contracts). However, after controlling for subindustry, there do not appear to be fewer MBEs bidding on large contracts compared with majority-owned firms. In other words, there is no indication that “bid capacity” is, on average, less for MBEs than majority-owned firms within the same construction or engineering subindustry. If anything, more MBEs bid on relatively large contracts than majority-owned firms in Oregon. (Results were less conclusive for WBEs.)

Appendix H describes these analyses.

Quantitative analysis of business closure, expansion and contraction. Based on U.S. Small Business Administration analyses for 2002 to 2006 for Oregon:

- African American-, Hispanic American- and women-owned firms were more likely than white- (or male-) owned businesses to close, but they were also less likely to shrink in size.
- Asian American-owned businesses were less likely to contract than white-owned businesses.

Quantitative analysis of business receipts and earnings. Keen Independent examined business earnings data for Oregon construction and engineering-related industries from the U.S. Census Bureau and the 2015 availability interviews with Oregon businesses. The data for annual revenue pertained to 1999, 2007 through 2012 and 2012 through 2014.

- With only a few exceptions, across time periods and data sources, minority- and women-owned firms had lower revenue than majority-owned firms.
- One of the data sets the study team examined included personal characteristics of the business owner. Regression analyses using these data indicated that female construction business owners had lower earnings than male owners, and Hispanic American engineering firm owners had lower earnings than non-minority owners after controlling for other factors.

Quantitative analysis of telephone survey results concerning potential barriers.

Keen Independent's availability interviews with Oregon businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business. The availability interviews suggest that relatively more minority- and women-owned firms report difficulties across a broad set of aspects of operating a business within the Oregon transportation contracting industry.

- Relatively more MBEs and WBEs had difficulty learning about bid opportunities, including those at ODOT and local agencies and in the private sector. MBEs and WBEs were also more likely to indicate difficulty learning about subcontracting opportunities from prime contractors.
- MBEs and WBEs were substantially more likely to report difficulty networking with prime contractors or customers.
- Relatively more minority- and women-owned firms than majority-owned firms reported that size of projects was a barrier to bidding.
- Only a few firms said that they had difficulties obtaining final approval of work from inspectors or prime contractors, however, relatively more MBEs and WBEs reported this as a difficulty.

Qualitative information about success of businesses in the Oregon marketplace.

Keen Independent also collected qualitative information about success of businesses in the Oregon transportation contracting industry through in-depth personal interviews, availability surveys, public meetings and other avenues. Some of the comments, especially related to the Great Recession, were noted earlier in Chapter 5.

Fluid employment size and types of work. Interviewees explained that firms in the transportation contracting industry must continuously adapt their operations in response to market conditions. This flexibility includes the size of a company's permanent and temporary workforce, owned and leased equipment, the types of work they pursue and where they work within the state.

- Some firms indicated they have changed the types of work they perform depending on market opportunities. Many businesses reported bidding as both a prime and subcontractor, and pursuing both public and private sector work.
- A number of companies reported that their employment size expands and contracts depending on specific work opportunities, season or market conditions. As an extreme example, one owner of a specialty construction business reported that staff was reduced to one part-time employee during the Great Recession.
- Some firm owners reported flexibility in the locations and sizes of contracts that their firms perform. "\$5,000 to contracts in the millions" was a typical comment about the sizes of contracts and subcontracts firms perform. "No job is too small, neither too big for us" was stated by an owner of a DBE-certified professional services firm. This business owner, like many others, indicated that the firm could handle bigger contracts than those it had received.
- Interviewees reported that firms that typically bid on large contracts when the market is good will also bid on smaller contracts in lean times, increasing competition for those small projects.
- Some businesses reported that the profitability of a contract can be affected by where it is in the state, and that they won't always bid a contract in any location. Conversely, many firms reported that they frequently seek work throughout the state. Some Oregon businesses reported working in the Seattle area, which a few reported to currently be a stronger market than Oregon.
- Market conditions, backlog of work and whether they have the necessary skills in-house affect prime contractors' decisions to subcontract work out. Some prime contractors reported that they typically subcontract specialty work.
- Some interviewees reported that small businesses may be at a disadvantage because the acquisition of equipment and supplies is affected by the financial health of the company and its ability to obtain financing.

Importance of business relationships. Existing relationships are an important factor in finding opportunities to bid on work according to many prime and subcontractors. Interviewees frequently reported the following:

- Prime contractors take price into consideration when selecting a subcontractor, but the previous relationships they have also play a large role in the selection process. Trust that a subcontractor will get the job done is important to a prime contractor. “It’s relationship-based” was a typical response to how prime contractors choose subcontractors.
- Business owners reported that it is difficult to cultivate new relationships with prime contractors. “Primes want to work with subs they know” was a typical comment. One owner of a DBE-certified business said the primes often give the work to “friends.” She said she only got opportunities as a subcontractor when there were DBE contract goals.
- Some interviewees reported that prime contractors sometimes “shop” a subcontractor’s bid, so even priced-based selection of subcontractors is not always fair.
- Opportunities for a prime contractor or consultant to win work with a customer may also be based on prior relationships. One DBE business owner reported that it can be very difficult to establish a client base as a prime contractor.

Many minority, female and white male interviewees reported the presence of a “good ol’ boy” network in Oregon that affects the construction and engineering industries. Some reported that the “good ol’ boy” network added barriers for women- and minority-owned firms in the transportation contracting industry. For example:

- One interviewee described it as “a system that continually feeds itself,” and commented that ODOT was a part of it.
- An owner of a DBE-certified firm said that it can be difficult for minority-owned firms to break into the industry, adding, “Most of the game is like an ‘old boy’s club,’ so it’s really hard to get into position.”
- There were also interviewees across groups who did not have any negative experience with closed networks or thought the “good ol’ boy” network was a thing of the past.

Disadvantages for small businesses. Many interviewees indicated that small businesses are at a disadvantage when competing in the transportation contracting industry.

- For many of the reasons discussed above, small businesses including MBE/WBEs said that it was difficult to establish relationships with prime contractors and customers.
- Access to financing can be affected by business size.

In addition, owners and managers of small businesses reported that public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work. There was qualitative evidence that:

- It is more difficult for smaller firms to market and identify contract opportunities.
- Small construction businesses seeking prime contracting and subcontracting work face barriers due to public sector bonding requirements.
- Excessive paperwork that often comes with public sector work is an extra burden to small businesses.
- Large size and scope of public sector contracts and subcontracts present a barrier to bidding.
- Public sector insurance requirements are a barrier to construction and engineering-related businesses seeking public sector prime contracts and subcontracts.
- Interviewees indicated that public agencies favor bidders and proposers they already know, limiting opportunities for other businesses.
- Public agency screening of potential contractors and engineering firms through prequalification can be a barrier to bidding based on the interviews. It appeared to one interviewee to be a “catch-22” where the firm has to already have specific experience to win work that would provide that experience. This interviewee went on to explain that many agencies only consider the “firm’s” experience and not that of its employees, which works against newer and smaller companies. One representative of a minority-owned engineering company said that ODOT’s prequalification requirements are a challenge to meet, and that they tend to write contracts “with larger businesses in mind.”
- Slow payment or non-payment by owners or by prime contractors can be especially damaging to small businesses and represent a barrier to performing that work. (Some interviewees reported that they do not have sufficient capital to wait to be paid when working on large contracts.) One interviewee said that slow payment is “not something a small firm can bear.” Some interviewees said that slow payment of subcontractors is sometimes due to onerous retainage policies of public sector agencies. However, other interviewees said that primes sometimes do not quickly pay subcontractors even after getting paid on time by the public agency.

Data show that MBE and WBE construction and engineering firms in Oregon are somewhat more likely than majority-owned businesses to be small businesses. Therefore, any barriers for small businesses may have a disproportionate effect on MBEs and WBEs.

Evidence of stereotyping and other race and gender discrimination. In the in-depth interviews, availability surveys and other information the study team analyzed as part of the study, some interviewees indicated difficulties for minorities and women other than those associated with being a small business.

There was some evidence that some prime contractors or customers held negative stereotypes concerning minority- and women-owned firms.

- One DBE firm owner said that white firms in his industry “go in [to a job and are] considered competent until proven incompetent.” He added, “[DBEs and MBEs] go in competent and are considered incompetent [by default].”
- When asked about any stereotypical attitudes, the owner of a DBE-certified specialty contracting firm reported, “I see that a lot ... yeah ... I feel [that] the stigma of being a MBE or DBE contractor is [that] if you have this certification, all of a sudden you’re in this bucket of contractors that can’t do this job or can’t do that job ... you can only do these small little jobs We can compete with everyone else.”
- Several minority and female business owners described being treated differently on projects than similar majority-owned firms. When asked about double standards, a president of a DBE-certified construction business said there was much higher performance pressure on minority contractors than on their majority-owned counterparts, including on ODOT contracts.
- One female specialty construction business owner related that she prefers to not tell people she is the owner. She went on to say that there is still a perception that women are unable to perform equally as well as men. One female interviewee reported, “When you are one of a few women in the room [with a lot of engineers], people sometimes think you are going to take notes.” Another female president of a DBE-certified specialty contract firm said, “They just don’t have respect for you.” One female interviewee described the construction industry as a “man’s industry.”
- Some interviewees indicated that conditions for minority and female business owners have improved over time. One minority construction business owner indicated that unfair treatment based on race, ethnicity and gender has been experienced by nearly everybody in the construction industry. When asked if it is an ongoing problem, he stated, “... it’s gotten a lot better.” And, some minorities and women indicated that their businesses were not affected by any race or gender discrimination.

Appendix J provides views from business owners and managers, trade association representatives and others who are knowledgeable about the Oregon transportation contracting industry.

Summary concerning success of businesses on the transportation contracting industry.

Minority- and women-owned construction and engineering businesses in Oregon are somewhat more likely to be small businesses than majority-owned businesses. Therefore, any disadvantages for small businesses disproportionately affect MBEs and WBEs.

Success in the transportation contracting industry depends on relationships with prime contractors and customers. Some of the minority and female interviewees reported unequal treatment, negative stereotypes and other forms of discrimination in Oregon.

F. Summary

As discussed in this Chapter and supporting appendices, there is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in the Oregon transportation contracting industry.

Such information is important when ODOT examines its future overall goal for DBE participation (Chapter 9) and its future operation of the Federal DBE Program for FHWA-funded contracts (Chapters 10 and 11).

CHAPTER 6.

Availability Analysis

Keen Independent analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing and able to perform ODOT and local agency prime contracts and subcontracts. ODOT can use availability results and other information from the study as it sets its overall DBE goal.

Chapter 6 describes the study team’s availability analysis in seven parts:

- A. Purpose of the availability analysis;
- B. Definitions of MBEs, WBEs, certified DBEs, potential DBEs and majority-owned businesses;
- C. Information collected about potentially available businesses;
- D. Businesses included in the availability database;
- E. MBE/WBE availability calculations on a contract-by-contract basis;
- F. Availability results; and
- G. Base figure for ODOT’s overall DBE goal for FHWA-funded contracts.

Appendix D provides supporting information.

A. Purpose of the Availability Analysis

Keen Independent examined the availability of MBE/WBEs for transportation contracts to develop:

1. A benchmark used in the disparity analysis; and
2. The base figure for ODOT’s overall DBE goals for FHWA-funded contracts

1. Benchmark in the disparity analysis. Chapter 7 of this Disparity Study compares ODOT’s utilization of MBE/WBEs against availability benchmarks.

- The disparity analysis compares the percentage of ODOT contract dollars that went to minority- and women-owned firms (MBE/WBE “utilization”) to the percentage of dollars that might be expected to go to those businesses based on their availability for specific types, sizes and locations of ODOT contracts (MBE/WBE “availability”).
- The comparisons in Chapter 7 determine whether there are any disparities between the utilization and availability of MBE/WBEs (by group) in ODOT work.

2. Base figure for ODOT’s overall DBE goal. As part of its operation of the Federal DBE Program, ODOT must establish an overall goal for DBE participation in its FHWA-funded contracts. The 2016 Disparity Study examines information for the three-year goal for FHWA-funded contracts beginning October 1, 2016. ODOT must follow regulations in 49 CFR Section 26.45 (c). It must start by calculating a “base figure” for its overall DBE goal, as explained in detail in Part G of this chapter.

- Keen Independent’s process for calculating the base figure for an overall DBE goal is the same as for determining MBE/WBE availability in a disparity analysis.
- However, the base figure calculation only includes current DBEs and those MBE/WBEs that appear to be eligible for DBE certification (“potential DBEs”). Therefore, businesses that have been denied certification, have been decertified, have graduated from the DBE Program or otherwise indicated that they would not qualify for certification should not be counted in the base figure.

This process follows guidance in the Final Rule effective November 3, 2014 and the United States Department of Transportation’s (USDOT’s) “Tips for Goal-Setting” that explains that minority- and women-owned firms that are not currently certified as DBEs but could be DBE-certified should be counted as DBEs in the base figure calculation.

The balance of Chapter 6 explains each step in determining the availability benchmarks and the base figure for ODOT’s overall DBE goal, beginning with definitions of terms.

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

The following definitions of terms based on ownership and certification status are useful background to the availability analysis.

MBE/WBEs. The availability benchmark and the base figure analyses use the same definitions of minority- and women-owned firms (MBE/WBEs) as do other components of the 2016 Disparity Study.

Race, ethnic and gender groups. As specified in 49 Code of Federal Regulations (CFR) Part 26, the study team separately examined utilization, availability and disparity results for businesses owned by:

- African Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans;
- Hispanic Americans;
- Native Americans; and
- Non-Hispanic white women.

Note that “majority-owned businesses” refer to businesses that are not minority- or women-owned.

Firms owned by minority women. Businesses owned by minority women are included with the results for each minority group. “WBEs” in this report refers to non-Hispanic white women-owned businesses. This definition of WBEs gives ODOT information to answer questions that may arise pertaining to the utilization of non-Hispanic white women-owned businesses, such as whether the work that goes to MBE/WBEs disproportionately goes to businesses owned by non-Hispanic white women. Keen Independent’s approach is consistent with court decisions that have considered this issue.

All MBE/WBEs, not only certified DBEs. When availability results are used as a benchmark in the disparity analysis, all minority- and women-owned firms are counted as such whether or not they are certified as DBEs or as MBEs or WBEs. For the following reasons, researching whether race- or gender-based discrimination has affected the participation of MBE/WBEs in contracting is properly analyzed based on the race, ethnicity and gender of business ownership and not on DBE certification status.

- Analyzing the availability and utilization of minority- and women-owned firms regardless of DBE/MBE/WBE certification status allows one to assess whether there are disparities affecting *all* MBE/WBEs and not just certified DBEs. Businesses may be discriminated against because of the race or gender of their owners regardless of whether they have successfully applied for DBE certification.
- Moreover, the study team’s analyses of whether MBE/WBEs face disadvantages include the most successful, highest-revenue MBE/WBEs. A disparity study that focuses only on MBE/WBEs that are, or could be, DBE-certified would improperly compare outcomes for “economically disadvantaged” businesses with all other businesses, including both non-Hispanic white male-owned businesses and relatively successful MBE/WBEs.¹ Limiting the analyses to a group of businesses that only includes low-revenue companies would have inappropriately made it more likely for the study team to observe disparities for MBE/WBE groups.²

The courts that have reviewed disparity studies have accepted analyses based on the race, ethnicity and gender of business ownership rather than on DBE certification status.

¹ In addition, 49 CFR Part 26 allows certification of white male-owned businesses as DBEs. Thus, disparity analyses based on certified DBEs might not purely be an analysis of disparities based on race/ethnicity and gender.

² An analogous situation concerns analysis of possible wage discrimination. A disparity analysis that would compare wages of minority employees to wages of all employees should include both low- and high-wage minorities in the statistics for minority employees. If the analysis removed high-wage minorities from the analyses, any comparison of wages between minorities and non-minorities would more likely show disparities in wage levels.

Certified DBEs. Certified DBEs are businesses that are certified as such through Oregon’s Certification Office of Minority, Women and Emerging Small Business (OMWESB), which means that they are businesses that:

- Are owned and controlled by one or more individuals who are presumed to be both socially and economically disadvantaged according to 49 CFR Part 26;³ and
- Have met the gross revenue and personal net worth requirements described in 49 CFR Part 26.

Potential DBEs. Potential DBEs are MBE/WBEs that appear that they could be DBE-certified based on revenue requirements described in 49 CFR Section 26.65. Potential DBEs do not include businesses that have been decertified or have graduated from the DBE Program. The study team examined the availability of potential DBEs as part of helping ODOT calculate the base figure of its overall DBE goal for FHWA-funded contracts. Figure 6-1 further explains Keen Independent’s definition of potential DBEs.

Keen Independent obtained information from ODOT’s Office of Civil Rights to identify firms that, in recent years, had graduated from the DBE Program or had been denied DBE certification (and had not been recertified).

Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white males).

- In the utilization and availability analyses, the study team coded each business as minority-, women-, or majority-owned.
- Majority-owned businesses included any non-Hispanic white male-owned businesses that were certified as DBEs.

Figure 6-1.
Definition of potential DBEs

Keen Independent did not include the following types of MBE/WBEs in its definition of potential DBEs:

- MBE/WBEs that had graduated from the DBE Program and not been recertified, or were de-certified;
- MBE/WBEs that are not currently DBE-certified that had applied for certification and had been denied; and
- MBE/WBEs not currently DBE-certified that appear to have exceeded the three-year average annual revenue limits for DBE certification.

At the time of this study, the overall revenue limit for DBE certification was \$23,980,000 (three-year average of annual gross receipts). Lower revenue limits applied for subindustries according to the U.S. Small Business Administration small business standards. Some MBE/WBEs exceeded either the \$23,980,000 or the subindustry revenue limits based on information that they provided in the availability surveys.

Business owners must also meet USDOT personal net worth limits for their businesses to qualify for DBE certification. Personal net worth was only a factor in the base figure calculations when a firm had graduated or been denied certification based on personal net worth that exceeded certification limits.

³ The Federal DBE Program specifies that African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women of any race or ethnicity, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration are presumed to be disadvantaged.

C. Information Collected about Potentially Available Businesses

Keen Independent’s availability analysis focused on firms with locations in Oregon and two counties in Washington State (Clark and Skamania County) that work in subindustries related to ODOT transportation-related construction and engineering contracts.

Based on review of ODOT prime contracts and subcontracts during the study period, the study team identified specific subindustries for inclusion in the availability analysis. Keen Independent contacted businesses within those subindustries by telephone to collect information about their availability for specific types, sizes and locations of ODOT and local agency prime contracts and subcontracts.

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure 6-2 summarizes characteristics of Keen Independent’s approach to examining availability.

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify businesses that are potentially available for ODOT and local agency transportation prime contracts and subcontracts.⁴ Figure 6-3 summarizes the process for identifying businesses, contacting them and completing the surveys.

Keen Independent began by compiling lists of business establishments that: (a) previously identified themselves to ODOT as interested in learning about future work (such as by listing themselves on ORPIN or eBIDs, previously submitting prime or sub bids or proposals, becoming planholders or requesting information updates from ODOT’s Office of Civil Rights); or (b) Dun & Bradstreet/Hoovers identified in certain transportation contracting-related subindustries in Oregon or Southwest Washington.⁵

Figure 6-2.
Summary of the strengths of Keen Independent’s “custom census” approach

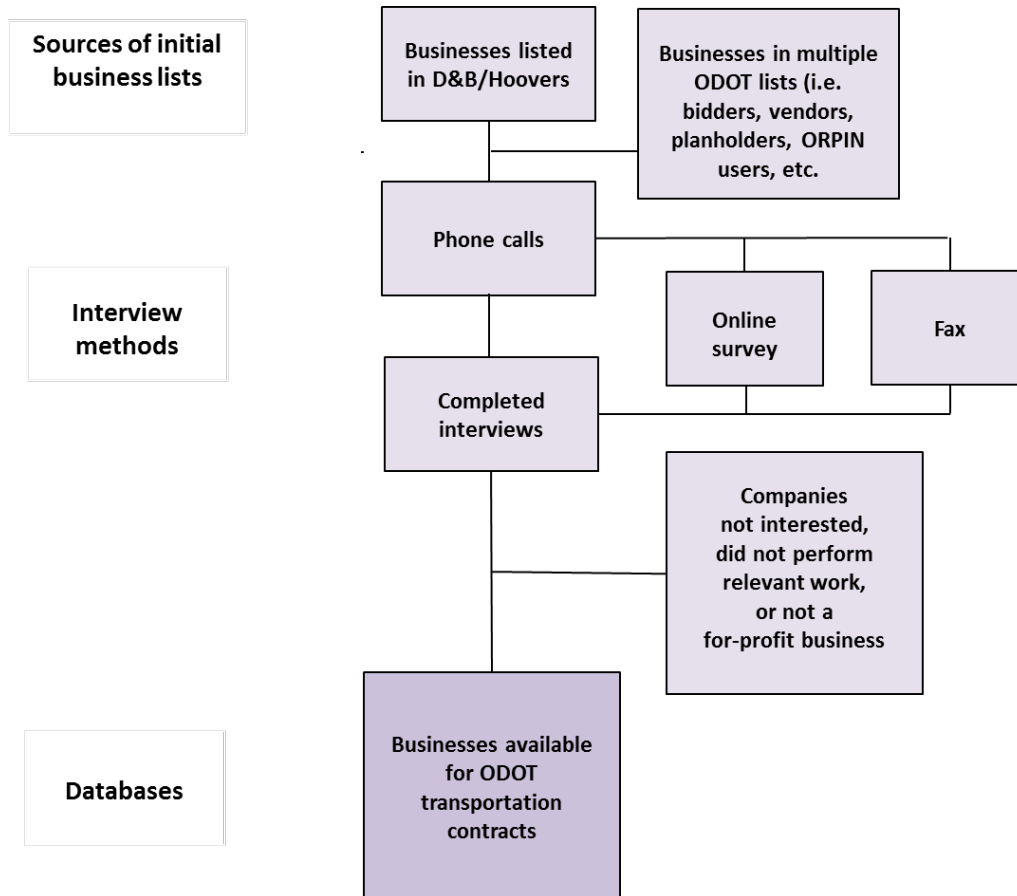
Federal courts have reviewed and upheld “custom census” approaches to examining availability. Compared with some other previous court-reviewed custom census approaches, Keen Independent added several layers of screening to determine which businesses are potentially available for work in the Oregon transportation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

For example, the Keen Independent analysis included discussions with businesses about interest in ODOT and local government work, whether they had bid on or performed similar work in the past, contract role and geographic locations of their work — items not included in some of the previous court-reviewed custom census approaches. Keen Independent also analyzed the sizes of contracts and subcontracts that businesses have bid on or performed in the past (referred to as “bid capacity” in this analysis).

⁴ The study team offered business representatives the option of completing surveys via fax or email if they preferred not to complete surveys via telephone.

⁵ D&B’s Hoover’s database is accepted as the most comprehensive and complete source of business listings in the nation. Keen Independent collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the transportation contracts that ODOT awarded during the study period.

Figure 6-3.
Availability survey process



Telephone surveys. Figure 6-3 outlines the process Keen Independent used to complete surveys with businesses possibly available for ODOT and local agency transportation-related work.

- The study team contacted firms by telephone to ask them to participate in the surveys (identifying ODOT as the organization requesting the information). Firms indicating over the phone that they were not interested or not involved in transportation contracting work were not asked to complete the other survey questions. Surveys for the 2016 Disparity Study began in June 2015 and were completed in August 2015.
- Some firms completed surveys when first contacted. For firms not immediately responding, the study team executed intensive follow-up over many weeks.
- When a business was unable to conduct the survey in English, the study team called back with a bilingual interviewer (English/Spanish) to collect basic information about the company and offer alternative means of completing the survey.

- Businesses could also learn about the availability surveys or complete the surveys via other methods such as:
 - Fax or email; and
 - Through the disparity study website that was maintained throughout the project. (Interested companies that learned about the surveys through the website or other means could complete the questionnaire online.)

Information collected in availability surveys. Survey questions covered many topics about each organization, including:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Types of transportation contract work performed, from asphalt paving to temporary traffic control for construction, and from design engineering to surveying for engineering-related work (Figure 3-4 in Chapter 3 provides a list of work categories included in the surveys);
- Qualifications and interest in performing transportation-related work for ODOT and local agencies in Oregon;
- Qualifications and interest in performing transportation-related work as a prime contractor or as a subcontractor (or trucking company or materials supplier);
- Past work in Oregon as a prime contractor or as a subcontractor, trucker or supplier;
- Ability to work in specific geographic regions (Portland/Hood River region, Willamette Valley and Northwest Oregon region, Southwestern Oregon, Central Oregon and Eastern Oregon);
- Largest prime contract or subcontract bid on or performed in Oregon in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix D provides an availability survey instrument.

Screening of firms for the availability database. The study team asked business owners and managers several questions concerning the types of work that their companies performed; their past bidding history; and their qualifications and interest in working on contracts for ODOT and local government agencies, among other topics. Keen Independent considered businesses to be potentially available for ODOT transportation prime contracts or subcontracts if they reported possessing all of the following characteristics:

- a. Being a private business (as opposed to a public agency or not-for-profit organization);
- b. Performing work relevant to transportation contracting;
- c. Having bid on or performed transportation-related prime contracts or subcontracts in Oregon in the previous five years; and
- d. Reporting qualifications for and interest in work for ODOT and/or for local governments.⁶

D. Businesses Included in the Availability Database

The study team used the availability database to produce availability benchmarks to:

- Determine whether there were any disparities in ODOT and local agency utilization of MBE/WBEs during the study period; and
- Help calculate a base figure for ODOT’s overall DBE goals for FHWA contracts.

Data from the availability surveys allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of ODOT and local agency transportation-related work, but it should not be considered an exhaustive list of every business that could potentially participate in ODOT and local agency contracts (see Appendix D).

After completing surveys with 7,119 Oregon businesses, the study team reviewed responses to develop a database of information about businesses that are potentially available for ODOT transportation contracting work. The study team’s research identified 1,639 businesses reporting that they were available for specific transportation contracts that ODOT and local agencies awarded during the study period. Of those businesses, 446 (27%) were minority- or women-owned. Figure 6-4 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group.

Because the results in Figure 6-4 are based on a simple count of firms with no analysis of availability for specific ODOT contracts, they only reflect the first step in the availability analysis.

⁶ For both ODOT and for local agency work, separate survey questions were asked about prime contract work and subcontract work.

Figure 6-4.
Number of businesses included in the availability database

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

Source:
Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	38	2.3 %
Asian-Pacific American-owned	27	1.6
Subcontinent Asian American-owned	15	0.9
Hispanic American-owned	57	3.5
Native American-owned	35	2.1
Total MBE	172	10.5 %
WBE (white women-owned)	274	16.7
Total MBE/WBE	446	27.2 %
Total majority-owned firms	1,193	72.8
Total firms	1,639	100.0 %

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

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for use as a benchmark in the disparity analysis and in helping ODOT set its overall DBE goals for FHWA-funded contracts.

- Dollar-weighted availability estimates represent the percentage of ODOT transportation contracting dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of ODOT transportation-related construction and engineering prime contracts and subcontracts.
- Keen Independent’s approach to calculating availability is a bottom up, contract-by-contract process of “matching” available firms to specific prime contracts and subcontracts.

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

Steps to the availability calculations. The study team identified the specific characteristics of each of the 8,027 ODOT and local agency prime contracts and subcontracts included in the utilization analysis and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported in the telephone or online survey that they:
 - Are qualified and interested in performing transportation-related work in that particular role, for that specific type of work, for that particular type of agency (ODOT or local agencies) or had actually performed work in that role based on contract data for the study period;

- Had performed work in the particular role (prime or sub) in Oregon within the past five years (or had done so based on contract data for the study period);
 - Are able to do work in that geographic location (or had done so based on contract data for the study period);
 - Had bid on or performed work of that size in Oregon in the past five years (or had done so based on contract data for the study period); and
 - Were in business in the year that the contract or task order was awarded.
2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in step 1 above.
 3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 6-5).

The study team repeated those steps for each contract element examined in the Disparity Study. The study team multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure 6-5 provides an example of how the study team calculated availability for a specific subcontract in the study period.

Special considerations for supply contracts.

When calculating availability for a particular type of materials supplies, Keen Independent counted as available all firms supplying those materials that reported qualifications and interest in that work for ODOT (or for local agencies when it was a local agency contract) and indicated that they could provide supplies in the pertinent region of the state. Bid capacity was not considered in these calculations.

Figure 6-5.
Example of an availability calculation

One of the subcontracts examined was for excavation (\$42,650) on a 2010 FHWA-funded contract for a local agency in Southwest Oregon. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2010;
- b. Indicated that they performed excavation on transportation-related projects;
- c. Reported working or bidding on subcontracts in Oregon in the past five years;
- d. Reported bidding on work of similar or greater size in the past five years;
- e. Reported ability to perform work in Southwest Oregon; and
- f. Reported qualifications and interest in working as a subcontractor on local government transportation projects.

There were 250 businesses in the availability database that met those criteria. Of those businesses, 54 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 22 percent (i.e., $54/250 = 24\%$).

The weight applied to this contract was $\$42,650 \div \$1.9 \text{ billion} = 0.002\%$ (equal to its share of total FHWA-funded contract dollars). Keen Independent made this calculation for each prime contract and subcontract.

Improvements on a simple “head count” of businesses. Keen Independent used a dollar-weighted approach to calculating MBE/WBE availability for ODOT and local agency work rather than using a simple “head count” of MBE/WBEs (i.e., simply calculating the percentage of all Oregon transportation contracting businesses that are minority- or women-owned). Using a dollar-weighted approach typically results in lower availability estimates for MBEs and WBEs than a headcount approach due in large part to Keen Independent’s consideration of types and sizes of work performed measuring availability, and because of dollar-weighting availability results for each contract element (a large prime contract has a greater weight in calculating overall availability than a small subcontract). The types and sizes of contracts for which MBE/WBEs are available in Oregon tend to be smaller than those of other businesses. Therefore, MBE/WBEs are less likely to be identified as available for the largest prime contracts and subcontracts.

There are several important ways in which Keen Independent’s dollar-weighted approach to measuring availability is more precise than completing a simple head count approach.

Keen Independent’s approach accounts for type of work. USDOT suggests calculating availability based on businesses’ abilities to perform specific types of work. USDOT gives the following example in Part II F of “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program”:

For instance, if 90 percent of your contract dollars will be spent on heavy construction and 10 percent on trucking, you should weight your calculation of the relative availability of firms by the same percentages.⁷

The study team took type of work into account by examining 35 different subindustries related to transportation construction, engineering and related purchases as part of estimating availability for ODOT and local agency work.

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

- Only businesses that reported being qualified for and interested in working as prime contractors were counted as available for prime contracts (or included because contract data for ODOT or local agencies indicated that they had prime contracts in the past five years).
- Only businesses that reported being qualified for and interested in working as subcontractors were counted as available for subcontracts (or included because contract data for ODOT or local agencies indicated that they had subcontracts in the past five years).
- Businesses that reported being qualified for and interested in working as both prime contractors and subcontractors were counted as available for both prime contracts and subcontracts.

⁷ Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program. (2013, June 25). Available at <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

Keen Independent’s approach accounts for the size of prime contracts and subcontracts. The study team considered the size — in terms of dollar value — of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., bid capacity) when determining whether to count that business as available for a particular contract element. When counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value in Oregon in the previous five years, based on the most inclusive information from survey results and analysis of past ODOT and local agency prime contracts and subcontracts.

Keen Independent’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*; *Western States Paving Company v. Washington State DOT*; *Rothe Development Corp. v. U.S. Department of Defense*,⁸ and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*).⁹

Keen Independent’s approach accounts for the geographic location of the work. The study team determined the location where work was performed for ODOT and local agency contracts: Portland/Hood River (Region 1), Willamette Valley and Northwest Oregon (Region 2), Southwestern Oregon (Region 3), Central Oregon (Region 4) and Eastern Oregon (Region 5).

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

F. Availability Results

Keen Independent used the approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for FHWA- and state-funded prime contracts and subcontracts that ODOT and local agencies awarded during the study period.

Figure 6-6 presents overall dollar-weighted availability estimates by MBE/WBE group for those contracts. Overall, MBE/WBE availability for FHWA-funded contracts is 19.29 percent. This result is lower than the percentage of availability firms that are MBE/WBE (27%) in Figure 6-4. Dollar-weighted availability was less for minority-owned firms (9.47%) than white women-owned firms (9.82%). Availability was 2.92 percent for African American-owned businesses, 2.78 percent for Native American-owned firms and 2.31 percent for Hispanic-owned businesses. Dollar-weighted availability was 0.83 percent for Asian-Pacific American-owned businesses and 0.62 percent for Subcontinent Asian American-owned firms.

⁸ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

⁹ *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

As shown in the center column of Figure 6-6, dollar-weighted availability estimates for state-funded contracts during the study period (19.01% for MBE/WBEs combined) is about the same as FHWA-funded contracts (19.29%).

Overall MBE/WBE availability (19.24%) is shown in the right-hand column of Figure 6-6. Results are very similar to availability results for FHWA-funded contracts.

Figure 6-6.
Overall dollar-weighted availability estimates for MBE/WBEs for ODOT FHWA- and state-funded contracts, October 2010–September 2014

Race/ethnicity and gender	FHWA	State	Total
African American-owned	2.92 %	2.59 %	2.86 %
Asian-Pacific American-owned	0.83	1.04	0.86
Subcontinent Asian American-owned	0.62	0.81	0.66
Hispanic American-owned	2.31	2.09	2.27
Native American-owned	<u>2.78</u>	<u>2.34</u>	<u>2.71</u>
Total MBE	9.47 %	8.86 %	9.37 %
WBE (white women-owned)	<u>9.82</u>	<u>10.15</u>	<u>9.88</u>
Total MBE/WBE	19.29 %	19.01 %	19.24 %

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis.

G. Base Figure for ODOT’s Overall DBE Goal for FHWA-funded Contracts

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ODOT’s FHWA-funded contracts. For the base figure for FHWA-funded contracts, calculations focus on current and potential DBEs.

Keen Independent’s approach to calculating ODOT’s base figure is consistent with:

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

Base figure for FHWA-funded contracts. As discussed above, Keen Independent’s availability analysis indicates that the dollar-weighted availability of minority- and women-owned firms for ODOT’s FHWA-funded transportation contracts is 19.29 percent based on current availability information and analysis of FHWA-funded ODOT and local agency contracts awarded from October 2010 through September 2014.

Calculations to convert MBE/WBE availability to current and potential DBEs for the base figure. Figure 6-7 provides the calculations to derive current/potential DBE availability when starting from the 19.29 percent MBE/WBE availability figure.

For FHWA-funded contracts, there were three groups of MBE/WBEs that Keen Independent did not count as potential DBEs when calculating the base figure:

- **Graduated or been denied DBE certification.** Keen Independent did not include MBE/WBEs that in recent years graduated from the DBE Program or had applied for DBE certification in Oregon and had been denied (based on information supplied by ODOT’s Office of Civil Rights). This was three firms.
- **Revenue exceeding DBE limits.** The study team did not count MBE/WBEs in the availability surveys reported having average annual revenue over the most recent three years (at the time of the 2015 survey) that exceeded the revenue limits for DBE certification for their subindustry (as of 2015). This was 18 firms.
- **BOLI list.** Also excluded were MBE/WBEs in the availability surveys that were prohibited for work for any portion of the FFY 2017 through FFY 2019 time period based on their inclusion on the Oregon Bureau of Labor and Industries (BOLI) List of Contractors Ineligible to Receive Public Works Contracts (as of November 2, 2015). This was one firm.

Adjusting for these three categories of MBE/WBEs reduces the base figure for FHWA-funded contracts by 3.45 percentage points (see Figure 6-7). The base figure for ODOT’s overall DBE goal is 15.84 percent. It represents the level of current/potential DBE participation anticipated based on analysis of FHWA-funded contracts from October 2010 through September 2014.

Figure 6-7.
Overall dollar-weighted availability estimates for current and potential DBEs for FHWA-funded contracts, October 2010–September 2014

Calculation of base figure	FHWA
Total MBE/WBE	19.29 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue thresholds or on BOLI list	<u>3.45</u>
Subtotal	15.84 %
Plus white male-owned DBEs	<u>--</u>
Current and potential DBEs	15.84 %

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis.

Because the 15.84 percent figure is based on FHWA-funded contracts from October 2010 through September 2014, if ODOT's mix of projects (such as size and location) were to substantially change for the FFY 2017 through FFY 2019 period, it might affect the overall base figure.

Dollar-weighted availability of current DBEs. Keen Independent also calculated the base figure if it only counted current DBEs. "Potential DBEs" are included in the analysis, but counted as non-DBEs. The calculation removes firms on the current BOLI list of ineligible contractors from the availability analysis altogether.

The base figure would be 6.00 percent if limited to currently-certified DBEs.

Additional steps before ODOT determines its overall DBE goals for FHWA-funded contracts.

As discussed in Chapter 9, ODOT must consider whether to make a step 2 adjustment to the base figure as part of determining its overall DBE goal for FHWA-funded contracts. Step 2 adjustments can be upward or downward, but there is no requirement for ODOT to make a step 2 adjustment as long as the agency can explain the factors considered and why no adjustment was warranted.

Chapter 9 discusses factors that ODOT might consider in deciding whether to make a step 2 adjustment to the base figures for FHWA-funded contracts.

CHAPTER 7.

Utilization and Disparity Analysis

Keen Independent’s utilization analysis reports the percentage of ODOT transportation contract dollars going to minority- and women-owned firms. The disparity analysis compares that utilization with the participation of minority- and women-owned firms that might be expected based on the availability analysis. (Chapter 6 and Appendix D explain the availability analysis.)

Chapter 7 presents results of the utilization and disparity analysis in five parts:

- A. Overview of the utilization analysis;
- B. Overall MBE/WBE and DBE utilization on ODOT contracts;
- C. Utilization by racial, ethnic and gender group;
- D. Disparity analysis for ODOT contracts; and
- E. Statistical significance of disparity analysis results.

A. Overview of the Utilization Analysis

Keen Independent examined the participation of minority- and women-owned firms on ODOT transportation contracts from October 2010 through September 2014. In total, Keen Independent’s utilization analysis included 2,219 contracts totaling \$1.9 billion over this time period, including FHWA- and state-funded contracts. Keen Independent’s analysis of these contracts included 5,808 subcontracts.

The study team collected information about ODOT projects as well as work awarded for local public agency (LPA) projects that use funds administered through ODOT. Chapter 3 and Appendix C explain the methods used to collect these data and determine the racial, ethnic and gender ownership characteristics of individual firms.

Note that ODOT awards work through a variety of contract agreements; to simplify, the utilization analysis refers to all such work as “contracts.”¹

¹ Also, prime contractors, not ODOT or local agencies, “award” subcontracts to subcontractors. To streamline the discussion, ODOT and local agency “award” of contract elements is used here and throughout the report.

Calculation of “utilization.” MBE/WBE

“utilization” is measured as the percentage of prime contract and subcontract dollars awarded to MBE/WBEs during the study period (see Figure 7-1). Keen Independent calculated MBE/WBE utilization for a group of contracts by dividing the contract dollars going to MBE/WBEs by the contract dollars for all firms.

To avoid double-counting contract dollars and to more accurately gauge utilization of different types of firms, Keen Independent based the utilization of prime contractors on the amount of the contract “retained” by the prime after deducting subcontract amounts. In other words, a \$1 million contract that involved \$400,000 in subcontracting only counts as \$600,000 to the prime contractor in the utilization analysis.

Figure 7-1. Defining and measuring “utilization”

“Utilization” of MBE/WBEs refers to the share of prime contract and subcontract dollars that an agency awarded to MBE/WBEs during a particular time period. Keen Independent measures the utilization of all MBE/WBEs regardless of certification. The study team reports utilization for firms owned by different racial, ethnic and gender groups.

Keen Independent measures MBE/WBE utilization as a percentage of total prime contract and subcontract dollars. For example, if 5 percent of prime contract and subcontract dollars went to WBEs during the study period, WBE utilization would be 5 percent.

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

Different results than in ODOT Uniform Reports of DBE Commitments/Awards and Payments.

USDOT requires agencies such as ODOT to submit reports about its DBE utilization on its FHWA-funded transportation contracts twice each year (typically in April and October).

Keen Independent’s analysis of MBE/WBE utilization goes beyond what ODOT currently reports to the FHWA, as explained below.

- **All MBE/WBEs, not just certified DBEs.** Per USDOT regulations, ODOT’s Uniform Reports focus exclusively on certified DBEs.

Keen Independent examined the utilization of minority- and women-owned firms in general — not just the utilization of certified DBEs. The study team’s analysis includes the utilization of MBE/WBEs that may have once been DBE-certified and graduated (or let their certifications lapse) and the utilization of MBE/WBEs that have never been DBE-certified. (Keen Independent separately reports utilization of MBE/WBEs that were DBE-certified during the study period.)²

² Businesses that are owned and operated by socially- and economically-disadvantaged white men can become certified as DBEs. Keen Independent identified one DBE-certified white male-owned business that ODOT utilized during the study period for a relatively small amount of contract dollars. Thus, utilization results for certified DBEs are not entirely a subset of the utilization results for all MBE/WBEs, but can be viewed that way in this report because of the small dollars going to the white male-owned DBE.

- **All transportation contracts, not just FHWA-funded contracts.** Because FHWA requires ODOT to prepare DBE utilization reports on its FHWA-funded transportation contracts, ODOT's Uniform Reports do not include state-funded contracts.
- **More complete contract information.** Through ODOT's assistance during the disparity study, and as part of ODOT's ongoing improvements to its contract data collection and reporting, the study team was able to analyze more complete data than ODOT had in its Uniform Reports.
- **Differences in classifying a subcontract within a time period.** Keen Independent attempted to include subcontracts associated with a prime contract in the same time period as that prime contract (e.g., a 2015 subcontract on a September 2014 prime contract would be included in results for FFY 2014). ODOT included data for a subcontract in the time period in which it was awarded (e.g., a 2015 subcontract would be included in the 2015 results).

As a result, Keen Independent's estimates of MBE/WBE participation on FHWA-funded contracts during the study period differ from the overall DBE participation ODOT reported to FHWA over a similar time period. However, estimates of DBE participation based on awards are very similar between the ODOT Uniform Reports as explained in the discussion of Figure 7-4.

Different results than in ODOT's September 2015 Waiver Request. ODOT's September 30, 2015 Waiver Request to USDOT examined utilization of minority- and women-owned firms on FHWA-funded construction contracts. ODOT's analysis included certain non-DBE-certified firms in the totals for MBE/WBEs. ODOT analyzed contracts for five years: FFY 2010 through FFY 2014. These data show higher utilization than ODOT's analysis based solely on DBE-certified firms, such as in ODOT's Uniform Reports.

Because of the focus on FHWA-funded construction contracts and the different time period, ODOT's results in the Waiver Request are not perfectly comparable to the Keen Independent utilization results in this chapter.

B. Overall MBE/WBE and DBE Utilization on ODOT Contracts

Figure 7-2 presents overall MBE/WBE utilization (as a percentage of total dollars) on ODOT transportation-related contracts awarded during the study period for FHWA- and state-funded contracts. Results are for the 8,027 prime contracts and subcontracts. The darker portion of the bar presents the utilization of MBE/WBEs that were DBE-certified.

Figure 7-2.
MBE/WBE and DBE share of prime contract/subcontract dollars for ODOT FHWA- and state-funded transportation contracts, October 2010–September 2014

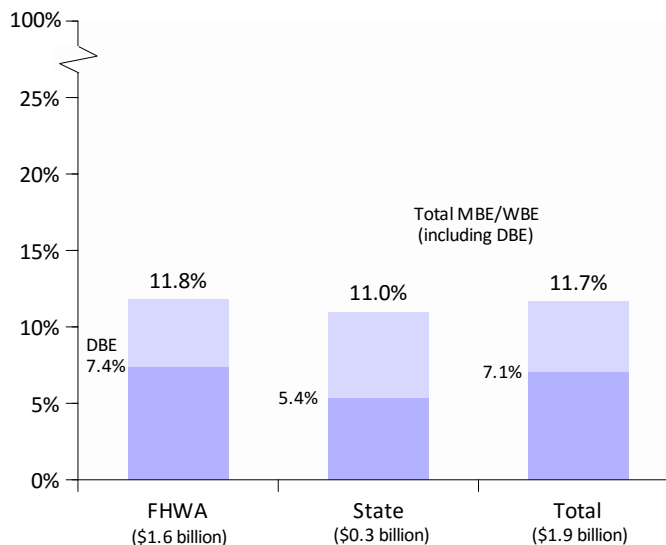
Note:

Dark portion of bar is certified DBE utilization.

Number of contracts/subcontracts analyzed is 6,248 for FHWA-funded contracts, 1,779 for state-funded contracts and 8,027 for all contracts/subcontracts.

Source:

Keen Independent from data on ODOT and LPA contracts October 2010-September 2014.



FHWA-funded contracts. Keen Independent examined 6,248 FHWA-funded prime contracts and subcontracts from October 2010 through September 2014. In total, there was \$1.6 billion in contract dollars for these contracts, much of the contract dollars examined in the study.³

MBE/WBEs received \$188 million, or 11.8 percent of ODOT FHWA-funded contract dollars during study period. About \$118 million (7.4%) of contract dollars went to MBE/WBEs that were DBE-certified at the time of the contract. Minority- and women-owned firms not certified as DBEs accounted for \$70 million or 4.4 percentage points of the total 11.8 percent MBE/WBE participation. (Note that ODOT set DBE contract goals on many FHWA-funded contracts during the study period.)

The above results for FHWA-funded contracts include more FHWA-funded contract dollars than ODOT included in its September 2015 Waiver Request for FFY 2011 through FFY 2014 (\$1.6 billion compared with the \$1.3 billion). The Waiver Request shows MBE/WBE utilization of 14.0 percent for this time period. Both the greater total dollars and the lower percentage of MBE/WBE participation in Keen Independent’s analysis of FHWA-funded contracts are mostly due to the engineering-related contracts that were not included in the ODOT waiver analysis.

³ Note that because ODOT and USDOT treat each contract with any FHWA dollars as “FHWA-funded,” the study team did so as well (some of the funding on these contracts was state dollars).

Keen Independent’s analysis of DBE participation for FFY 2011 through FFY 2014 also includes more FHWA-funded contract dollars than ODOT’s Uniform Reports of DBE Commitments/Awards and Payments for FFY 2011 through FFY 2014. Based on commitments and awards, ODOT’s reports show 10.4 percent DBE participation. As shown in Figure 7-2, Keen Independent reports 7.4 percent DBE participation, and includes both construction and engineering-related FHWA-funded contracts in this calculation. (Again, ODOT’s figures are just for construction.)

State-funded contracts. The study team obtained data on 1,779 state-funded transportation construction and engineering-related prime contracts and subcontracts for October 2010 through September 2014. These contracts totaled \$337 million.

Minority- and women-owned firms received 11.0 percent of the contract dollars for state-funded transportation contracts during the study period. Compared with FHWA-funded contracts, a smaller portion of this utilization (5.4%) was DBE participation (see Figure 7-2).

ODOT does not prepare DBE utilization reports for state-funded contracts.

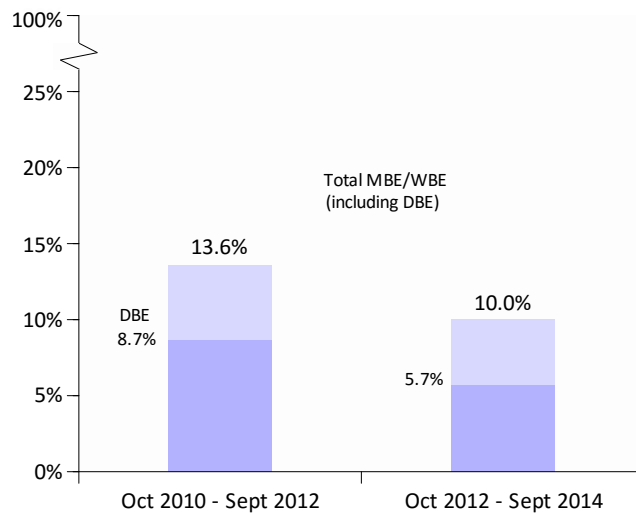
Contracts by time period. MBE/WBE participation was 13.6 percent for contracts awarded from October 2010 through September 2012. It dropped to 10.0 percent for October 2012 through September 2014. This decrease was associated with a sharp decrease in utilization of firms certified as DBEs (8.7 percent down to 5.7 percent). Figure 7-3 shows these results.

As discussed later in Chapter 7, decline in the utilization of Hispanic American-owned firms explains this decrease in overall MBE/WBE and in DBE utilization.

Figure 7-3.
MBE/WBE and DBE participation from
October 2010–September 2012 and
October 2012–September 2014

Note:
 Dark portion of bar is certified DBE utilization.
 Number of contracts/subcontracts analyzed is 3,986 for Oct. 2010–Sept. 2012 and 4,041 for Oct. 2012–Sept. 2014.

Source:
 Keen Independent from data on ODOT and LPA contracts October 2010–September 2014.



C. Utilization by Racial, Ethnic and Gender Group

Figure 7-4 presents detailed information for minority- and women-owned firms (top portion of the table) and certified DBEs (bottom portion of the table) for FHWA- and for state-funded contracts. For each set of contracts, Figure 7-4 shows:

- Total number of prime contracts and subcontracts awarded to the group (e.g., 1,032 FHWA-funded prime contracts and subcontracts to white women-owned firms);
- Combined dollars of prime contracts and subcontracts going to the group (e.g., \$81,886,000 to white women-owned firms); and
- The percentage of combined contract dollars for the group (e.g., white women-owned firms received 5.2 percent of total FHWA-funded contract dollars).

FHWA-funded contracts. As shown in the top portion of Figure 7-4 for FHWA-funded contracts, white women-owned firms (WBEs) received the largest number of prime contracts and subcontracts, the most dollars and the highest share of dollars out of all MBE/WBE groups. Among minority-owned firms, African American-owned firms (150) and Native American-owned firms (150) received the most prime contracts and subcontracts. African American-owned firms (\$32 million) and Hispanic American-owned firms (\$31 million) received the most dollars of FHWA-funded contracts. Both African American- and Hispanic American-owned firms received 2.0 percent of FHWA-funded contracts.

Native American-owned firms received 1.4 percent of contract dollars. Utilization of Asian-Pacific American-owned firms was 0.7 percent and utilization of Subcontinent Asian American-owned firms was 0.7 percent for FHWA-funded contracts.

The bottom portion of Figure 7-4 indicates that DBEs owned by white women, Hispanic Americans and African Americans accounted for most of the DBE participation on FHWA-funded contracts. In total, firms certified as DBEs received 1,007 prime contracts and subcontracts and \$118 million of the FHWA-funded contract dollars during the study period. This accounted for 7.4 percent of FHWA-funded contract dollars.

State-funded contracts. Figure 7-4 also shows participation of MBE/WBEs on state-funded contracts. White women-owned firms (4.9%) and Hispanic American-owned firms (4.3%) accounted for most of the total participation of MBE/WBEs on state-funded contracts. Even though DBE contract goals were not applied, DBEs did participate in state-funded contracts, receiving about 5.4 percent of total contract dollars (see the bottom portion of Figure 7-4).

Figure 7-4.
 MBE/WBE and DBE share of ODOT prime contracts and subcontracts for
 FHWA- and state-funded contracts, October 2010–September 2014

	FHWA			State		
	Number of contracts*	\$1,000s	Percent of dollars	Number of contracts*	\$1,000s	Percent of dollars
MBE/WBEs						
African American-owned	150	\$ 31,663	2.0 %	15	\$ 355	0.1 %
Asian-Pacific American-owned	95	10,590	0.7	9	804	0.2
Subcontinent Asian American-owned	37	10,377	0.7	68	944	0.3
Hispanic American-owned	117	31,363	2.0	41	14,374	4.3
Native American-owned	150	21,629	1.4	35	3,947	1.2
Total MBE	549	105,623	6.6	168	20,424	6.1 %
WBE (white women-owned)	1,032	81,886	5.2	265	16,602	4.9
Total MBE/WBE	1,581	\$ 187,510	11.8 %	433	\$ 37,026	11.0 %
Majority-owned	4,667	1,401,664	88.2	1,346	300,077	89.0
Total	6,248	\$ 1,589,174	100.0 %	1,779	\$ 337,103	100.0 %
DBEs						
African American-owned	76	\$ 20,882	1.3 %	9	\$ 276	0.1 %
Asian-Pacific American-owned	57	3,117	0.2	7	579	0.2
Subcontinent Asian American-owned	36	10,372	0.7	65	500	0.1
Hispanic American-owned	81	23,801	1.5	26	7,005	2.1
Native American-owned	64	10,086	0.6	18	1,743	0.5
Total MBE	314	\$ 68,259	4.3 %	125	\$ 10,103	3.0 %
WBE (white women-owned)	693	49,661	3.1	130	7,961	2.4
White male-owned DBE	0	0	0.0	1	39	0.0
Total DBE certified	1,007	\$ 117,920	7.4 %	256	\$ 18,103	5.4 %
Non-DBE	5,241	1,471,254	92.6	1,523	319,000	94.6
Total	6,248	\$ 1,589,174	100.0 %	1,779	\$ 337,103	100.0 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on ODOT and LPA contracts October 2010-September 2014.

FHWA- and state-funded ODOT transportation contracts. Figure 7-5 presents MBE/WBE and DBE participation for combined FHWA- and state-funded ODOT transportation contracts during the study period.

White women-owned firms obtained 5.1 percent of ODOT contract dollars and minority-owned firms received 6.5 percent of ODOT contract dollars. In total, 11.7 percent of ODOT contract dollars went to minority- and women-owned firms.

Figure 7-5.
MBE/WBE and DBE share of ODOT prime contracts and subcontracts for combined FHWA- and state-funded contracts, October 2010–September 2014

	Total FHWA and State		
	Number of contracts*	\$1,000s	Percent of dollars
MBE/WBEs			
African American-owned	165	\$ 32,018	1.7 %
Asian-Pacific American-owned	104	11,394	0.6
Subcontinent Asian American-owned	105	11,321	0.6
Hispanic American-owned	158	45,737	2.4
Native American-owned	185	25,577	1.3
Total MBE	717	\$ 126,048	6.5 %
WBE (white women-owned)	1,297	98,488	5.1
Total MBE/WBE	2,014	\$ 224,536	11.7 %
Majority-owned	6,013	1,701,741	88.3
Total	8,027	\$ 1,926,277	100.0 %
DBEs			
African American-owned	85	\$ 21,159	1.1 %
Asian-Pacific American-owned	64	3,696	0.2
Subcontinent Asian American-owned	101	10,872	0.6
Hispanic American-owned	107	30,806	1.6
Native American-owned	82	11,829	0.6
Total MBE	439	\$ 78,362	4.1 %
WBE (white women-owned)	823	57,621	3.0
White male-owned DBE	1	39	0.0
Total DBE-certified	1,263	\$ 136,023	7.1 %
Non-DBE	6,764	1,790,254	92.9
Total	8,027	\$ 1,926,277	100.0 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on ODOT and LPA contracts October 2010-September 2014.

Contracts by time period. Figure 7-6 examines combined FHWA- and state-funded contract dollars going to minority- and women-owned firms on contracts for the first two years of the study period (FFY 2011 through FFY 2012) and the final two years of the study period (FFY 2013 through FFY 2014).

The drop in MBE/WBE participation between the first two years and final two years of the study period was largely due to a decrease in participation of Hispanic American-owned firms. Utilization for this group was 3.8 percent of ODOT contract dollars from October 2010 through September 2012. For October 2012 through September 2014, Hispanic American-owned firms obtained 1.2 percent of contract dollars.

Utilization of white women-owned firms was about 5 percent in both time periods. Among other MBE groups, utilization increased for Subcontinent Asian American-owned (from 0.1% to 1.0%). Utilization of all other MBE groups declined from the first two years to the final two years.

Figure 7-6.
MBE/WBE and DBE share of ODOT prime contracts and subcontracts for FHWA- and state-funded contracts with and without DBE contract goals, October 2010–September 2012 and October 2012–September 2014

	FFY2011–FFY2012			FFY2013–FFY2014		
	Number of contracts*	\$1,000s	Percent of dollars	Number of contracts*	\$1,000s	Percent of dollars
MBE/WBEs						
African American-owned	82	\$ 17,380	2.0 %	83	\$ 14,638	1.4 %
Asian-Pacific American-owned	65	5,629	0.6	39	5,765	0.5
Subcontinent Asian American-owned	15	1,184	0.1	90	10,137	1.0
Hispanic American-owned	88	32,952	3.8	70	12,785	1.2
Native American-owned	93	16,273	1.9	92	9,304	0.9
Total MBE	343	73,418	8.4	374	\$ 52,630	5.0 %
WBE (white women-owned)	649	45,849	5.2	648	52,639	5.0
Total MBE/WBE	992	\$ 119,266	13.6 %	1,022	\$ 105,270	10.0 %
Majority-owned	2,994	756,838	86.4	3,019	944,903	90.0
Total	3,986	\$ 876,104	100.0 %	4,041	\$ 1,050,173	100.0 %
DBEs						
African American-owned	54	\$ 13,233	1.5 %	31	\$ 7,925	0.8 %
Asian-Pacific American-owned	37	2,302	0.3	27	1,394	0.1
Subcontinent Asian American-owned	14	1,179	0.1	87	9,693	0.9
Hispanic American-owned	64	26,362	3.0	43	4,445	0.4
Native American-owned	45	8,214	0.9	37	3,616	0.3
Total MBE	214	\$ 51,289	5.9 %	225	\$ 27,073	2.6 %
WBE (white women-owned)	414	25,047	2.9	409	32,574	3.1
White male-owned DBE	0	0	0.0	1	39	0.0
Total DBE certified	628	\$ 76,337	8.7 %	635	\$ 59,686	5.7 %
Non-DBE	3,358	799,767	91.3	3,406	990,487	94.3
Total	3,986	\$ 876,104	100.0 %	4,041	\$ 1,050,173	100.0 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on ODOT and LPA contracts October 2010-September 2014.

D. Disparity Analysis for ODOT Contracts

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on ODOT and LPA transportation prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work. (Availability is also referred to as the “utilization benchmark.”) Keen Independent made those comparisons for individual MBE/WBE groups. Chapter 6 explains how the study team developed benchmarks from the availability data.

To make results directly comparable, Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts (e.g., 5% utilization compared with 4% availability). Keen Independent then calculated a “disparity index” to easily compare utilization and availability results among MBE/WBE groups and across different sets of contracts.

- A disparity index of “100” indicates an exact match between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts (often referred to as “parity”).
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 in this report are described as “substantial.”⁴

Figure 7-7 describes how Keen Independent calculated disparity indices.

Figure 7-7.
Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of an MBE/WBE group matches what might be expected based on its availability for a specific set of contracts. With the disparity index, one can directly compare results for one group to that of another group, and across different sets of contracts. Disparity indices are calculated using the following formula:

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

For example, if actual utilization of MBEs on a set of ODOT contracts was 2 percent and the availability of MBEs for those contracts was 4 percent, then the disparity index would be 2 percent divided by 4 percent, which would then be multiplied by 100 to equal 50. In this example, MBEs would have actually received 50 cents of every dollar that they might be expected to receive based on their availability for the work.

⁴ Some courts deem a disparity index below 80 as being “substantial,” and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013); *Rotbe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). Also see Appendix B for additional discussion.

Results for minority- and women-owned firms on ODOT contracts. White women-owned firms received 5.1 percent of ODOT contract dollars (FHWA- and state-funded combined). This utilization was below what might be expected from the availability analysis — 9.9 percent. Minority-owned firms received 6.5 percent of ODOT contract dollars, a result that was also below what might be expected from the availability analysis — 9.4 percent. Figure 7-8 shows these results.

The resulting disparity index for WBEs is 52 (5.11% divided by 9.88%, times 100). The disparity index for MBEs is 70 (6.54% divided by 9.37%, times 100). Because the indices for WBEs and for MBEs were below 80, they are “substantial,” as explained on the previous page.

Figure 7-8.
MBE/WBE utilization and availability for ODOT FHWA- and state-funded contracts, October 2010–September 2014

Note:
 Number of contracts/subcontracts analyzed is 8,027.

Source:
 Keen Independent disparity analysis for ODOT and LPA contracts.

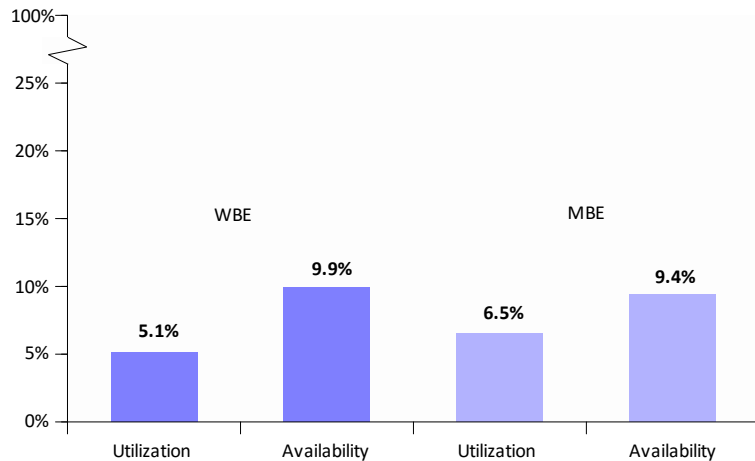


Figure 7-9 on the next page shows disparity indices for individual MBE groups as well as WBEs.⁵

African American-owned firms. African American-owned firms received 1.7 percent of contract dollars, substantially less than what might be expected in the availability analysis (2.9%). The disparity index for this group was 58. Keen Independent identified this substantial disparity for African American-owned firms in spite of DBE-certified African American-owned businesses being eligible to participate in ODOT’s DBE goals for construction contracts during this period.

Asian-Pacific American-owned businesses. Utilization of Asian-Pacific American-owned firms (0.6%) was substantially below what might be expected from the availability analysis (0.9%), and the disparity index was 69 for this group, even though DBEs owned by Asian Pacific Americans were eligible to meet DBE contract goals in the first two years of the study period.

Subcontinent Asian American-owned companies. Utilization of Subcontinent Asian American-owned businesses (0.6%) was somewhat less than expected from the availability analysis (0.7%). The disparity index for this group was 90. Subcontinent Asian American-owned firms were eligible to meet DBE contract goals for construction contracts during the study period.

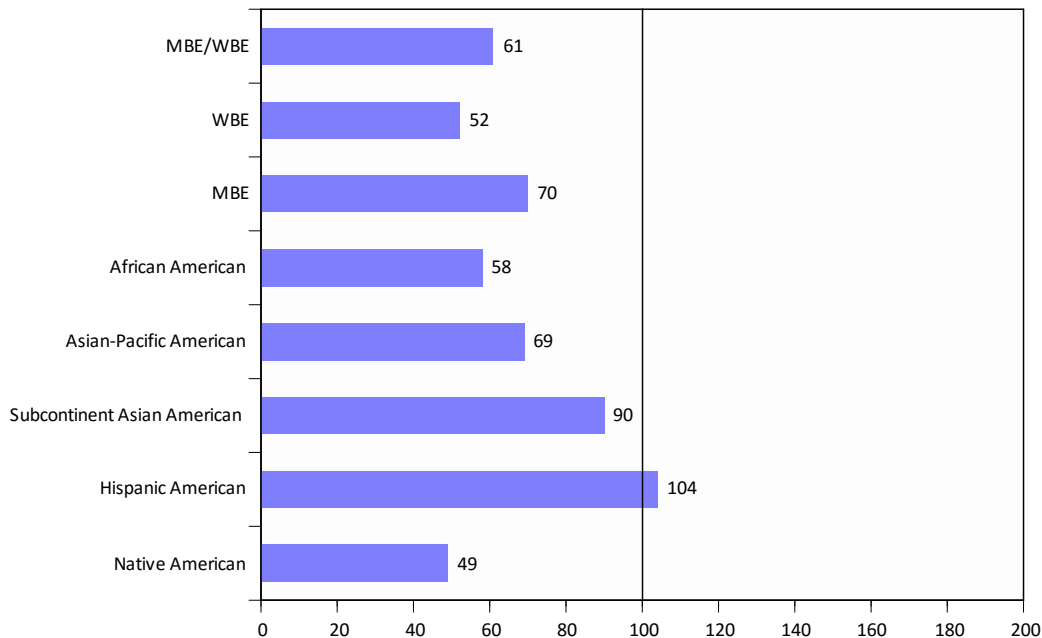
⁵ Note that the utilization and availability statistics are rounded to the nearest tenth of a percent, but the disparity indices were calculated from non-rounded results.

Hispanic American-owned firms. From October 2010 through September 2014, Hispanic American-owned firms obtained 2.4 percent of ODOT contract dollars, about the same what might be expected from the availability analysis (2.3%), resulting in a disparity index of 104. Most of this utilization was two firms: Capital Concrete Construction and LaDuke Construction. The availability results for Hispanic American-owned firms are limited by the fact that neither of these firms provided information to be included in the detailed availability analysis. Capital Concrete has voluntarily surrendered its contractor’s license, no longer has a working telephone number and does not appear to be available for ODOT work. LaDuke Construction indicated that they were not interested in discussing future work for ODOT when contacted by the study team to participate in an availability interview in 2015. Even though neither firm provided information necessary to be included in the availability analysis for Hispanic American-owned firms, both of these firms are still counted in the utilization results. (Without these two firms, utilization of Hispanic American-owned firms would have been 0.9 percent.)

Native American-owned businesses. Native American-owned firms had a utilization of 1.3 percent, below what might be expected based on the availability analysis (2.7%). The disparity index for this group was 49.

Overall results for MBE/WBEs. Overall, the disparity index for MBE/WBEs combined was 61, even with the application of DBE contract goals for some DBE groups for some of these contracts. As previously noted, Figure 7-9 also presents the disparity index for white women-owned firms (52).

Figure 7-9. Disparity indices for MBE/WBEs, by group, for ODOT FHWA- and state-funded contracts, October 2010–September 2014



Note: Number of contracts/subcontracts analyzed is 8,027.

Source: Keen Independent disparity analysis for ODOT and LPA contracts.

Results for October 2010 through September 2012. Keen Independent also separately examined utilization and availability results for the first two years of the study period and the final two years of the study period. Figure 7-10 presents results for ODOT contracts from October 2010 through September 2012.

White women-owned firms received 5.2 percent of ODOT contract dollars, which was below the 9.9 percent that might be expected from the availability analysis for this time period. As shown in Figure 7-11 on the following page, the disparity index was 53, indicating a substantial disparity for white women-owned firms in this time period.

Minority-owned firms received 8.4 percent of the contract dollars, somewhat below what might be expected from the availability analysis (10.0%). The disparity index was 84 for MBEs in this time period, not a substantial disparity.

Figure 7-10.
MBE/WBE utilization and availability for FHWA- and state-funded contracts without DBE contract goals, October 2010–September 2012

Note:
 Number of contracts/subcontracts analyzed is 3,986.

Source:
 Keen Independent disparity analysis for ODOT and LPA contracts.

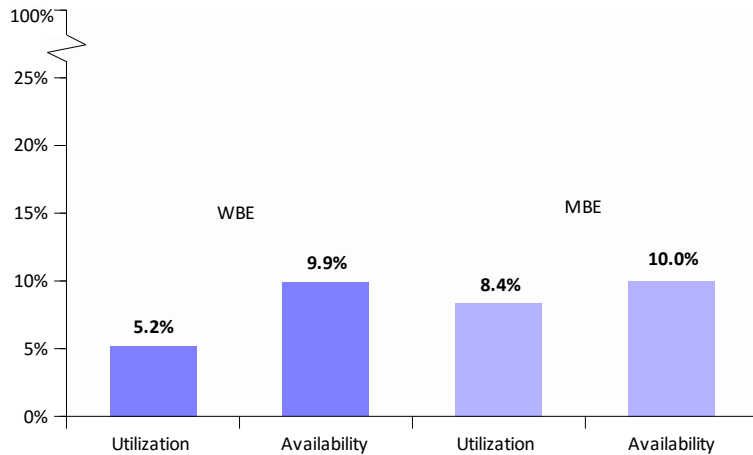
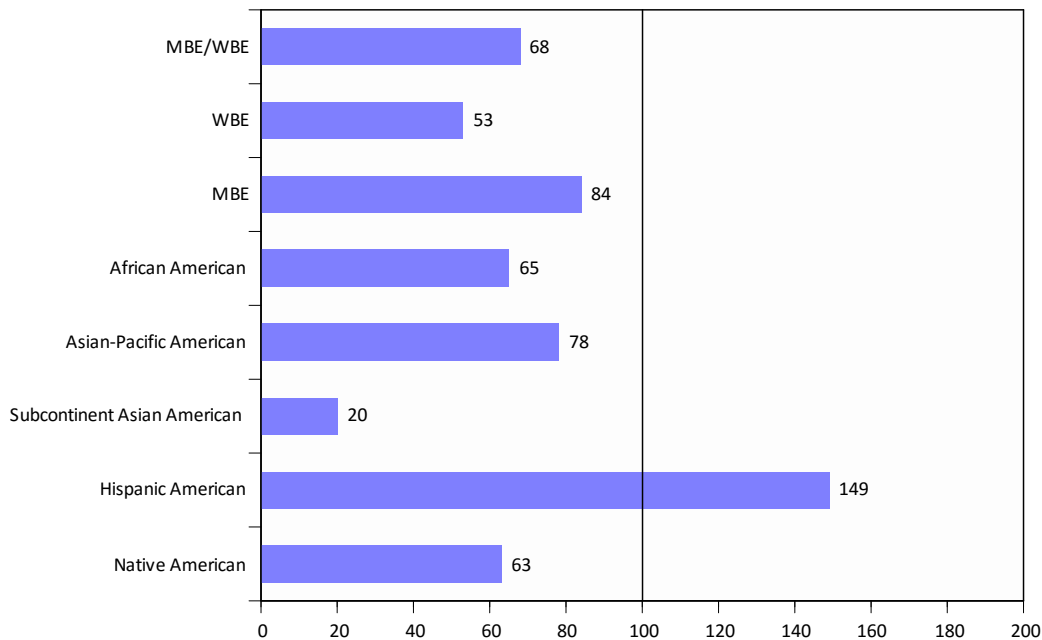


Figure 7-11 provides disparity indexes for each MBE group as well as for WBEs and MBE/WBEs overall for ODOT contracts from October 2010 through September 2012.

- As previously noted, WBEs obtained about one-half of the contract dollars that might be expected based on the availability analysis (disparity index of 53).
- There were substantial disparities for African American-, Asian-Pacific American-, Subcontinent Asian American- and Native American-owned businesses.
- Utilization of Hispanic American-owned firms (3.8%) exceeded the 2.5 percent availability benchmark for this group. The disparity index was 149 for Hispanic American-owned firms in these two years.

Figure 7-11. Disparity indices for MBE/WBEs, by group, for ODOT FHWA- and state-funded contracts, October 2010–September 2012



Note: Number of contracts/subcontracts analyzed is 3,986.

Source: Keen Independent disparity analysis for ODOT and LPA contracts.

Results for October 2012 through September 2014. Figure 7-12 presents WBE and MBE utilization and availability results for contracts from October 2012 through September 2014.

Utilization (5.0%) and availability (9.9%) for white women-owned firms were similar for this time period as for the previous two years. The disparity index was 51, which was also substantial (see Figure 7-13).

MBE utilization dropped to 5.0 percent for October 2012 through September 2014. The disparity index for MBEs was 57, which indicates a substantial disparity.

Figure 7-12.
MBE/WBE utilization
and availability for
ODOT FHWA- and
state-funded contracts
without DBE contract
goals,
October 2012–
September 2014

Note:
Number of
contracts/subcontracts
analyzed is 4,041.

Source:
Keen Independent disparity
analysis for ODOT and LPA
contracts.

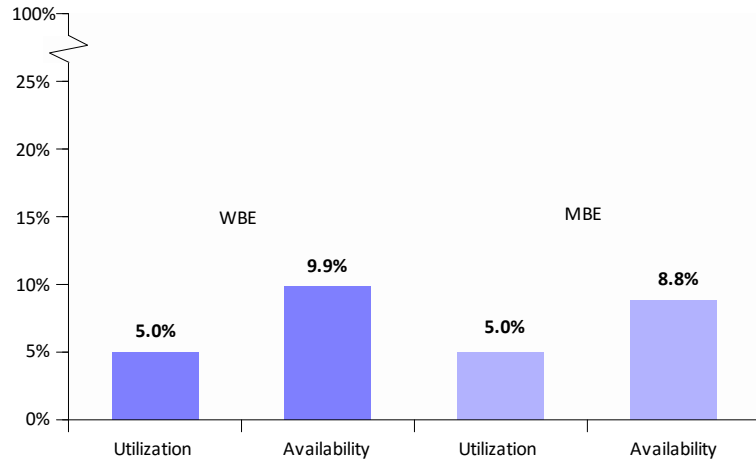
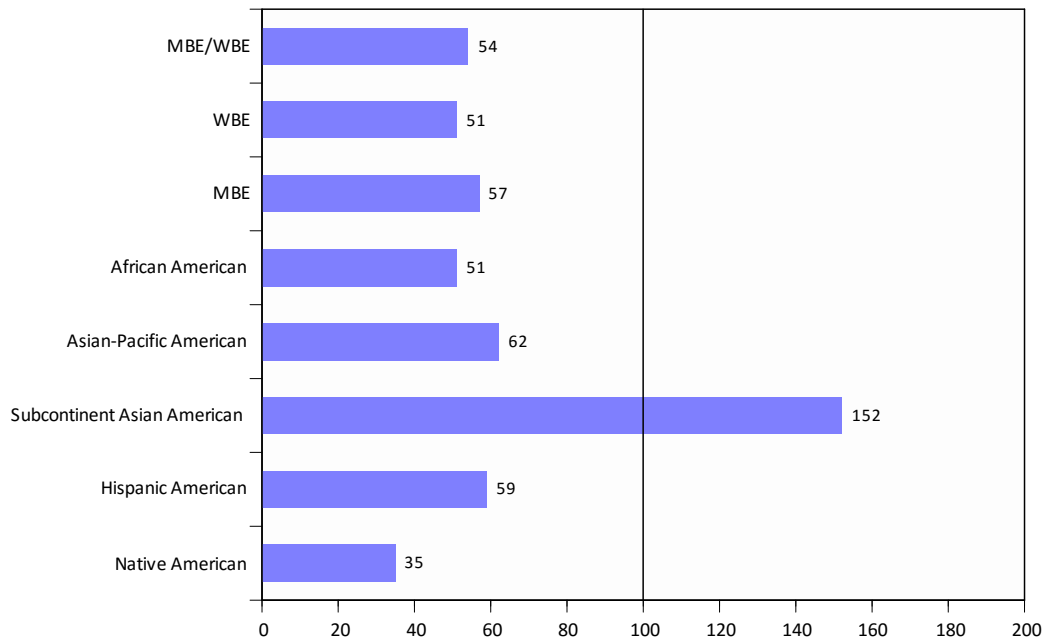


Figure 7-13 indicates substantial disparities for all MBE groups except for Subcontinent Asian American-owned firms.

- Unlike the previous two years, there was no disparity for Subcontinent Asian American-owned firms in this time period. Note that DBEs owned by Subcontinent Asian Americans were eligible to participate in DBE contract goals for ODOT construction contracts.
- There were substantial disparities for other MBE groups, including Hispanic American-owned firms (disparity index of 59 for this group). Even with eligibility to meet DBE contract goals, there was a substantial disparity in ODOT’s utilization of African American-owned firms (disparity index of 51).

Figure 7-13. Disparity indices for MBE/WBEs, by group, for ODOT FHWA- and state-funded contracts, October 2012–September 2014



Note: Number of contracts/subcontracts analyzed is 4,041.

Source: Keen Independent disparity analysis for ODOT and LPA contracts.

Utilization and disparity results for other sets of ODOT contracts. Chapter 8 examines utilization results for subsets of ODOT contracts to further explore factors behind the disparities identified in Chapter 7.

E. Statistical Significance of Disparity Analysis Results

Analysis of statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. As both the availability and the utilization analyses attempted to obtain information for populations of firms and contracts rather than samples, this opportunity for an alternative explanation of any disparity is minimized.

Statistical confidence in availability results.

Keen Independent did not draw a sample of companies to research in the availability analysis. The study team attempted to reach each firm in the relevant geographic market area identified by ODOT or by Dun & Bradstreet as possibly doing business within relevant subindustries (as described in Chapter 6).

Keen Independent examined the accuracy of the initial list of potentially available firms and the number of firms successfully reached from that list in the availability survey effort.

- The list of potentially available firms very accurately depicted the universe of highway construction and engineering-related firms in the relevant marketplace. One measure is whether firms receiving the most ODOT work were represented on the list of firms to be contacted in the availability survey. Keen Independent examined firms receiving at least \$300,000 in ODOT contract dollars (423 firms representing more than 96 percent of total contract dollars). All of those firms were on Keen Independent’s list to be contacted in the availability survey if they were located in the relevant geographic market area and performed relevant work. This demonstrates the comprehensiveness and accuracy of the initial list of firms to be contacted in the availability survey.
- The second issue is how many of the potentially availability firms were successfully contacted in the availability survey. Keen Independent was able to reach more than 7,100 businesses on the list of potentially available companies, a very large number of responses. The “response rate” to the survey was very high: more than 57 percent of the businesses on the initial list were successfully contacted. Figure 7-14 explains the high level of statistical confidence in the availability results due to the number of responses and the high response rate. (Of the firms on the availability list that received at least \$300,000 in ODOT work, 72 percent were successfully contacted.)

Figure 7-14.

Confidence interval for availability results

Keen Independent conducted telephone interviews with more than 7,100 business establishments — a very large number of businesses for this type of research. Of those businesses, 1,639 were available for ODOT transportation contracts. If the results are treated as a sample, the reported 27.2 percent representation of MBE/WBEs among all available firms is accurate within about +/- 0.7 percentage points. By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and a finite population correction factor when determining these confidence intervals.)

- The third issue is whether there was any indication that availability results would differ if 100 percent of the firms the study team attempted to contact were successfully reached.
 - The very high response rate reduces this possibility.
 - The survey approach also minimizes this possibility. There were multiple callbacks at different times of day and different days of the week to reach companies that didn't respond to the first contact, and interviewees were given multiple ways to complete a survey (phone, online, fax, email). Interviewers clearly identified that they were calling as part of an ODOT-sponsored study. Efforts to address potential language barriers also minimized the possibility of under-reaching certain groups. (The study team switched to a Spanish-language introduction if there were associated language barriers. Because of this step, language barriers presented a difficulty in conducting the survey for only 11 companies due to languages such as Russian or Romanian.)
 - Finally, Keen Independent reviewed whether there was any difference in response rates for minority- and women-owned firms compared with other firms. As discussed in Appendix D, Keen Independent performed this analysis by comparing the representation of minority- and women-owned firms in the initial list and the representation in the set of successfully contacted firms. Ownership information for firms in both lists came from D&B ownership records for those firms. Minority- and women-owned firms were 7.4 percent of firms in the initial list and 8.0 percent of firms successfully contacted (based solely on D&B information on ownership). The consistency in these results suggests minimal potential for any non-response bias affecting the availability results.

In sum, it is reasonable to view the quality of the availability data as approaching that of a “population” of available firms.

Statistical confidence in utilization results. Keen Independent also attempted to compile a complete “population” of ODOT transportation contracts and subcontracts for the study period. The study team successfully examined each contract and subcontract in the study period included in the ODOT data and was able to code firms receiving those contracts and subcontracts as minority-owned (by group), white women-owned or majority-owned. There was no sampling of the contract data.

The study team performed in-depth research on ownership status of all firms obtaining at least \$10,000 of ODOT transportation-related work during the study period. Keen Independent also coded ownership of firms below this threshold, but did not perform in-depth research on every firm. ODOT and the External Stakeholder Group also reviewed firm ownership information. Although inaccuracies in ownership information are possible, it is extremely unlikely that they could materially affect utilization results.

In sum, it is appropriate to use the utilization results as highly accurate information reflecting a population of ODOT transportation contracts and subcontracts.

Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”

Additional analysis of statistical confidence in results of the disparity analysis. As outlined below, the study team also used a sophisticated statistical simulation tool to examine whether there were a sufficient number of contracts and subcontracts examined to be confident that results indicating disparities could not be easily replicated by chance in contract awards.

Monte Carlo analysis. One can be more confident in making certain interpretations from the disparity results if they are not easily replicated by chance in contract awards. For example, if there were only 10 ODOT contracts examined in the disparity study, one might be concerned that any resulting disparity might be explained by random chance in the award of those contracts.

Figure 7-15 describes Keen Independent’s use of Monte Carlo analysis to statistically examine this issue.

Results. Figure 7-16 presents the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for MBEs and WBEs for all contracts.

The Monte Carlo simulations did not replicate the disparities for WBEs in any of the 10,000 simulation runs. Therefore, one can be confident that chance in contract and subcontract awards can be rejected as an explanation for the observed disparity for white women-owned businesses in ODOT contracts.

Figure 7-15. Monte Carlo analysis

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

The study team assumed that each available firm had an equal chance of “receiving” that contract element. For example, the odds of an MBE receiving that contract element were equal to the number of MBEs available for the contract element divided by the total number of firms available for the work. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to “receive” that contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represented simulated utilization of MBEs for that set of contract elements.

The entire Monte Carlo simulation was then repeated 10,000 times. The combined output from all 10,000 simulations represented a probability distribution of the overall utilization of MBEs and utilization of WBEs if contracts were awarded randomly based on the availability of businesses working in the Oregon transportation contracting industry.

The Monte Carlo simulations replicated the disparity for minority-owned firms in three of the 10,000 simulation runs, or less than 0.1 percent of the time. Applying a 95 percent confidence level for “statistical significance,” the disparity for minority-owned firms is statistically significant, and one can reject chance in contract awards as the explanation of the disparity.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure 7-14 and elsewhere in this chapter), and it may not be appropriate for very small populations of firms.⁶

Figure 7-16.
Monte Carlo results for MBEs and WBEs for ODOT FHWA- and state-funded contracts, October 2010–September 2014

	MBE	WBE
Disparity index	70	52
Number of simulation runs out of 10,000 that replicated observed utilization	3	0
Probability of observed disparity occurring due to "chance"	< 0.1 %	< 0.1 %
Reject chance in awards of contracts as a cause of disparity?	Yes	Yes

Source: Keen Independent from data on ODOT and LPA FHWA- and state-funded contracts, October 2010-September 2014.

⁶ Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

CHAPTER 8.

Further Exploration of MBE/WBE and DBE Utilization on FHWA- and State-funded Contracts

Building upon the analysis presented in Chapter 7, Keen Independent further examines the utilization of minority- and women-owned firms for different types and locations of ODOT contracts in Chapter 8. Chapter 8 also reports participation of DBEs. Results generally focus on FHWA- and state-funded contracts combined. Unless otherwise specified, results combine ODOT and LPA contracts.

Keen Independent presents results as follows:

- A. Contracts with DBE contract goals and those without goals;
- B. Construction and engineering contracts;
- C. ODOT-awarded contracts and local public agency-awarded contracts;
- D. ODOT regions;
- E. Prime contracts and subcontracts;
- F. Construction prime contracts, including analysis of process and case studies of bids;
- G. Engineering-related prime contracts, including analysis of process and case studies of proposals;
- H. ODOT operation of the Federal DBE Program for FHWA-funded contracts, including overconcentration analysis; and
- I. Summary of results.

A. Contracts With and Without DBE Contract Goals

As discussed in Chapters 1 and 4, ODOT sets DBE contract goals during different portions of the study period on some FHWA-funded contracts. Other FHWA-funded contracts, and all state-funded contracts, did not have DBE contract goals.

MBE/WBE participation. MBE/WBE participation was 15.3 percent on contracts with DBE contract goals and 9.2 percent on FHWA- and state-funded contracts without DBE contract goals. Figure 8-1 on the following page provides this information.

DBE participation. Keen Independent's analysis shows higher DBE utilization on contracts with DBE contract goals than those without contract goals. As shown in Figure 8-1, 10.0 percent of contract dollars went to DBEs when ODOT set a DBE contract goal. Without DBE contract goals, DBE participation was 5.1 percent (5.0% on FHWA-funded contracts). ODOT might consider this 5.1 percent participation when projecting the amount of DBE participation it can achieve through neutral means (see Chapter 10).

Figure 8-1.
MBE/WBE and DBE share of dollars for
contracts with and without DBE
contract goals, October 2010–
September 2014

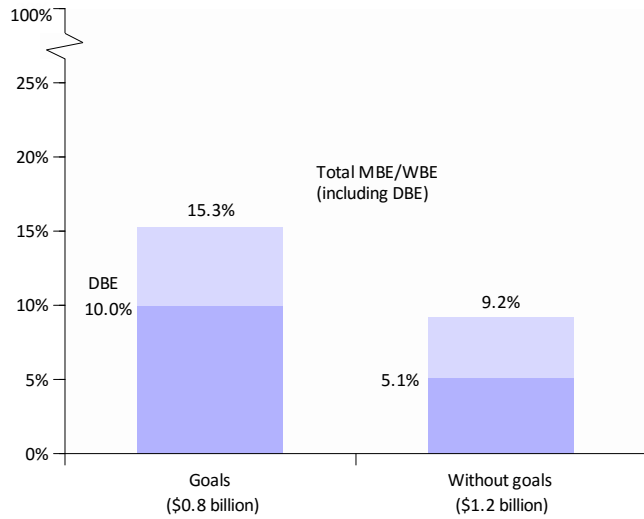
Note:

Dark portion of bar is certified DBE utilization.

Number of contracts/subcontracts analyzed is 1,980 with DBE contract goals and 6,047 without contract goals.

Source:

Keen Independent from data on ODOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2010-September 2014.



Disparity analysis for contracts with DBE goals indicated that it did not fully eliminate the disparity for MBE/WBEs (disparity index of 86), perhaps because participation in the DBE contract goals program for construction contracts was limited to two DBE groups. The disparity index for MBE/WBEs for contracts without DBE contract goals was 46.

B. Construction and Engineering Contracts

Figure 8-2 presents MBE/WBE participation for construction contracts and engineering-related contracts. Overall, MBE/WBE participation was higher on construction contracts (about 12.4%) than engineering-related contracts (6.3%).

Participation of DBEs was also higher on construction contracts than engineering-related contracts (7.7% compared with 2.9%).

Figure 8-2.
MBE/WBE and DBE share of dollars for
construction and engineering-
contracts, October 2010–
September 2014

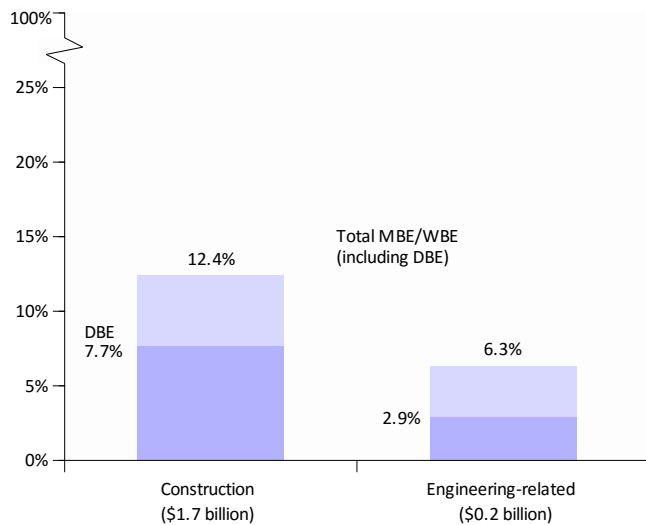
Note:

Dark portion of bar is certified DBE utilization.

Number of contracts/subcontracts analyzed is 5,877 for construction and 2,150 for engineering-related contracts.

Source:

Keen Independent from data on ODOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2010-September 2014.



There were disparities between MBE/WBE utilization and availability for both construction and engineering contracts.

- The 12.4 percent MBE/WBE utilization on construction contracts was substantially below the 19.3 percent availability for those contracts, with a disparity index of 65.
- Based on 19.1 percent MBE/WBE availability for engineering-related contracts, there was a substantial disparity for MBE/WBEs on these contracts as well (disparity index of 33).

C. ODOT Contracts and Local Public Agency (LPA) Contracts

Keen Independent also examined results for ODOT contracts and local public agency (LPA) contracts. In terms of dollars, most of the FHWA- and all of the state-funded transportation contracts examined in this disparity study were for ODOT projects (\$1.7 billion). LPA contracts totaled \$184 million.

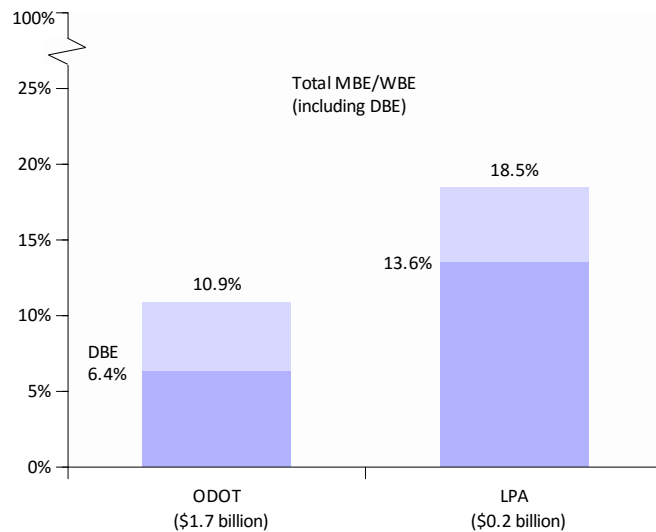
As shown in Figure 8-3, MBE/WBE and DBE participation was considerably higher on LPA contracts than ODOT contracts. All of the LPA contracts had FHWA funding and often had DBE contract goals applied. MBE/WBE utilization for LPA contracts (18.5%) was more than availability (17.3%), with a disparity index of 107.

MBE/WBE utilization on ODOT-awarded contracts (10.9%) was substantially less than availability (19.5%), and the disparity index was 56.

Figure 8-3.
MBE/WBE and DBE share of dollars for ODOT and LPA projects, October 2010–September 2014

Note:
 Dark portion of bar is certified DBE utilization.
 Number of contracts/subcontracts analyzed is 7,417 for ODOT contracts and 610 for LPA contracts.

Source:
 Keen Independent from data on ODOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2010-September 2014.

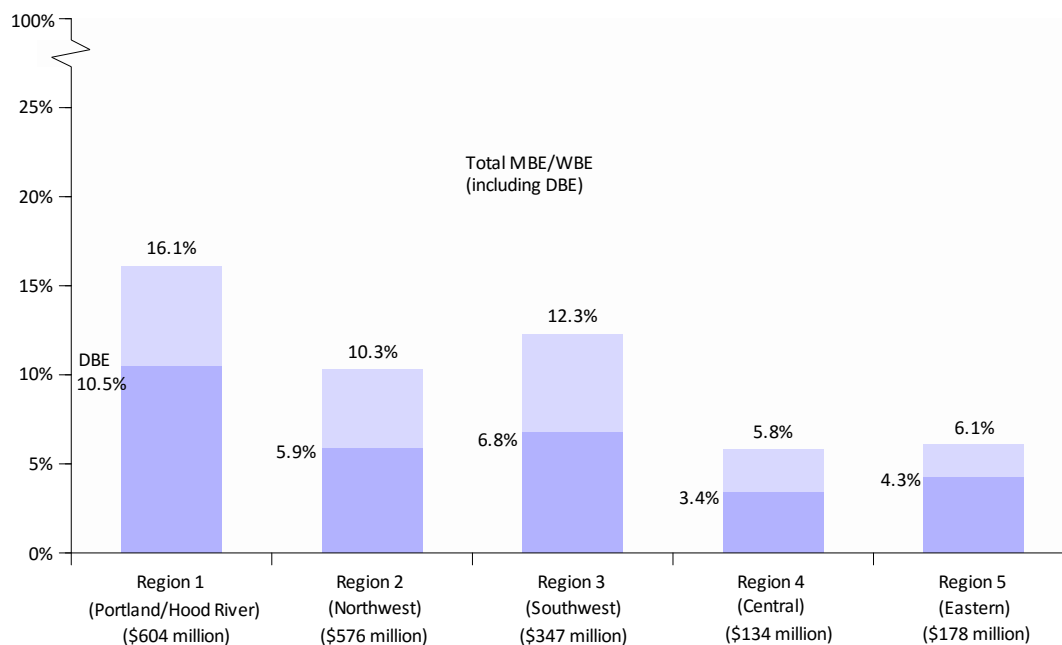


D. ODOT Regions

Keen Independent examined MBE/WBE and DBE utilization in each ODOT region. Projects spanning two regions are counted in each, but statewide contracts are not shown. Figure 8-4 includes FHWA- and state-funded construction and engineering-related contracts from October 1, 2010 through September 30, 2014.

- MBE/WBE utilization participation (16%) and DBE participation (11%) were highest in Region 1, which includes the Portland area.
- MBE/WBE and DBE participation were lowest in Central and Eastern Oregon (Regions 4 and 5). In those regions, about 6 percent of contract dollars went to MBE/WBEs and 3 to 4 percent went to DBEs.
- Regions 2 and 3 showed MBE/WBE participation in the range of 10 to 12 percent and DBE participation was about 6 to 7 percent.

Figure 8-4. MBE/WBE and DBE share of dollars for contracts by ODOT region, October 2010–September 2014



Note: Dark portion of bar is certified DBE utilization. Number of contracts/subcontracts analyzed is: Region 1 (2,542), 2 (2,267), 3 (1,333), 4 (692) and 5 (646).

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2010-September 2014.

There was some variation in MBE/WBE availability between regions (Region 1 had higher MBE availability), but because many MBE/WBE and majority-owned companies indicated in the survey that they worked in multiple regions and were counted as available for work in those regions (or statewide), it was usually less than 1 percentage point different from the overall availability figure for ODOT. The mix and sizes of contracts and subcontracts also affected the availability results in each region.

There were disparities between MBE/WBE utilization and availability for each region, even with the application of DBE contract goals for some contracts in each region.

- The disparity index for MBE/WBEs for contracts in Region 1 was 83, a disparity even with the application of DBE goals for some contracts.
- The disparity indices were 57 and 64 for Regions 2 and 3, respectively.
- There were also substantial disparities for MBE/WBEs in Region 4 (index of 28) and Region 5 (index of 31).

E. Prime Contracts and Subcontracts

Keen Independent examined the percentage of subcontract dollars going to MBE/WBEs and DBEs. The study team performed similar analyses for dollars retained by prime contractors. Figure 8-5 presents results of this research.

Subcontracts. Subcontracts accounted for about one-third of the total contract dollars examined in this study. (Results combine ODOT and LPA construction and engineering-related subcontracts.) MBE/WBEs obtained about 22 percent of ODOT subcontract dollars and majority-owned firms received 78 percent of subcontract dollars. DBEs accounted for 13.7 percentage points of the overall utilization of MBE/WBEs in ODOT subcontracts.

Prime contracts. The study team also analyzed dollars going to prime contractors based on amounts retained by prime contractors after subtracting the value of subcontracts. MBE/WBEs received 5.6 percent of prime contract dollars. DBEs accounted for 3.2 percent of total prime contract dollars.

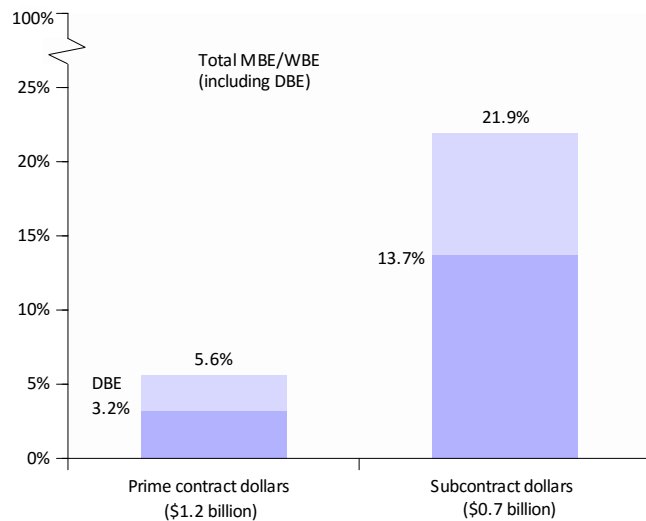
Figure 8-5.
MBE/WBE and DBE share of dollars for
prime contracts and subcontracts,
October 2010–September 2014

Note:

Dark portion of bar is certified DBE utilization.
Number of prime contracts analyzed is 2,219.
Number of subcontracts analyzed is 5,808.

Source:

Keen Independent from data on ODOT and LPA
FHWA- and state-funded prime contracts and
subcontracts, October 2010–September 2014.



The disparity index for MBE/WBEs for subcontracts was 90 (21.9% utilization and 24.3% availability). Utilization on subcontracts with and without DBE contract goals is discussed later in this chapter.

There was a substantial disparity between utilization (5.6%) and availability (16.3%) for MBE/WBEs as prime contractors; the disparity index was 35.

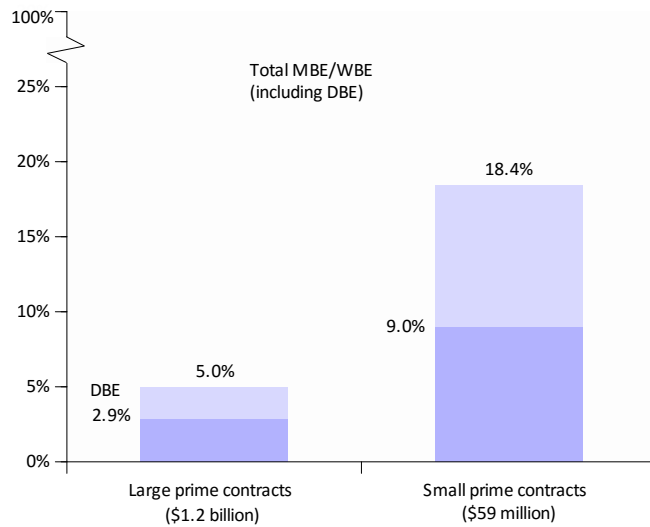
Large and small prime contracts. Keen Independent further analyzed MBE/WBE and DBE participation on prime contracts by examining large and small prime contracts during the study period. (Utilization is based on dollars retained by the prime.) “Large” contracts were those of \$100,000 or more for construction and \$150,000 or more for engineering:

- As shown in Figure 8-6, MBE/WBEs received 5.0 percent of prime contract dollars on large contracts (2.9% for DBEs); and
- On small contracts, 18.4 percent of prime contract dollars went to minority- and women-owned firms (9.0% for DBEs).

Figure 8-6.
MBE/WBE and DBE share of dollars for large and small prime contracts, October 2010–September 2014

Note:
 Dark portion of bar is certified DBE utilization.
 Number of prime contracts analyzed is 989 for large contracts and 1,230 for small contracts.

Source:
 Keen Independent from data on ODOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2010-September 2014.



There were substantial disparities between the MBE/WBE utilization and availability as prime contractors on both large and small prime contracts (disparity indices of 31 for large contracts and 83 for small contracts).

F. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ODOT Construction Contracts

Keen Independent analyzed participation of minority- and women-owned firms as prime contractors on ODOT construction contracts during the October 2010-September 2014 study period.

Utilization of MBE/WBEs and DBEs as prime contractors on ODOT construction contracts.

Minority- and women-owned firms won 256 or 19 percent of the 1,357 FHWA- and state-funded construction prime contracts during the study period.¹ (Based on headcount, 23 percent of firms available for ODOT construction prime contracts are MBE/WBEs).

¹ Of these construction contracts, 1,311 were awarded by ODOT.

Because MBE/WBEs won smaller contracts, on average, MBE/WBEs only received 5.9 percent of construction prime contract dollars, or \$61 million out of \$1.03 billion of the dollars retained by prime contractors (i.e., not subcontracted). DBEs won 133 construction prime contracts totaling \$37 million during the study period (3.6% of the total dollars). Figure 8-7, below, shows these results.

Utilization of MBE/WBEs and DBEs as prime contractors on large and small construction contracts. Keen Independent examined number and dollars of construction prime contracts going to MBE/WBEs and DBEs for large contracts (\$100,000 or more) and small contracts (less than \$100,000).

Large contracts. Of the 706 large construction contracts, MBE/WBEs won 66 contracts, or 9 percent of the total. MBE/WBEs accounted for 5.3 percent of prime contractor dollars. The disparity index for MBE/WBEs was 34 for large construction prime contracts, indicating a substantial disparity.

Most of the MBE/WBE utilization was a small number of Hispanic American-owned construction firms (more than three-quarters of MBE/WBE utilization on large prime contracts).

DBEs were awarded 33 of these large prime contracts (3.3% of dollars).

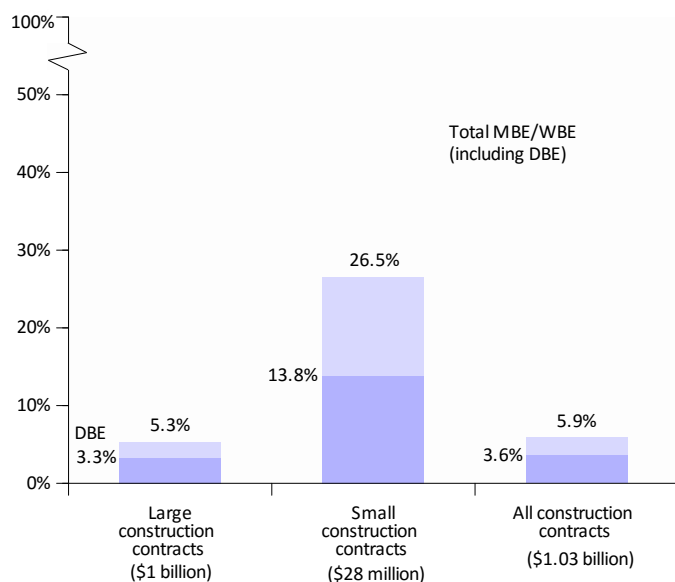
Small contracts. MBE/WBE prime contractors were awarded 190, or one-quarter, of the 651 construction contracts less than \$100,000. MBE/WBE received 26.5 percent of contract dollars. The higher utilization of MBE/WBEs on smaller ODOT contracts might be in part due to ODOT’s Small Contracting Program (discussed later in this chapter). Of the 651 small contracts, 100 (or 15%) were awarded to DBEs. About 13.8 percent of small construction prime contract dollars went to DBEs.

MBE/WBE utilization as prime contractors was higher than the 24.2 percent that might be expected based on the availability analysis for these prime contracts (disparity index of 110).

Figure 8-7.
MBE/WBE and DBE share of dollars of construction prime contracts, October 2010–September 2014

Note:
 Number of prime contracts analyzed is 706 for large contracts and 651 for small contracts. Number of prime contracts analyzed for all contracts is 1,357.

Source:
 Source: Keen Independent Research from ODOT contract records.



Small Contracting Program (SCP). Keen Independent identified 139 ODOT construction contracts during the study period for which the Small Contracting Program applied. ODOT designed these contracts to be open to small firms, many of which are minority- and women-owned. Fifty-one of these under \$100,000 contracts went to MBE/WBEs, accounting for 40.0 percent of SCP prime contract dollars for construction. This utilization exceeded what was expected based on availability (24.6%). By comparison, 29 percent of construction contracts less than \$100,000 went to MBE/WBEs when the SCP was not used as the contracting method.

DBEs were awarded 21.4 percent of the contract dollars under SCP for construction.

Emerging Small Business (ESB) Program. Keen Independent identified 117 ODOT construction contracts during the study period for which the Emerging Small Business Program applied. These projects are set aside for exclusive bidding by certified ESB firms. Thirty-four of the ESB construction contracts went to MBE/WBEs. MBE/WBEs received 24.7 of those contract dollars. This utilization was in line with what was expected based on availability (24.4%). The disparity index was 101.

ODOT bid process for construction contracts. ODOT generally awards construction contracts to low bidders (that are deemed responsive and responsible). It is possible that some aspects of the bidding process present barriers to small business participation as prime contractors, including for MBE/WBEs. (However, under the Small Contracting Program for construction contracts, ODOT can select a group of registered firms to bid on certain construction contracts of less than \$100,000.)

Keen Independent examined ODOT requirements for bidding on its construction contracts, processes for notifying potential bidders of construction contract opportunities, and methods for selecting a prime contractor to perform the work in order to explore this possibility.

State code. Oregon Revised Statute Chapter 279A, 279B and 279C governs public contracting, public improvements and related contracts. ODOT follows these requirements and other state law pertaining to public works contracts in its contracting practices.

Bonding. Bid, payment and performance bonds are required under Oregon state law for public improvement contracts in excess of \$100,000 or in excess of \$50,000 in the case of contracts for highways, bridges and other transportation projects. Bid bonds may not exceed 10 percent of the proposed bid. (ODOT can waive bid bonds on small contracts.) In-depth interviews with business owners and managers and the results of the availability interviews with Oregon businesses identified bonding as a barrier for minority- and women-owned firms (see Chapter 5 and Appendix J).

Advertisement of invitations to bid. Public bidding of ODOT construction contracts is generally required by Oregon state law. Public bidding is advertised in at least one newspaper of general circulation. If the public improvement contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation. ODOT also advertises construction contract bid opportunities on its website, and provides a schedule of coming contracts up for bid. Private bid services also provide information on ODOT contracts that are available to bid.

It does not appear difficult to learn of ODOT contract opportunities if potential bidders are familiar with ODOT's process for communicating those opportunities. However, when surveyed, MBE/WBEs were more likely than majority-owned firms to report difficulties learning about ODOT bid opportunities (and local agency bid opportunities).

Bid process. Firms seeking to bid on ODOT construction prime contracts follow the process below:

- It must be prequalified for ODOT work and for a project of the appropriate size;
- The firm must request project and bidding materials from ODOT; and
- The firm must submit a bid, either physically or through ODOT's electronic bidding system.

Prequalification requirement for construction prime contractors. Any firm wishing to bid as a prime contractor on an ODOT construction project must first be prequalified. To become prequalified, a firm must submit a prequalification application, which is assessed by ODOT Highway/Bridge Construction Contracts Procurement Specialists.

The prequalification application requires:

- General information about the firm;
- Articles of incorporation (if applicable);
- Licenses and registrations;
- Three references for each work class;
- A statement of experience containing details of completed projects;
- Other information about the company; and
- A filing fee of \$100.

ODOT no longer requires contractors to provide financial records with the prequalification applications. However, since bonding is required, company financials will be examined by the bonding company.

Applications for prequalification must be submitted at least 10 calendar days prior to the bid opening date of a project a contractor wishes to bid to allow time for their prequalification application to be reviewed and either approved or denied. There is no scoring involved in the contracting prequalification process.

Notice of approval is made within 30 days of application submittal. Once approved, prequalification is valid for one year from the first day of the month following approval of the prequalification application.

Special prequalification for construction prime contractors. When elements of a project involve specialized knowledge or expertise, Contractor Special Prequalification may be required. Unlike the above contractor prequalification process, Contractor Special Prequalification is evaluated and scored on items such as time and technical approach.

Contractor Special Prequalification qualifies only the prime contractor and the team submitted (subcontractors and individuals who were used to meet the Contractor Special Prequalification Requirements). If awarded the contract, the team submitted during the special prequalification is required to perform the work on the proposed project.

Plans and specifications. Potential bidders can download plans and specifications for free through the eBIDS online system.

Electronic bidding. ODOT uses the Bid Express electronic bidding system for receiving construction bids.

Notice of first-tier subcontractors. ODOT requires a First-Tier Subcontractor Disclosure Form within two hours of bid closing for contracts of more than \$100,000. ODOT posts completed Disclosure Forms along with preliminary bid results and DBE form submittals on its website.

Analysis of bids on ODOT construction contracts. Keen Independent analyzed bid information for a random sample of 100 ODOT construction contracts from October 2010 through September 2014 (see Appendix C for a description of this methodology). In total, 616 bids were submitted for these 100 contracts. MBE/WBEs submitted 48 of the 616 bids:

- A total of 35 bids on these prime contracts (5.7% of all bids) came from minority-owned firms (seven unique firms); and
- 13 bids (2% of all bids) came from WBEs (eight different firms).

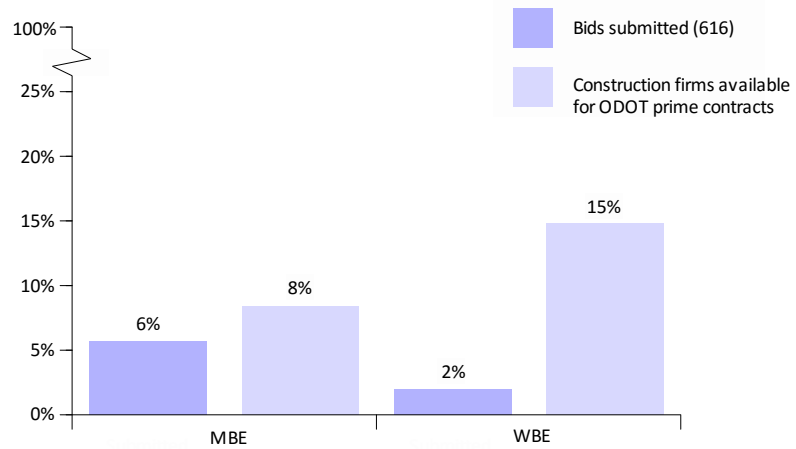
The proportion of bids from MBEs was lower than what might be expected given the relative number of firms available for ODOT prime construction contracts in the availability analysis that were MBEs (8.4%). The relative number of bids from WBEs was very low compared to the proportion of available firms that were WBEs (14.8%).²

² Note that this is based on a count of firms identified in the availability analysis that were available for ODOT construction prime contracts; it is not dollar-weighted.

Figure 8-8 presents MBE and WBE share of bids submitted (darker bars) and the proportion of firms available for ODOT prime contracts that are MBEs and WBEs (lighter bars).

Figure 8-8.
MBE/WBE bids as a share of total bids submitted on ODOT construction contracts

Note: Based on analysis of 616 bids on 100 contracts randomly sampled with the October 2010 - September 2014 study period.



Source: Keen Independent Research from ODOT contract records.

Keen Independent examined whether the bids submitted by MBEs and WBEs on ODOT construction contracts were equally likely to be a winning bid as a bid from a majority-owned firm. To do so, Keen Independent calculated an “expected value” of MBE and WBE contract awards if bids submitted by MBE/WBEs were equally as likely as bids from majority-owned firms to be successful. (In other words, an MBE submitting one bid out of 10 on a contract had odds of 10 percent to win that contract.)

Based on this analysis:

- The four contracts that MBEs won out of the 100 exactly matched the number of awards that would be expected given the number of bids from MBEs on individual contracts. (Although MBEs submitted 6 percent of the total bids, those bids tended to be on contracts that generated a larger number of bids, reducing the odds of winning a contract.)
- WBEs won three contracts, which was more than what might be expected (2 awards) based on the number of bids WBEs submitted on those contracts.

The analysis does not indicate that MBE or WBE bids were treated differently by ODOT or that they were less likely than bids from majority-owned firms to result in contract awards.

G. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ODOT Engineering-related Prime Contracts

Keen Independent also explored participation of minority- and women-owned firms as prime consultants in the 862 engineering-related contracts or task orders during the study period.

Utilization of MBE/WBEs and DBEs as prime consultants on ODOT engineering-related contracts. Minority- and women-owned firms were awarded 134 of the engineering-related prime contracts or price agreements during the study period, or about 16 percent of the total number of contracts.³ MBE/WBEs comprised about 24 percent of firms available for ODOT engineering-related work as prime consultants.

About \$8 million in prime contract dollars (after deducting subcontracts) went to MBE/WBEs, which was 4.3 percent of total prime contract dollars for engineering-related contracts. The availability analysis for engineering-related prime contracts indicated that MBE/WBEs might be expected to receive 17.6 percent of those contract dollars. The disparity index was 25.

DBEs were awarded 88 engineering-related contracts (10% of the total) for 0.9 percent of the work. Figure 8-10 presents the utilization of MBE/WBEs and DBEs as prime consultants on engineering-related contracts.

Utilization of MBE/WBEs and DBEs as prime consultants on large and small engineering-related contracts. Keen Independent examined number and dollars of engineering-related prime contracts and task orders going to MBE/WBEs and DBEs for large contracts (\$150,000 or more) and small contracts (less than \$150,000).

Large contracts. Keen Independent identified 283 large engineering-related contracts and task orders; MBE/WBEs won 10 of them (4% of the total). MBE/WBEs accounted for 2.9 percent of prime contractor dollars. The disparity index for MBE/WBEs was 17 for large engineering-related prime contracts, a substantial disparity. (A Native American-owned engineering firm accounted for nearly all of this utilization.)

DBEs obtained 0.1 percent of the prime contract dollars for engineering-related contracts.

Small contracts. MBE/WBEs received 124 small engineering-related contracts and task orders, almost one-quarter of the 579 ODOT engineering-related prime contracts and task orders of less than \$150,000. MBE/WBE received 11.3 percent of prime contract dollars. ODOT has a Small Contracting Program for architecture, engineering, land surveying and related services contracts under \$150,000.

The 11.3 percent MBE/WBE utilization as prime consultants was less than the 21 percent availability for those small contracts (disparity index of 55).

DBEs were awarded 87 of those small engineering-related prime contracts and task orders.

³ Only awards with some payments associated with them were examined in this utilization analysis.

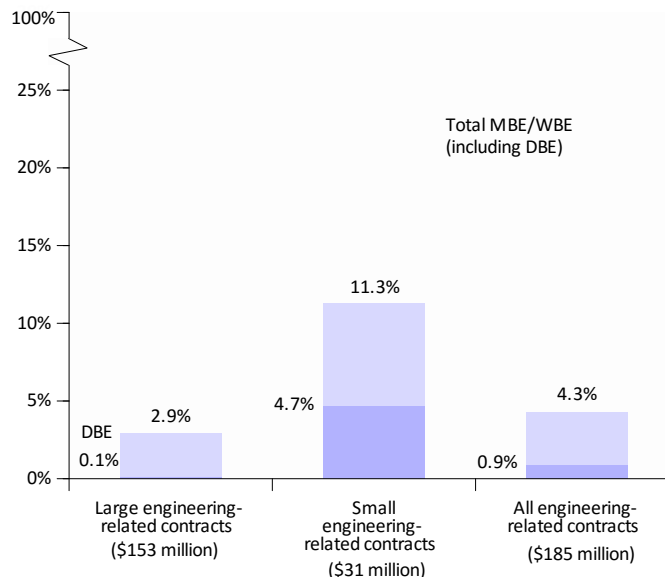
Figure 8-9.
MBE/WBE and DBE
participation as prime
consultants in engineering-
related contracts, October
2010–September 2014

Note:

Number of prime contracts
analyzed is 283 for large contracts
and 579 for small contracts.
Number of prime contracts
analyzed for all contracts is 862.

Source:

Source: Keen Independent
Research from ODOT contract
records.



Small Contracting Program for A&E and other services. The study team identified 32 engineering-related contracts in the study period for which the Small Contracting Program applied. Six contracts went to MBE/WBEs for 17.4 percent of the prime contract dollars (five of these firms were DBEs). MBE/WBE utilization was less than availability (20.6%) when the SCP program applied. The disparity index was 84.

Emerging Small Business Program. The volume of ESB Program engineering contracts was not enough to examine as part of the utilization or disparity analysis.

ODOT contract award process for engineering-related contracts. ODOT often uses a two-tiered selection and assignment process to award A&E-related contracts. Firms competing for these types of ODOT A&E-related contracts must first be awarded a price agreement. To be selected for a price agreement, firms must respond to a request for proposal (RFP) issued by ODOT for A&E type services. ODOT uses the same advertising process for consultant selection as it does for contractor selection. Prequalification is not required to propose on ODOT A&E type service price agreements.

Advertisement of invitations to bid. Public bidding of ODOT A&E-related service price agreements is generally required by Oregon state law. Public bidding is advertised in at least one newspaper of general circulation. ODOT uses the Oregon Procurement Information Network (ORPIN) to distribute notices of A&E opportunities to companies that have signed up with ORPIN to receive notices for that type of work.

It does not appear difficult to learn of ODOT A&E-related opportunities if potential bidders are familiar with ODOT’s process for communicating those opportunities. However, when surveyed, MBE/WBEs were much more likely than majority-owned firms to report difficulties learning about ODOT bid opportunities (and local agency bid opportunities).

Price Agreement bid and selection process. ODOT typically begins the consultant selection process for a specific engineering-related price agreement by requesting that consultants submit proposals in response to an RFP for a specific type of A&E-related service.

Submitted proposals are evaluated by a panel within ODOT consisting of at least three people. Each member of the panel conducts an independent evaluation of each firm and gives each proposal a score based upon their evaluation. Evaluation criteria and total number of points available vary depending on the type of work, but the ODOT panel typically evaluates consultants based on the following criteria:

- **Project approach and management.** One of the evaluation factors is how successfully, clearly and precisely the consultant expressed an understanding of the nature and scope of work and the major tasks and issues, as well as how well they identified any problems they are likely to encounter.
- **Project team and qualifications.** Evaluators consider the experience and qualifications of the proposed consultant team in light of the scope of the project, work classes involved and ODOT policies.
- **Firm capability.** ODOT reviews the ability of the firm to do the work, including specialized qualifications and the capacity of the consultant team to accomplish the work given current staff workloads.

Depending on the project, ODOT may deem it necessary to interview the selected firm. In this case, ODOT may choose to interview all proposers, or only the highest-ranked proposer.

Proposers are required to provide references as part of the evaluation criteria. For some ODOT projects, the selected firm's references may be asked questions regarding responsiveness, ability to meet schedule, ability to meet budget, adequate resource allocation and overall experience with the proposer.

When all proposals have been independently scored by all panel members, the panel meets to discuss the scoring. It is not necessary that members concur on any given point. Scores cannot be changed unless an Evaluation Committee member failed to consider critical information in a proposal. Scores are then compiled and firms are ranked based on the highest to lowest average score. One or multiple firms may be selected to earn a Price Agreement for the related A&E type services.

Procedures are in place if consultants wish to protest an award. All firms that submitted a proposal are entitled to review the scores and proposals of the firm(s) selected for the contract.

Being selected for an ODOT price agreement for engineering-related contracts does not always mean that a firm will receive ODOT work. Once they are selected to receive a price agreement for specific area classes, firms must learn of and earn a Work Order Contract (WOC) in one of two ways:

- Mini RFP; or
- Direct appointment/contract.

Mini RFPs. An ODOT Project Manager can choose to select a consultant through a mini RFP process for A&E services needed for outsourced ODOT design projects. Mini RFPs are emailed to firms with applicable Price Agreements. Very similar to the price agreement RFP process, submitted proposals are evaluated by a panel within ODOT consisting of at least three people, including the project manager. Each member of the panel conducts an independent evaluation of each firm and gives each proposal a score based upon their evaluation. Evaluation criteria and total number of points available change from project to project, but the ODOT panel typically evaluates consultants based on criteria similar to that of the original price agreement RFP.

When all proposals have been independently scored by all panel members, the panel meets to discuss the scoring. It is not necessary that members concur on any given point. Scores cannot be changed unless an Evaluation Committee member failed to consider critical information in a proposal. Scores are then compiled and firms are ranked based on the highest to lowest average score. Once the highest-ranking responsive, responsible proposal has been determined, a notice of intent to award the contract is announced, and a notice of standing is provided to all proposers.

After the consultant is selected, the Project Manager negotiates the Statement of Work (SOW), schedule and costs with assistance from the regional technical staff and the ODOT Procurement Office (OPO).

Direct appointments. Direct appointments for WOC assignments are a second option for the selection of firms to provide A&E services. Direct appointments are only permitted for specific assignments that meet applicable statutes and rules including:

- WOCs that do not exceed \$100,000;
- Continuation of a project; or
- Projects that have been delayed or delayed and materially altered.

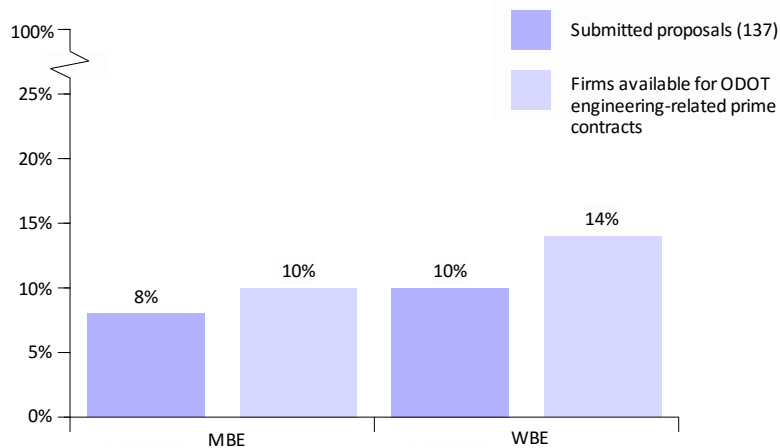
When firms are selected for direct appointments, the ODOT project manager negotiates the Statement of Work (SOW), schedule and costs with assistance from the regional technical staff and the ODOT Procurement Office (OPO).

Analysis of proposals on ODOT engineering contracts. Keen Independent analyzed the relative number of bids submitted by MBEs and WBEs for a random sample of 50 engineering-related contracts during the study period. Of the 137 bids submitted, 11 (8%) were submitted by MBEs and 14 (10%) were submitted by WBEs.

Based on the availability analysis, 10 percent of companies available for ODOT engineering contracts were MBEs and 14 percent were WBEs. The relative number of proposals from MBEs and WBEs was somewhat lower than what might be expected from their relative availability for this work (8% compared with 10%, and 10% compared with 14%). Figure 8-10 displays these results.

Figure 8-10.
MBE/WBE proposals
as a share of total
proposals submitted
on a sample of ODOT
engineering-related
contracts

Note: Based on analysis
of 137 bids on 50
contracts randomly
sampled within the
October 2010 -
September 2014 study
period.



Source: Keen
Independent Research
from ODOT contract
records.

Keen Independent examined whether the proposals submitted by MBEs and WBEs on ODOT engineering-related contracts were equally likely to be a winning proposal as one from a majority-owned firm. As with construction bids discussed previously in this chapter, Keen Independent calculated an “expected value” of MBE and WBE contract awards given the number of proposals submitted for each contract. (In other words, an MBE submitting one proposal out of 10 on a contract had odds of 10 percent to win that contract.) Based on this analysis:

- The three contracts that MBEs won exactly matched the number of awards that would be expected given the number of bids from MBEs on individual contracts. (Although MBEs submitted 8 percent of the total proposals, those proposals tended to be on contracts that generated a large number of proposals, reducing the odds of winning a contract.)
- WBEs won four contracts, which was what might be expected given the number of bids WBEs submitted on those contracts.

The analysis of contract awards from these 50 engineering-related contracts indicates that proposals from MBE or WBEs were as likely to result in contract awards as proposals submitted from majority-owned firms.

H. ODOT Operation of the Federal DBE Program, including Overconcentration Analysis

This part of Chapter 8 examines:

- ODOT’s operation of the DBE contract goals program;
- Any overconcentration of DBEs;
- Participation of individual DBEs in ODOT contracts; and
- DBE participation as prime contractors.

DBE contract goals program. The Federal DBE Program provides for recipients of FHWA funds to set an overall goal for DBE participation and use DBE contract goals to meet any portion of their overall goal they do not project being able to meet using race-neutral means.⁴ However, federal regulations direct those operating the program to reduce or eliminate the use of contract goals to ensure that they do not result in exceeding the overall goal.⁵

Because of the *Western States Paving* court decision in 2005 and subsequent guidance from USDOT, ODOT did not set DBE contract goals from January 2006 through fall 2008 (see Chapter 2 for further explanation). Since that time, ODOT has set DBE contract goals for some of its FHWA-funded construction and engineering-related contracts. Only certain DBE groups have been eligible to meet those contract goals.

ODOT sets DBE contract goals on a contract-by-contract basis. Bidders or proposers comply with a DBE contract goal by making good faith efforts to meet it. A bidder or proposer can demonstrate this in one of two ways:

- By showing it has obtained enough DBE participation to meet the contract goal; or
- Documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in doing so.⁶

ODOT has a process for considering good faith efforts submissions from any bidder or proposer that is unable to meet the DBE contract goal. In recent years, bidders on construction contracts almost always met the DBE contract goal; they rarely attempted to comply by showing good faith efforts to meet a goal that they were unable to meet.

Utilization of DBEs with and without DBE contract goals. Keen Independent identified \$77 million in contract dollars going to DBEs on the 372 FHWA-funded contracts for which DBE contract goals were applied. This was comprised of 369 subcontracts to DBEs totaling \$68 million and three prime contracts to DBEs for \$9 million. There was a total of \$774 million in FHWA-funded contracts for which DBE contract goals applied.

- Overall participation of DBEs was 10.0 percent on contracts with DBE contract goals, as shown in the bottom portion of Figure 8-11. DBE participation on contracts without goals was 5.1 percent.
- DBE participation on contracts with goals was mostly distributed across African American- and white women-owned firms, as shown in Figure 8-11.
- There was very little participation of DBEs owned by African Americans, Asian-Pacific Americans, Subcontinent Asian Americans and Native Americans on ODOT contracts without DBE contract goals.

⁴ 49 CFR Section 26.51(d).

⁵ 49 CFR Section 26.51(f)(2). And, if an agency exceeds its overall goal in two consecutive years through the use of contract goals, it must reduce its use of contract goals proportionately in the following year (see 49 CFR Section 26.51(f)(4)).

⁶ 49 CFR Section 26.53(a).

Figure 8-11.
 MBE/WBE and DBE utilization for ODOT contracts with and without DBE contract goals,
 October 2010–September 2014

	FHWA-funded contracts with DBE goals			FHWA- and state-funded contracts w/o DBE goals		
	Number of prime and subcontracts	\$1,000s	Percent of dollars	Number of prime and subcontracts	\$1,000s	Percent of dollars
MBE/WBEs						
African American-owned	134	\$ 31,098	4.0 %	31	\$ 920	0.1 %
Asian-Pacific American-owned	57	8,750	1.1	47	2,644	0.2
Subcontinent Asian American-owned	29	9,447	1.2	76	1,874	0.2
Hispanic American-owned	47	12,064	1.6	111	33,673	2.9
Native American-owned	56	11,997	1.6	129	13,579	1.2
WBE (white women-owned)	321	45,141	5.8	976	53,347	4.6
Total MBE/WBE	644	\$ 118,497	15.3 %	1,370	\$ 106,039	9.2 %
Majority-owned	1,336	655,303	84.7	4,677	1,046,438	90.8
Total	1,980	\$ 773,800	100.0 %	6,047	\$ 1,152,477	100.0 %
DBEs						
African American-owned	67	\$ 20,535	2.7 %	18	\$ 623	0.1 %
Asian-Pacific American-owned	34	2,622	0.3	30	1,074	0.1
Subcontinent Asian American-owned	29	9,447	1.2	72	1,425	0.1
Hispanic American-owned	34	10,444	1.3	73	20,362	1.8
Native American-owned	20	8,252	1.1	62	3,577	0.3
WBE (white women-owned)	188	25,902	3.3	635	31,719	2.8
White male-owned DBE	0	0	0.0	1	39	0.0
Total DBE	372	\$ 77,203	10.0 %	891	\$ 58,820	5.1 %
Non-DBE	1,608	696,597	90.0	5,156	1,093,657	94.9
Total	1,980	\$ 773,800	100.0 %	6,047	\$ 1,152,477	100.0 %

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

Source: Keen Independent from data on ODOT and LPA Program contracts October 2010–September 2014.

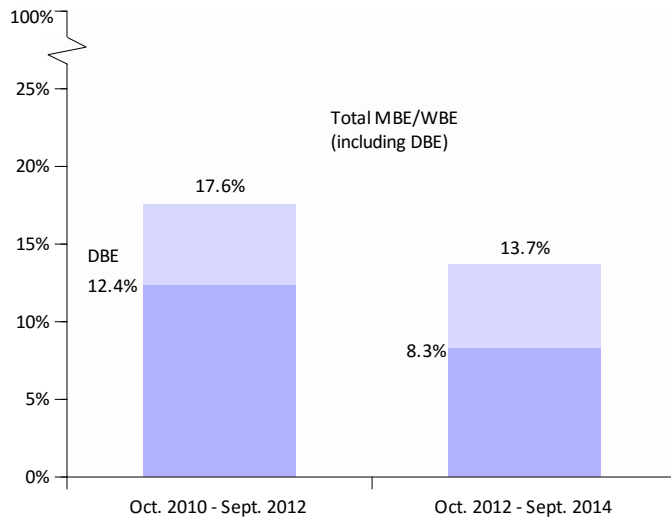
DBEs received 17 percent of the subcontract dollars on contracts with DBE contract goals (not shown). By comparison, DBEs received 9 percent of the subcontract dollars on FHWA- and state-funded contracts without DBE contract goals. Total MBE/WBE participation was 26.2 percent of subcontract dollars when DBE goals were applied (disparity index of 110) and 16.4 percent without goals (disparity index of 66).

Figure 8-12 examines trends over time in MBE/WBE and DBE utilization on contracts that had DBE contract goals. In the last two years of the study period, DBE participation on contracts with goals was lower than the first two years of the study period. Subcontinent Asian American-owned DBEs were the only group for which participation increased over these two time periods.

Figure 8-12.
MBE/WBE and DBE
share of total
contract dollars on
contracts with DBE
goals FFY 2011–
FFY 2012 and
FFY 2013–
FFY 2014

Note: Number of prime contracts/subcontracts analyzed is 945 for FFY 2011-FFY 2012, and 1,035 for FFY 2013-FFY 2014.

Source: Keen Independent Research from ODOT contract records.



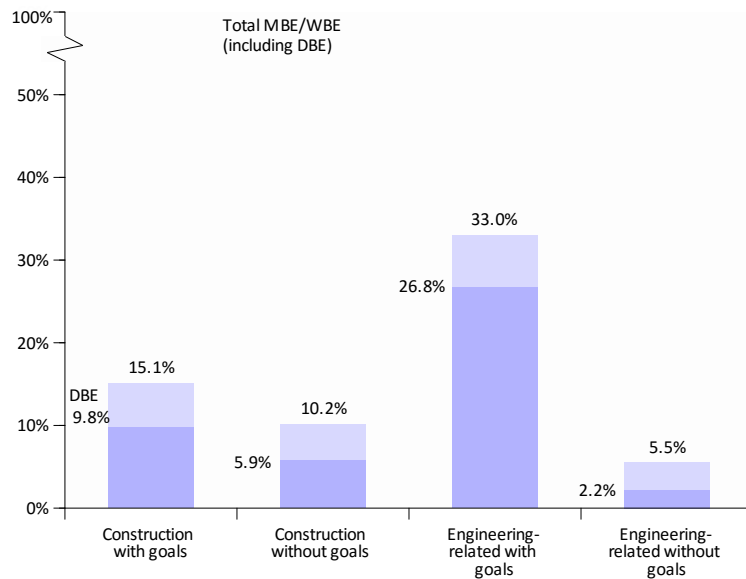
On contracts without DBE goals (not shown), MBE/WBE and DBE participation decreased between the two time periods as well.

Effect of DBE contract goals for construction and engineering-related contracts. DBE contract goals had a positive effect on MBE/WBE and DBE participation for both construction and engineering-related contracts, as shown in Figure 8-13.

- DBE participation was about twice as high on construction contracts with DBE contract goals (9.8%) as construction contracts without goals (5.9%). MBE/WBE participation was also higher (15.1%). The disparity index for MBE/WBEs on construction contracts was 85 on contracts with DBE goals and 50 on contracts without goals.
- For engineering-related contracts, DBE participation was 26.8 percent on contracts with goals and only 2.2 percent for contracts without goals. MBE/WBE utilization was also higher on contracts with goals (33.0%). The disparity index for MBE/WBEs on these contracts was 148 with contract goals and 29 without contract goals.

Figure 8-13.
MBE/WBE and DBE
share of total contract
dollars on construction
and on engineering-
related contracts with
and without contract
goals

Note: Number of prime contracts/subcontracts analyzed is 1,798 for construction with goals, 4,079 for construction without goals, 182 for engineering-related with goals and 1,968 for engineering-related without goals.



Source: Keen Independent Research from ODOT contract records.

Analysis of any overconcentration of DBEs. The Federal DBE Program requires agencies implementing the program to take certain steps if they determine that “DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work” (see 49 CFR Section 26.33(a)).

Keen Independent examined the representation of DBEs and work going to DBEs in three ways:

- Share of ODOT contract dollars within a type of work going to DBEs;
- Distribution of DBE dollars by work type; and
- Representation of DBEs among all firms available for specific types of contracts and subcontracts.

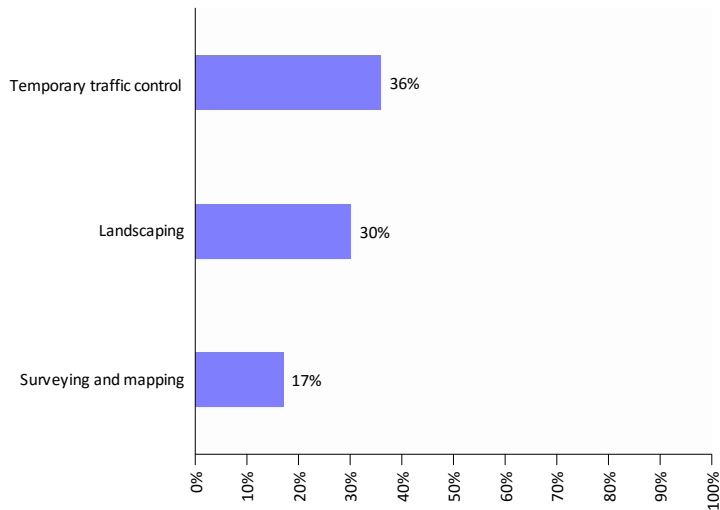
Share of ODOT contract dollars within a type of work going to DBEs. For each specific type of work examined in the study, the study team calculated the share of dollars going to DBE firms. Figure 8-14 shows that DBEs accounted for 30 percent or more of the total work in two types of work: traffic control and landscaping.

Not shown in Figure 8-14 is DBE share of petroleum supply dollars and trucking dollars. ODOT does not have equivalent information for non-DBEs for these two disciplines, as they are not usually procured through subcontracted agreements.

Figure 8-14.
DBE share of total contract dollars on FHWA- and state-funded contracts, October 2010–September 2014

Note: Number of prime contracts/subcontracts analyzed is 8,027.

Source: Keen Independent Research from ODOT contract records.



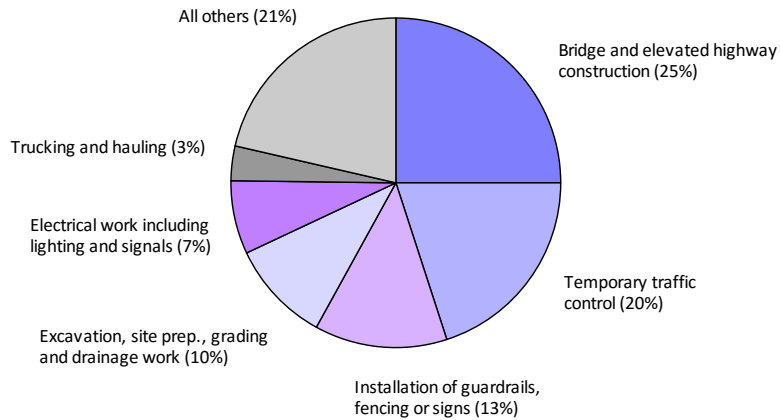
Distribution of DBE contract dollars across types of work. Another way to examine potential overconcentration of DBEs is whether DBE participation is only found in certain types of work. That might be another indicator that DBE contract goals overly burden non-DBEs in those subindustries.

In the study period, work classified as bridge and elevated highway construction accounted for 25 percent of DBE participation, temporary traffic control was 20 percent of DBE dollars, installation of guardrails, fencing or signs made up 13 percent and excavation, site prep., grading and drainage work made up 10 percent. Thirteen other types of work individually represented between 1 and 10 percent of DBE dollars. These results indicate broad participation of DBEs across types of work. This minimizes the possibility that any particular type of non-DBE is unduly burdened by the DBE contract goals program. Figure 8-15 presents these results.

Figure 8-15.
DBE share of total contract dollars on FHWA- and state-funded contracts, October 2010–September 2014

Note: Number of prime contracts/subcontracts analyzed is 8,027.

Source: Keen Independent Research from ODOT contract records.



Representation of DBEs among firms available for particular types of contracts or subcontracts. Finally, Keen Independent analyzed whether DBEs accounted for a dominant share of firms available for particular types of work.

Keen Independent first examined DBEs and non-DBEs in the availability data based on the subindustry they indicated as their primary line of work. There was no worktype where DBEs accounted for a dominant share of firms available for that type of work. DBEs represented the highest share of companies in temporary traffic control (of the firms for which this was their primary line of work, 29 percent were DBEs).

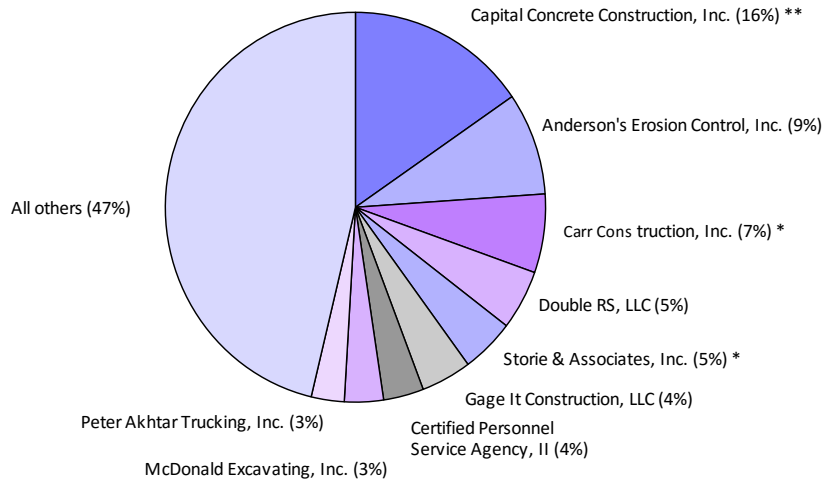
The study team also performed this analysis based on all the types of highway-related work that companies indicated they perform. Examining the data in that way, DBEs represented a smaller share of firms performing traffic control and other types of work.

Participation of individual DBEs in ODOT FHWA-funded contracts. Nine DBEs accounted for about one-half of the total FHWA-funded contract dollars going to DBEs during the study period. Two of these eight firms were no longer DBE-certified at the time of this study. Capital Concrete Construction, which received the most ODOT contract dollars during the study period, appears to no longer be in business.

Figure 8-16.
DBEs accounting for the most dollars of FHWA-funded contracts, October 2010–September 2014

Note: Number of prime contracts/subcontracts analyzed is 6,248.

Source: Keen Independent Research from ODOT contract records.



*No longer DBE certified starting in 2014
 **Disconnected phone and surrendered contractor's license at time of the study

DBE participation as prime contractors. DBEs were awarded 24 of the 991 FHWA-funded prime contracts from October 2010 through September 2014. About 2.9 percent of prime contract dollars went to DBEs.

I. Summary from Further Exploration of MBE/WBE and DBE Utilization

The analyses presented in Chapter 8 provide insights into the overall disparities in the utilization of MBE/WBEs discussed in Chapter 7, and about programs to address those disparities, including ODOT's use of the DBE contract goals program and the impact of the Small Contracting Program.

Overall pattern of disparities for MBE/WBEs. There was a broad pattern of disparities for MBE/WBEs across different subsets of ODOT contracts. For example, disparities were found for both subcontracts (without DBE contract goals) and prime contracts, and for both construction and engineering-related contracts.

MBE/WBE utilization and DBE participation varied considerably by ODOT region within the state. The percentage of Region 1 contract dollars going to MBE/WBEs, which includes the Portland Metropolitan Area, was more than double the share of dollars going to MBE/WBEs in the central and eastern portions of the state. Even so, there was a pattern of disparities in the utilization of MBE/WBEs across regions.

Impact of DBE contract goals. Use of DBE contract goals increased the participation of both DBEs and MBE/WBEs overall. On contracts without DBE contract goals, DBE participation was 5.1 percent (50% on FHWA-funded contracts). DBE participation on contracts with goals was 5 percentage points higher (10.0%). MBE/WBE participation increased by about the same amount when contract goals applied.

However, disparity analysis for contracts with DBE goals indicated that it did not fully eliminate the disparity for MBE/WBEs (disparity index of 86), perhaps because participation in the DBE contract goals program for construction contracts was limited to two DBE groups. (The disparity index for MBE/WBEs for contracts without DBE contract goals was 46.)

DBE contract goals, when used, appeared to be most effective in addressing disparities for engineering-related contracts. More DBE groups were eligible to meet the goal, and the disparity index for these contracts for MBE/WBEs was 148 when DBE contract goals were used. Because ODOT only started setting DBE contract goals for engineering-related contracts in April 2013, relatively few of the engineering-related contracts during the study period had DBE contract goals. DBE participation was 2.9% for engineering-related contracts for the study period, but 26.8 percent on contracts with DBE goals.

Any barriers to MBE/WBE participation as prime contractors. MBE/WBEs received 5.6 percent of prime contract dollars. Of that total, DBEs obtained 3.2 percentage points (2.9% for FHWA-funded contracts).

Case studies of ODOT contracts found some underrepresentation of bids and proposals from MBEs and larger underrepresentation for WBEs. There appear to be factors in the ODOT contracting process, including bonding and perhaps prequalification requirements for construction prime contractors, and evaluation factors for engineering-related contracts, that might work against the success of smaller, newer businesses as prime contractors. However, once a bid or proposal was submitted to ODOT, there was no difference in the likelihood of one from an MBE/WBE being successful compared with those submitted by majority-owned firms.

Because there may be factors in the marketplace that put MBE/WBEs at a disadvantage competing for ODOT prime contracts given the contracting processes in place, the number of bids and proposals ODOT receives from those businesses may be somewhat depressed. Even though ODOT employs processes typical of public agencies, some of which are required by state law, those processes might negatively affect opportunities for MBE/WBEs.

Small Contracting Program. The Small Contracting Program also appears to be an effective means to increase MBE/WBE participation in construction-related contracts. There were too few engineering-related contracts under the Small Contracting Program to assess its effectiveness for these contracts.

Emerging Small Business Program. The ESB program also appears to be an effective means to increase MBE/WBE participation in construction-related contracts.

Any undue burdens on non-DBEs as part of implementation of the Federal DBE Program. There was no other indication of overconcentration of DBE participation based on the analyses performed.

CHAPTER 9.

Overall Annual DBE Goal

As part of its implementation of the Federal DBE Program, ODOT is required to set an overall annual goal for DBE participation in its FHWA-funded transportation contracts. The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program only need to develop and submit overall annual DBE goals every three years. At the time of this study, ODOT had an overall annual goal of 13.10 percent for FHWA-funded contracts. It must submit a new goal in 2016 for federal fiscal years 2017 through 2019 (new goal starting October 1, 2016).

ODOT must prepare and submit a Goal and Methodology document to FHWA that presents its overall annual DBE goal for the next three fiscal years, supported by information about the steps used to develop the overall goal. Chapter 9 provides information that ODOT might consider as part of setting its overall annual DBE goal. Chapter 9 is organized in the following parts, based on the two-step process that 49 CFR Part 26.45 outlines for agencies to set their overall goals:

- A. Establishing a base figure (step 1);
- B. Consideration of a step 2 adjustment; and
- C. Quantification of any step 2 adjustment.

Through these steps, agencies such as ODOT are to determine “the level of DBE participation you would expect absent the effects of discrimination.”¹

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall annual goal for DBE participation in ODOT’s FHWA-funded transportation contracts.

As presented in Chapter 6, current and potential DBEs are available for 15.84 percent of ODOT FHWA-funded transportation contracts based on analysis of October 2010 through September 2014 FHWA-funded contracts.² ODOT might consider 15.84 percent as the base figure for its overall annual DBE goal if it anticipates that the types of FHWA-funded contracts that the agency will award in federal fiscal years 2017 through 2019 are, on balance, reasonably similar to the types of FHWA-funded contracts that the agency awarded during the October 2010 through September 2014 study period.

Chapter 6 explains the availability analysis that developed the base figure.

¹ 49 CFR Section 26.45(b).

² As discussed in Chapter 5, potential DBEs include current DBEs and those MBE/WBEs that are DBE-certified or appear that they could be based on annual revenue limits described in 49 CFR Part 26.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs. The base figure including only current DBEs is 6.00 percent.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, ODOT must consider potential step 2 adjustments to the base figure as part of determining its overall annual DBE goal for FHWA-funded contracts. ODOT is not required to make any step 2 adjustments as long as it considers appropriate factors and explains its decision in its Goal and Methodology document.

The Federal DBE Program outlines factors that an agency must consider when assessing whether to make any step 2 adjustments to its base figure:

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

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to ODOT as it determines whether to make any step 2 adjustments.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

DBE participation based on ODOT Uniform Reports to FHWA. USDOT suggests that agencies should choose the median level of annual DBE participation for relevant years as the measure of past participation: "Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages."⁴

³ 49 CFR Section 26.45.

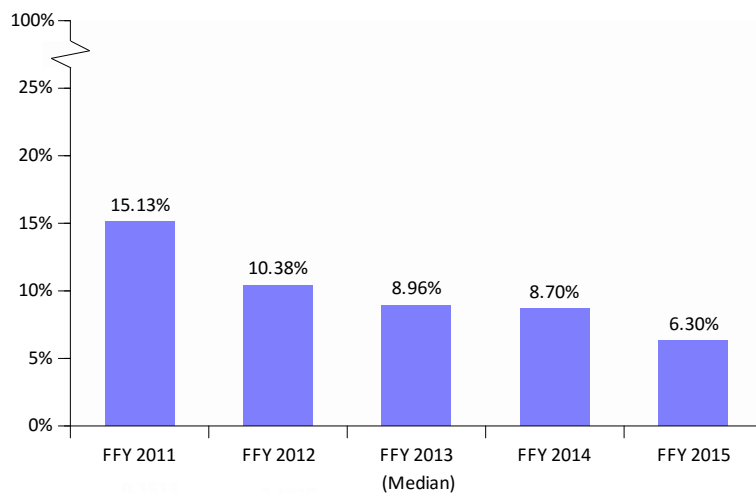
⁴ Section III (A)(5)(c), see Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program. (June 25, 2013) Available at <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

Figure 9-1 presents information about past DBE participation based on commitments/awards data from ODOT Uniform Reports of DBE Awards or Commitments and Payments reported to the FHWA. Participation in FFY 2013 (8.96%) represented the median annual participation based on these data. DBE participation is shown for FFYs 2011, 2012, 2013, 2014 and 2015. This provides one more year of DBE utilization information than included in the disparity study utilization data, which ended with FFY 2014.

ODOT data regarding commitments and awards were more instructive than payments because ODOT did not include non-committed DBEs without Commercially Useful Function (CUF) review in its payments data.

Note that, due to data limitations, ODOT had not included information about FHWA-funded engineering-related contracts in its Uniform Reports submitted to FHWA up until FFY 2015.⁵ Keen Independent’s analysis indicated lower DBE utilization during the study period on engineering-related contracts (3.3%). As such, the results in Figures 9-1 somewhat overstate actual DBE participation on FHWA-funded contracts combining construction and engineering.

Figure 9-1.
ODOT reported past DBE participation on FHWA-funded contracts based on awards, federal fiscal years 2011, 2012, 2013, 2014 and 2015



Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.

The median DBE participation for FHWA-funded contracts indicates that ODOT might make a downward step 2 adjustment based on this factor, as explained later in this chapter.

DBE participation based on Keen Independent utilization analysis for FHWA-funded contracts. Keen Independent’s analysis identified 7.42 percent participation of DBEs on FHWA-funded contracts from October 2010 through September 2014, as shown in Figure 7-4 in Chapter 7. Because Keen Independent was able to include data for engineering-related contracts, this utilization figure might be a more accurate indicator of past DBE participation on all FHWA-funded contracts than ODOT reports.

⁵ FHWA was aware of these data limitations.

2. Information related to employment, self-employment, education, training and unions.

Chapter 5 summarizes information about conditions in the Oregon transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Oregon are presented in Appendices E through H. Keen Independent's analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement in the Oregon construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform ODOT and local agency transportation contracts. There are also barriers to business ownership for those working in these industries.

It may not be possible to quantify all the cumulative effects that barriers may have had in depressing the availability of minority- and women-owned firms in the Oregon transportation contracting industry, however, the effects of barriers in business ownership can be quantified, as explained below.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Oregon construction and engineering industries.

- The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).⁶ Those analyses revealed that Hispanic Americans, Native Americans and white women working in construction were less likely than non-minorities and white men to own construction businesses, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, women working in the Oregon engineering industry were less likely than men to own engineering companies after accounting for various gender-neutral personal characteristics. This disparity was statistically significant. There were disparities for certain minority groups as well, but the results were such that the study team could not quantify the impact on availability.

⁶ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Keen Independent analyzed the impact that barriers in business ownership would have on the base figure if Hispanic Americans, Native Americans and white women owned businesses at the same rate as similarly-situated non-minorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.⁷

Figure 9-2 calculates the impact on overall MBE/WBE availability, resulting in possible upward adjustment of the base figure to 21.31 percent. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction and engineering prime contracts and subcontracts that ODOT and local agencies awarded from October 2010 through September 2014). Calculations are explained below.

Figure 9-2.
Potential step 2 adjustment considering disparities in the rates of business ownership

	a.	b.	c.	d.	e.
Current and potential DBEs	Current availability	Disparity index for business ownership	Availability after initial adjustment*	Availability after scaling to 100%	Components of overall DBEs availability**
Construction					
Hispanic Americans	2.04 %	53	3.85 %	3.58 %	
Native Americans	2.86	61	4.69	4.36	
Other minorities	3.18	n/a	3.18	2.96	
White women	<u>7.71</u>	67	<u>11.51</u>	<u>10.71</u>	
Minorities and women	15.79 %	n/a	23.23 %	21.62 %	19.20 %
All other businesses	<u>84.21</u>	n/a	<u>84.21</u>	<u>78.38</u>	
Total firms	100.00 %	n/a	107.44 %	100.00 %	
Engineering and other subindustries					
Minorities	8.75 %	n/a	8.75 %	8.48 %	
White women	<u>7.53</u>	70	<u>10.76</u>	<u>10.42</u>	
Minorities and women	16.28 %	n/a	19.51 %	18.90 %	2.11 %
White men/majority	<u>83.72</u>	n/a	<u>83.72</u>	<u>81.10</u>	
Total firms	100.00 %	n/a	103.23 %	100.00 %	
Total for current and potential DBEs	15.84 %	n/a	n/a		21.31 %
Difference from base figure					5.47 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of the base figure were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 88.8%, engineering = 11.2%).

Source: Keen Independent based on FHWA-funded contracts for October 2010 through September 2014 and statistical analysis of U.S. Census Bureau American Community Survey data for Oregon for 2008-2012.

⁷ 49 CFR Section 26.45(d)(3).

The study team completed these “but for” analyses separately for construction and engineering contracts and then weighted the results based on the proportion of FHWA-funded contract dollars that ODOT awarded for construction and engineering for October 2010-September 2014 (88.8% weight for construction and 11.2% weight for engineering). The rows and columns of Figure 9-2 present the following information from Keen Independent’s “but for” analyses:

- a. **Current availability.** Column (a) presents the current availability of MBE/WBEs by group for construction and for engineering and other subindustries among firms included in the base figure analysis (i.e., excludes graduated DBEs, firms with revenue too high to be a DBE and firms on BOLI list). Each row presents the percentage availability for MBEs and WBEs. The current combined availability of MBE/WBEs for ODOT FHWA-funded transportation contracts for October 2010-September 2014 is 15.84 percent, as shown in bottom row of column (a).
- b. **Disparity indices for business ownership.** As presented in Appendix F, Hispanic Americans, Native Americans and white women working in the Oregon construction industry were significantly less likely to own construction firms than similarly-situated non-minorities and white men. Keen Independent projected business ownership rates for those groups if they owned businesses at the same rate as non-minorities and white males with similar personal characteristics (i.e., business ownership rate for those firms given a level playing field). The study team then calculated a business ownership disparity index for each group by dividing the actual business ownership rate by the business ownership rate projected given a level playing field, and then multiplying the result by 100.

Column (b) of Figure 9-2 presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in column (b), Hispanic Americans owned construction businesses at 53 percent of the rate that would be expected based on the projection if business ownership rates were in line with white males who had similar personal characteristics. Appendix F explains how the study team calculated the disparity indices.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates for MBEs and WBEs by industry after initially adjusting for statistically significant disparities in business ownership rates. The study team calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100. For example, for Hispanic American-owned firms, current availability (2.04%) was divided by the disparity index of 53, with 3.85 percent as the result after this initial adjustment.
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that were re-scaled so that the sum of the availability estimates equals 100 percent for each industry. The study team re-scaled the adjusted availability estimates by taking each group’s adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under “Total firms” in column (c) — and multiplying by 100. For example, the re-scaled availability estimate for Hispanic Americans shown for construction was calculated in the following way: $(3.85\% \div 107.44\%) \times 100 = 3.58\%$.

- e. **Components of overall DBE goal with upward adjustment.** Column (e) of Figure 9-2 shows the component of the total base figure attributed to the adjusted MBE and WBE availability for construction versus engineering and other subindustries. The study team calculated each component by taking the total availability estimate shown in column (d) for construction and for engineering/other — and multiplying it by the proportion of total FHWA-funded contract dollars in each industry (i.e., 88.8% for construction and 11.2% for engineering). For example, the study team used the 21.62 percent figure shown for MBE/WBE availability for construction firms in column (d) and multiplied it by 88.8 percent for a result of 19.20 percent. A similar weighting of MBE/WBE availability for engineering/other produced a value of 2.11 percent.

The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, which is 21.31 percent as shown in the bottom of column (e).

Finally, Keen Independent calculated the difference between the “but for” MBE/WBE availability (21.31%) and the base figure calculated from current availability (15.84%) to determine the potential upward adjustment. This difference, and potential upward adjustment, is 5.47 percentage points ($21.31\% - 15.84\% = 5.47\%$).

Therefore, based on information related to business ownership, ODOT might consider an upward adjustment to its overall DBE goal of up to 5.47 percentage points. This goal would be 21.31 percent.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Oregon marketplace.
- Any barriers that MBE/WBEs face in obtaining financing and bonding would also place those businesses at a disadvantage in obtaining ODOT and local agency construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 5, Appendix G and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect a relatively large number of minority- and women-owned firms compared with majority-owned firms based on survey results (see Appendix G).

The information about financing, bonding and insurance supports an upward step 2 adjustment in ODOT’s overall annual goal for DBE participation in FHWA-funded contracts, but there is not a clear way to quantify the impact of such barriers on the current availability of MBE/WBEs.

4. Other factors. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step 2 adjustments to their base figure.⁸

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Oregon marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 5 summarizes that evidence and Appendix H presents supporting quantitative analyses.

There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 5. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Oregon transportation contracting industry.

There is not a straightforward way to project the number of MBE/WBEs available for ODOT work but for the effects of these other factors.

C. Quantification of Any Step 2 Adjustment

Quantification of potential downward or upward step 2 adjustments is summarized below.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. Analysis of this factor might indicate a downward step 2 adjustment if ODOT based past DBE participation on Keen Independent’s analysis of FHWA-funded contracts for October 2010 through September 2014. DBEs obtained 7.42 percent of FHWA-funded construction and engineering-related contracts contract dollars during this time period.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 15.84 percent base figure and 7.42 percent DBE participation is 8.42 percentage points. One-half of this difference is a downward adjustment of 4.21 percentage points. The goal would then be calculated as $15.84\% - 4.21\% = 11.63\%$ (see Figure 9-3 on page 9).

2. Information related to employment, self-employment, education, training and unions. The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 5.47 percentage points to reflect the “but-for” analyses of business ownership rates presented in Figure 9-2. If ODOT made this adjustment, the overall DBE goal for FHWA-funded contracts would be 21.31 percent ($15.84\% + 5.47\% = 21.31\%$). Figure 9-3 also shows these calculations.

⁸ 49 CFR Section 26.45.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, as explained, impact of these factors on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Oregon could not be specifically quantified. However, the evidence supports an upward adjustment.

Figure 9-3.

Potential step 2 adjustments for ODOT's overall DBE goal for FHWA-funded contracts, FFY 2017-FFY 2019

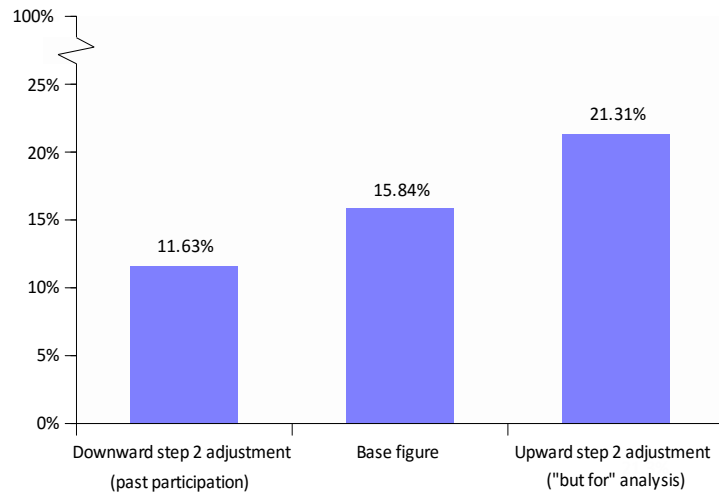
Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	15.84 %	From base figure analysis
Evidence of current capacity	- 7.42	Past DBE participation
Difference	8.42 %	
	÷ 2	Reduce by one-half
Adjustment	4.21 %	Downward adjustment for current capacity
Base figure	15.84 %	From base figure analysis
Adjustment for current capacity	- 4.21	Downward step 2 adjustment
Overall DBE goal	11.63 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	15.84 %	From base figure analysis
Adjustment for "but for" factors	+ 5.47	"But for" step 2 adjustment for business ownership
Overall DBE goal	21.31 %	Upper range of DBE goal

Source: Keen Independent analysis.

Summary. ODOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. Figure 9-4 summarizes the potential adjustments described in this chapter.

Figure 9-4.
Potential step 2 adjustments
to ODOT overall DBE goal for
FHWA-funded contracts,
FFY 2017–FFY 2019

Source: Keen Independent analysis.



CHAPTER 10.

Portion of DBE Goal for FHWA-funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.¹ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to MBE/WBEs or DBEs. Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

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

USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures, including the following:

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

¹ 49 CFR Section 26.51.

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

³ Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Available at <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

- An FHWA template for how it considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through neutral and conscious means. An excerpt from that template is provided in Figure 10-1.

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

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

Chapter 10 is organized around each of those general areas of questions.

Figure 10-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

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

Source:
FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year].

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

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

Minority-owned firms. There is quantitative evidence of disparities for minority-owned firms in ODOT contracts and in the Oregon transportation contracting marketplace, and qualitative evidence of racial discrimination in the Oregon transportation contracting marketplace.

When examining ODOT transportation-related contracts from October 2010 through September 2014, there were substantial disparities between the utilization and availability for:

- African American-owned firms (even though African American-owned DBEs were eligible to participate in ODOT's race-conscious contract goals program);
- Asian-Pacific American-owned firms (even though Asian-Pacific American-owned DBEs were eligible to participate in ODOT's construction contract goals program in the first year of the study period); and
- Native American-owned firms.

There were also substantial disparities for Subcontinent Asian American-owned firms and for Hispanic American-owned firms for certain years of the study period:

- For October 2010 through September 2012, there was a substantial disparity in the utilization of Subcontinent Asian American-owned firms, even though this group was eligible to participate in the DBE contract goals program for construction contracts. (There was also a substantial disparity when examining non-goals contracts for October 2010 through September 2014.)
- From October 2010 through September 2014, Hispanic American-owned firms obtained 2.4 percent of ODOT contract dollars, slightly higher than what might be expected from the availability analysis (2.3%), resulting in a disparity index of 104. Most of this utilization was two firms: Capital Concrete Construction and LaDuke Construction. The availability results for Hispanic American-owned firms are limited by the fact that neither of these firms provided information to be included in the detailed availability analysis. Capital Concrete has voluntarily surrendered its contractor's license, no longer has a working telephone number and does not appear to be available for ODOT work. LaDuke Construction indicated that they were not interested in discussing future work for ODOT when contacted by the study team to participate in an availability interview in 2015. Even though neither firm provided information necessary to be included in the availability analysis for Hispanic American-owned firms, both of these firms are still counted in the utilization results. (Without these two firms, utilization of Hispanic American-owned firms would have been 0.9 percent and availability would still be 2.7 percent.)

In sum, there appears to be evidence of substantial disparities for each MBE group when examining ODOT transportation contracts.

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.⁵ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁶ The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.⁷ The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity- or gender-conscious remedial action.⁸ In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Ninth Circuit Court found that even where evidence of discrimination is present in a recipient’s market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race-conscious program, for each of the minority groups to be included in any race-conscious elements in a recipient’s implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient’s marketplace.⁹

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.

The evidence of disparities and other quantitative and qualitative results in this report should be considered by ODOT in determining whether or not there is the presence of discrimination within the Oregon transportation contracting marketplace, and as to which groups that may be properly included in narrowly tailored race-conscious measures under the Federal DBE Program.

White women-owned firms. There is also quantitative evidence of disparities for white women-owned firms in ODOT contracts and in the Oregon transportation contracting industry, and qualitative evidence of gender discrimination for Oregon transportation contracting marketplace, which ODOT should consider in determining whether gender-based discrimination affects these firms. The disparities in the utilization of white women-owned firms in ODOT contracts were substantial for the October 2010 through September 2012 study period.

ODOT will need to evaluate this evidence in light of USDOT requirements and the intermediate scrutiny legal standard of review for gender-conscious programs when deciding whether gender-conscious remedies are supportable in its implementation of the Federal DBE Program in Oregon.

⁵ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.

⁶ *Western States Paving*, 407 F.3d at 1001.

⁷ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

⁸ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

⁹ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

Certain federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁰ The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to a sufficiently important governmental interest or the achievement of that underlying objective.¹¹

The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. (See Appendix B.)

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

Figure 10-2 summarizes ODOT’s reported certified DBE participation since October 2010. As shown, reported DBE participation based on DBE commitments/awards on FHWA-funded contracts was above its goal in FFY 2011 and was below the goal in subsequent years.

Figure 10-2.
ODOT overall DBE goal and reported DBE participation on FHWA-funded contracts, FFY 2011 through FFY 2015

Federal fiscal year	DBE goal	DBE commitments/awards	Difference from DBE goal
2011	11.50 %	15.13 %	3.63 %
2012	11.50	10.38	-1.12
2013	16.95	8.96	-7.99
2014	16.95	8.70	-8.25
2015	13.10	6.30	-6.80

Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.
Source for 2014 and 2015: ODOT Shortfall Analysis reports submitted to FHWA.

¹⁰ See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification”).

¹¹ *Id.*

C. What has DBE participation been when ODOT has not applied DBE contract goals (or other race-conscious remedies)?

Keen Independent examined three sources of information to assess race-neutral DBE participation:

- ODOT-reported race-neutral DBE participation on FHWA-funded contracts for the most recent years;
- Keen Independent estimates of DBE participation on FHWA-funded contracts for which no DBE contract goals applied; and
- Information concerning DBE participation as prime contractors.

The discussion in the following two pages examines these three sets of participation figures.

Race-neutral DBE participation in recent ODOT Uniform Reports. Per USDOT instructions, ODOT counts as “neutral” participation any prime contracts going to DBEs not used to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

ODOT’s Uniform Reports of DBE Awards/Commitments and Payments for the five most recent federal fiscal years and ODOT’s Shortfall Analysis reports submitted to FHWA indicate race-neutral participation of a high of 13.15 percent in FFY 2011 and a low of 4.40 percent in FFY 2015 (median of 7.10%). Figure 10-3 presents these results.

The right-hand column of Figure 10-3 calculates the share of total participation achieved through neutral means (neutral DBE participation ÷ total DBE participation). In FFY 2015, ODOT achieved about two-thirds of its total DBE commitments/awards through neutral means (4.40 ÷ 6.30 = 70%), higher than in FFY 2013 and lower than in other years.

Note that Figure 10-3 does not include engineering-related contracts.

Figure 10-3.
ODOT-reported race-neutral and race-conscious DBE participation on FHWA-funded contracts for FFY 2011 through FFY 2015

Federal fiscal year	DBE commitments/awards			Share achieved Through neutral
	Total	Race-neutral	Race-conscious	
2011	15.13 %	13.15 %	1.98 %	87 %
2012	10.38	9.61	0.77	93
2013	8.96	5.13	3.83	57
2014	8.70	7.10	1.60	82
2015	6.30	4.40	1.90	70

Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.
Source for 2014 and 2015: ODOT Shortfall Analysis reports submitted to FHWA.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on ODOT’s FHWA-funded construction and engineering-related contracts without DBE contract goals. As reported in Chapter 8, ODOT achieved 5.0 percent DBE participation on these contracts from October 2010 through September 2014. (DBE participation was 5.1 percent when examining non-goals FHWA- and state-funded contracts combined.)

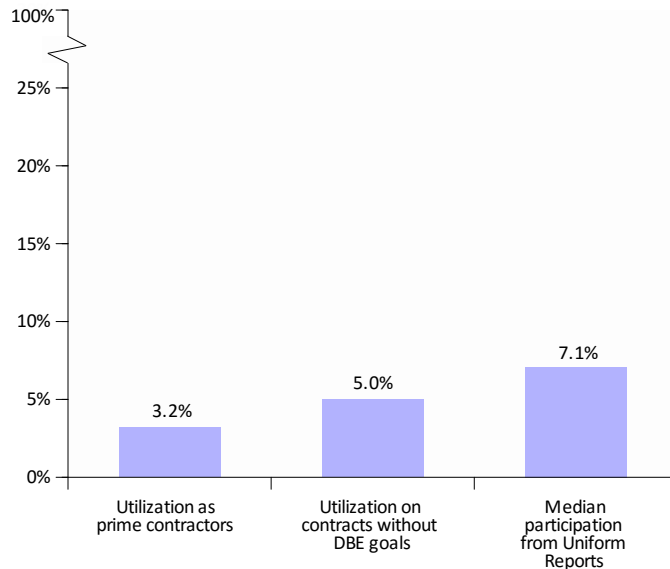
DBE participation as prime contractors. Focusing just on participation as prime contractors, DBEs obtained 3.2 percent of prime contract dollars on FHWA-funded contracts.

Conclusions. As shown in Figure 10-4, the three different measures of past DBE participation in a neutral environment show 3.2 percent, 5.0 percent and 7.1 percent participation.

Keen Independent’s 5.0 percent estimate of DBE utilization on ODOT contracts when DBE contract goals did not apply may be the most complete measure, as it combines prime contract and subcontracts and encompasses both construction and engineering contracts.

Figure 10-4.
Measures of race-neutral DBE participation

Source:
Keen Independent from data on ODOT contract records and ODOT Uniform Reports of DBE Awards/Commitments and Payments.



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

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

Keen Independent’s discussion of neutral remedies in Chapter 4 indicates that ODOT has implemented an extensive set of neutral measures, including a Small Contracting Program. The study team also examined other potential neutral measures. At this time, it is difficult to quantify how much more race-neutral participation these ongoing programs or any new efforts might achieve during the FFY 2017 through FFY 2019 time period.

E. Summary

Chapter 10 provides information to ODOT as it considers (1) its projection of the portion of its overall DBE goal to be achieved through neutral means, and (2) if all DBE groups will be allowed to participate in any DBE contract goals program, or whether ODOT will request a waiver that limits participation to certain groups.

1. Should ODOT project that it can meet all of its overall DBE goal through neutral means?

ODOT must consider whether it can achieve 100 percent of its overall DBE goal through neutral means or whether race-conscious programs are needed. Such a determination depends in part on the level of the overall DBE goal. If ODOT's overall DBE goal for FHWA-funded contracts is in the range of 11.63 percent or higher, the evidence presented in this report indicates that ODOT would not meet its DBE goal solely through neutral means.

ODOT should consider all of the information in the report and other sources when reaching its decision on any use of race- and gender-conscious programs (such as DBE contract goals).

- There is information indicating disparities in outcomes for minorities and women in the Oregon contracting marketplace, substantial disparities for MBE/WBEs in ODOT contracts, and qualitative evidence of race and gender discrimination within the local transportation contracting marketplace.
- ODOT's DBE participation on FHWA-funded contracts has fallen considerably below its overall DBE goal in FFYs 2012, 2013, 2014 and 2015 based on commitments and awards data, even with race-conscious programs in place for certain DBE groups.
- Based on ODOT Uniform Reports for FFY 2011 through FFY 2015, ODOT reported less than 10 percent DBE participation achieved through neutral means in four out of the five years. The median participation was 7.1 percent. (FFY 2011 through FFY 2014 reports do not include information on engineering-related contracts, which would lower these figures.) This level of participation is less than an overall DBE goal of 11.63 percent or higher.
- Keen Independent estimated that DBE participation for FFY 2011 through FFY 2014 was 5.0 percent on ODOT construction and engineering-related contracts without DBE contract goals. This is considerably below an overall DBE goal of 11.63 percent or higher.
- DBE participation as prime contractors and consultants was 3.2 percent over the study period, also below an 11.63 percent goal.
- For ODOT FHWA-funded construction and engineering contracts overall, including those with DBE contract goals, Keen Independent determined that DBE participation was only 7.42 percent, considerably below an overall goal of 11.63 percent or higher.

- ODOT has extensive neutral measures in place and there are many small business assistance programs offered by other institutions throughout the state. Any additional measures ODOT might be able to immediately institute would probably have only a small impact in comparison with what already exists. It appears unlikely that ODOT could increase its neutral participation of DBEs to reach an overall DBE goal to the level of 11.63 percent or higher solely through additional neutral measures.

2. If ODOT uses a combination of neutral means and DBE contract goals, how much of the overall DBE goal can ODOT project to be met through neutral means? ODOT will need to choose the appropriate neutral projection based on information in this study and other information it may have. Relevant results include the following:

- The most complete and accurate information about past DBE participation in a neutral environment comes from Keen Independent’s utilization analysis for contracts without DBE contract goals.

ODOT achieved 5.0 percent DBE participation on FHWA-funded ODOT contracts without DBE contract goals based on Keen Independent analysis of these contracts from October 2010 through September 2014 (calculated across the entire time period).¹²

If ODOT achieved the same level of race-neutral participation on FHWA-funded contracts in FFY 2017 through FFY 2019 as it did for contracts without DBE contract goals from October 2010 through September 2014 (5.0%), it would need to achieve 6.63 percentage points of an 11.63 percent overall DBE goal through race- and possibly gender-conscious means (11.63% – 5.00% = 6.63%).

If the overall DBE goal were higher than 11.63 percent, ODOT might need to project a larger portion of the goal to be met through race- and gender-conscious means, as demonstrated in Figure 10-5.

- For purposes of comparison, the left-hand column of Figure 10-5 shows the overall DBE goal and projections that ODOT developed for FFY 2015 through FFY 2016.
- The three columns to the right in Figure 10-5 present neutral and race-conscious projections for three examples of the different levels of overall DBE goals that ODOT might select for FFY 2017 through FFY 2019.
- In each column, the neutral projection (row 2) is subtracted from the overall DBE goal (row 1) to derive the race-conscious projection (row 3).

¹² There was 5.1 percent DBE participation on non-goals contracts during the study period if FHWA- and state-funded contracts are combined. This result might be used project future neutral participation as well.

Figure 10-5.

Current ODOT overall DBE goal and projections of race-neutral for FHWA-funded contracts and examples of overall goal and projections for FFY 2017 through FFY 2019

Component of overall DBE goal	FFY 2015- FFY 2016	FFY 2017- FFY 2019		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	13.10 %	11.63 %	15.84 %	21.31 %
Neutral projection	- <u>7.90</u>	- <u>5.00</u>	- <u>5.00</u>	- <u>5.00</u>
Race-conscious projection	5.20 %	6.63 %	10.84 %	16.31 %

Source: Keen Independent analysis.

CHAPTER 11.

Recommendations

Study team recommendations emerged from the quantitative and qualitative results of the disparity study, especially through the comments of many individuals inside and outside ODOT who provided input.

First, many of those providing input recognized ODOT's past changes in contracting policies and practices that enhanced access for small businesses. Suggestions for further improvement, as well as Keen Independent's assessment of results, tended to group around a set of desired outcomes regarding ODOT contracting and assistance programs. Simply put, ODOT can continue to do more to ensure that its contracting and assistance is:

1. Open;
2. Simple;
3. Fair;
4. Transparent;
5. Impactful; and
6. Monitored and improving.

ODOT should continue top-to-bottom improvement regarding its contracting and its assistance programs.

Figure 11-1, on the following page, summarizes examples of initiatives ODOT might consider in pursuing these objectives. The initiatives are illustrative and by no means exhaustive. ODOT might find that some are not possible or effective after further review, or might be able to address the identified issue through another approach.

The balance of Chapter 11 examines these potential initiatives.

Figure 11-1.
Examples of potential ODOT initiatives under each objective

Objectives and recommendations
<p>1. Openness</p> <ul style="list-style-type: none"> a. Continue outreach to potential bidders, proposers, subcontractors and suppliers b. Disseminate information through an electronic newsletter c. Provide real-time training and assistance on how to win and perform work on ODOT projects
<p>2. Simplicity</p> <ul style="list-style-type: none"> a. Simplify learning about, bidding on and performing ODOT work, especially small contracts b. Increase number of certified DBEs through targeted outreach and certification assistance
<p>3. Fairness</p> <ul style="list-style-type: none"> a. Review how firm qualifications are assessed in construction and A&E contract awards b. Implement payment notification service for subcontractors and subconsultants c. Explore initiatives to limit opportunities for bid shopping and other unfair contracting practices d. Research other ways to improve treatment of subcontractors on ODOT contracts e. Continue support for apprenticeships and other programs to promote entry and advancement
<p>4. Transparency</p> <ul style="list-style-type: none"> a. Expand awareness of construction contract award information b. Provide comprehensive information about consultant contract awards, including subcontractors
<p>5. Impact</p> <ul style="list-style-type: none"> a. Continue partnerships to provide general business assistance b. Build stronger DBEs and other small businesses within core transportation contracting disciplines c. Consider an ESB contract goals program for state-funded contracts d. Pursue changes in state law to allow expansion of Small Contracting Program and ESB/SBE Programs e. Consider including each DBE group as eligible for DBE contract goals program
<p>6. Monitored and improving</p> <ul style="list-style-type: none"> a. Expand data collection and reporting, including a comprehensive business contact list b. Continue to use external stakeholder groups that include DBEs and ESBs c. Plan future disparity studies

1. Openness

ODOT has made substantial efforts to communicate contracting opportunities to firms in the industry. Based on availability survey results and in-depth interviews, more remains to be done. Among the firms in the transportation contracting industry surveyed as part of this study, more than one in four MBE/WBEs and 18 percent of majority-owned firms reported difficulties learning about ODOT business opportunities. A relatively high percentage of MBE/WBEs also reported difficulties learning about subcontracting opportunities.

Keen Independent discusses three general strategies beginning on the following page.

(a) Continue outreach to potential bidders, proposers, subcontractors and suppliers.

ODOT participates in many activities to introduce contracting opportunities to small businesses.

- ODOT provides considerable information about contract opportunities on its website and through electronic notification systems, but firms need to be aware of these information sources to use them. ODOT should increase outreach and education about easy ways to be informed of opportunities as prime contractors and as subcontractors.
- ODOT may need to design better procedures to inform small businesses of prime contract opportunities through the Small Contracting Program and ESB Program.
- The ODOT Office of Civil Rights in partnership with Procurement Office and Project Delivery staff should continue outreach efforts, including specific training on how to learn about prime contract and subcontract opportunities for construction, A&E and other contracts.
- Some public meeting attendees recommended that more ODOT staff participate in efforts to include DBEs in ODOT contract opportunities.

(b) Disseminate information through an electronic newsletter. ODOT might consider developing a monthly or quarterly electronic newsletter that could keep DBEs, ESBs and other small businesses informed of ODOT opportunities and assistance, including links to other groups. This also might help ODOT recruit firms to apply for certification (see Recommendation 2-b).

(c) Provide real-time, web-based training and assistance on how to win and perform work on ODOT projects. ODOT might expand opportunities for companies that have not had much experience as a subcontractor or prime contractor on ODOT contracts through a web-based “one-stop shop” for information and training. Although ODOT has a consultant portal and contractor portal, its web-based assistance can be substantially improved.¹

This small business portal would centralize and expand the assistance ODOT provides on its website to DBEs and other business owners who have questions about how to learn about ODOT work, seek subcontract opportunities, become prequalified as a prime contractor, submit bids and proposals, and comply with ODOT requirements as they perform the work. In that way, key questions about working with ODOT can be answered real-time any day of the week, which fits the timing of the business owners’ need for information. An advantage of this approach is that ODOT can consistently direct businesses to this small business portal.

The Arizona Department of Transportation (ADOT) is developing a new small business assistance portal. Once it is live in April or May 2016, it might provide a model for ODOT. The ADOT website will offer round-the-clock virtual coaching for small businesses and DBEs statewide.

The online portal provides guidance on ADOT’s Small and Disadvantaged Business Enterprise Program, DBE certification, prequalification and registration for small business programs. It also walks prime contractors, subcontractors, truckers and suppliers through bid preparation and contract

¹ Keen Independent found missing information, broken links and other non-user-friendly aspects of both portals.

compliance, and addresses issues of licensing and registration, bonding and insurance, prequalification, good faith efforts, Commercially Useful Function and other relevant topics. ADOT's goal is to provide businesses a one-stop experience.

2. Simplicity

A number of business owners interviewed in the study were aware of past ODOT efforts to address some of the specifications, contract processes and other requirements that limit opportunities for smaller and newer firms, as well as companies that have limited ODOT experience. For example:

- Some MBE/WBEs and other firms had positive comments about ODOT's electronic bidding system for construction contracts. (Some professional services firms requested electronic bidding as well.)
- With the advantage of simplified procedures and requirements, ODOT's Small Contracting Program appeared to be effective in encouraging minority- and women-owned business participation as prime contractors and consultants.

(a) Simplify learning about, bidding on and performing ODOT work, especially small prime contracts and subcontracts. Many businesses and other groups interviewed in the study and participating public meetings encouraged ODOT to continue to seek small business-friendly improvements, and identified remaining barriers. Appendix J discusses the wide range of potential improvements mentioned, including:

- Reducing or streamlining paperwork (frequently mentioned by businesses and ODOT staff);
- More strategic unbundling of ODOT contracts to carve out portions of work that can provide prime contracting opportunities to small businesses, including design and other non-construction work;
- More use of the Small Contracting Program and the ESB Program for construction, A&E and other contracts through internal education and encouragement; and
- More attention to perceived small business-unfriendly process and requirements in consulting contracts such as excessive insurance requirements.

Appendix J provides business owners' feedback on the wide range of processes and requirements that can negatively affect DBEs and other small businesses. ODOT might conduct further research, including additional industry input, before targeting barriers to be first addressed.

(b) Increase the number of certified DBEs through targeted outreach and certification assistance. Several metrics identify the need for targeted outreach to potential DBEs that would encourage more firms to become DBE-certified.

- More than one-third of the dollars going to minority- and women-owned firms on ODOT's FHWA-funded contracts went to non-DBEs (4.4 percentage points of the total 11.8 percent utilization).

- Among the 50 minority- and women-owned firms that received at least \$1 million in ODOT contract dollars during the study period, 20 were not currently DBE certified.
- On a dollar-weighted basis, potential DBEs comprise more than one-third of the 15.84 percent availability of current/potential DBEs for FHWA-funded contracts.

Some of the business owners interviewed in the study indicated that the hoops to jump through, complexity of the process and amount of paperwork involved discouraged certification as a DBE. There were also barriers due to perceptions by some minority and female business owners that DBE certification carried a negative stereotype among customers and prime contractors.

ODOT might consider the following initiatives:

- Because it is not the certifying agency, ODOT is ideally suited to encourage and assist companies with certification applications (without then having to evaluate those applications). ODOT might target this outreach and assistance in core areas of highway contracting and engineering. Personal communications from ODOT leadership, coupled with tangible benefits from certification, might be necessary. Encouragement from industry associations could also be helpful.
- An additional way of encouraging DBE certification is to help firms obtain other valuable certifications. This should include ESB certification, but might also extend to U.S. Small Business Administration 8(a) Program certification. For example, the Montana Department of Transportation reports that its efforts to assist DBEs obtain 8(a) certification are successful and appreciated. (There are considerable benefits to 8(a) certification beyond DBE certification.)
- ODOT might retain outside consultants to promote certification and walk firms through the certification process. Keen Independent's data identifying non-certified firms can be a starting point for this targeted outreach.
- ODOT will be more successful encouraging DBE certification if there are tangible benefits to that certification for all DBE groups. For many DBE groups, lack of eligibility to participate in meeting contract goals construction contracts has been a factor.
- Local agencies operating the Federal DBE Program might also partner with ODOT in outreach and certification assistance.

3. Fairness

ODOT should review two aspects of fair treatment of minority- and women-owned firms and small businesses in general:

- Whether ODOT unfairly advantages or disadvantages certain prime contractors or consultants; and
- Whether ODOT and prime contractors treat subcontractors fairly.

(a) Review how firm qualifications are assessed in construction and A&E contract awards.

ODOT should review how it prequalifies firms as prime contractors for its construction work and awards consultant contracts based on qualifications.

- Because it relies on bonding companies, ODOT no longer considers company financials in its prime contractor review of qualifications, one potential barrier to DBE and other small business participation in ODOT construction contracts. However, ODOT staff might review other aspects of contractor prequalification.
 - ODOT has a Supplemental Question as to whether a firm was denied prequalification by another public sector agency. ODOT prequalification might be adopting other agencies' barriers.
 - ODOT can grant prequalification for a work class based on prequalification for that work in other states. Larger companies, and those located in other states, might be the principal beneficiaries of this "reciprocity." As small businesses based in Oregon might not be as likely to have become prequalified in other states, ODOT should ensure that use of its reciprocity does not disadvantage these firms.
 - ODOT uses years a firm has been in business "as a prime contractor" and "as a subcontractor" in its prequalifications. There are two potential issues with the use of this factor: disadvantaging firms with less time in business, and disadvantaging subcontractors when assessing potential prequalification as a prime contractor.

ODOT might consider experience of the owners and managers of the company as a bigger factor than years in business.

It also might reexamine whether separating years of experience as a prime and as a subcontractor is necessary. (The 2016 Disparity Study identified substantial overlap in prime contract and subcontract work for construction firms, with the role on any given contract largely dependent on market opportunity.)

- Concerning A&E and other professional services contracts, ODOT might review its policies and procedures to ensure that evaluation of qualifications as much as possible focuses on the individuals who will conduct the work rather than the firm as a whole, and that experience with ODOT is not weighted more heavily than other experience. Firm size, financial strength and length of time in business should be discouraged as evaluation factors except in unusual circumstances.

- ODOT also examines “capacity” of consulting firms at different stages of the selection process, including scoring of capacity by evaluators and its use of the Capacity Summary Form in the mini-RFP process. It must be careful not to reinforce any disadvantages in the marketplace affecting minority- and women-owned firms through use of “capacity” in its evaluations. Based on in-depth interviews, A&E firms can quickly expand or shrink staff, or partner with other firms, depending on opportunities. ODOT should build this “elasticity” into any consideration of “capacity” if it continues to use that factor at all.

(b) Implement a payment notification service for subcontractors and subconsultants.

Interviewees from firms that work as subcontractors on public sector projects reported some continued mistreatment due to delayed payment by prime contractors. Currently, subcontractors do not know when ODOT has paid the prime contractor without calling ODOT staff. ODOT should develop a payment notification system for its construction and consultant contracts and any other contracts that might have subcontractors or suppliers.

- One option is to require verification of payment by subcontractors. The advantage of this approach is that ODOT can track whether or not subcontractors are being paid by prime contractors in a timely fashion. However, it places additional administrative burdens on subcontractors to confirm payments each month (or quarter) and requires ODOT staff to review results.
- Another option is to either post notice of ODOT’s payment of the prime contractor on ODOT’s website, or email notice of payment to subcontractors on each contract. An email system places no additional burdens on subcontractors, and if they do not wish to receive those email notices, they can opt out.

The Montana Department of Transportation has recently implemented a payment notification system where subcontractors receive email notification when MDT has paid a prime contractor on a construction contract.

Keen Independent suggests that ODOT begin with a simple notification system, but explore whether it could adopt a verification of subcontractor payment system on a case-by-case basis where there are concerns about prime contractor payment of subcontractors and suppliers.

(c) Explore initiatives to limit opportunities for bid shopping and other unfair contracting practices. As discussed in Appendix J, many business owners and managers indicated that bid shopping and bid manipulation regularly occurs in the Oregon construction industry, which negatively affects subcontractors and suppliers. Some interviewees reported that DBEs were singled out for these predatory practices.

One of the consequences of fear of bid shopping is that subcontractors hold their quotes for prime contractors until the last minute, creating more difficulty for primes to develop a bid. According to the Native American owner of a construction firm, “One guy will get ahold of another guy’s number, and next thing you know ... the next morning he cuts his price and he’s just like \$1,000 or \$5,000 underneath the other guy’s price.” He reported that is why subcontractors get their quotes to prime contractors at the last possible moment.

Beyond educating contractors about ethical practices, general approaches to addressing bid shopping include the following:

- **Bid listing and required use unless substitution is approved.** State law requires bidders on ODOT contracts to list subcontractors within two hours of bid closing and use listed subcontractors unless substitution is approved by ODOT.²

These practices are among standard approaches to limit bid shopping. ODOT could increase contractor compliance concerning requests for ODOT approval for any substitutions. This provision appears to be consistently applied for DBEs but not for other subcontractors.

- **Bid depository systems.** Another approach to controlling bid shopping is to establish bid depository systems. With a bid depository, a third party collects subcontractor bids and makes them available to prime contractors at a specified time prior to bid closing. However, some programs have come under legal attack when they require prime contractors to use the subcontractor bid provided through the bid depository.
- **Penalties for bid shopping contained in subcontractor quotes.** There are also contractual ways that subcontractors can better protect themselves when offering quotes to prime contractors by placing conditions in those quotes. These sometimes include conditions that the bid price is confidential and any disclosure triggers certain penalties. ODOT would need to further research enforceability of these conditions in Oregon. If they appear to be enforceable and effective, ODOT could provide training to subcontractors about their use.

ODOT might work with industry groups to explore opportunities that can further limit bid shopping on its projects, whether it be submission of subcontract lists with the bid, testing of bid depositories, training of subcontractors concerning submission of quotes or other initiatives.

(d) Research other ways to improve treatment of subcontractors on ODOT contracts. The prime contractor, not ODOT, holds the agreement with the subcontractor on an ODOT project. Even so, ODOT is a steward of public funds and has an interest in equitable treatment of DBE and non-DBE subcontractors.

In addition to the payment notification and bid shopping initiatives discussed above, there may be other ways ODOT can help ensure that subcontractors are treated fairly on its contracts. This might include strengthening its role in receiving and addressing any allegations of unfair treatment from firms attempting to compete for subcontract opportunities as well as those listed as subcontractors and subconsultants.

² ORS 279C.585.

(e) Continue support for apprenticeships and other programs to promote entry and advancement within transportation construction and engineering. Future availability of minority- and women-owned businesses in the local transportation industry depends upon entry and advancement of minority and female employees. However, there is a long history of discrimination against minorities and women in Oregon, as discussed at the beginning of Chapter 5. Certain effects of that discrimination appear to continue. Based on the results in the 2016 Disparity Study, there is not a level playing field for entry and advancement opportunities for certain minority groups and for women in the local construction and engineering industries.

ODOT partners with other organizations to open doors for minorities and women to enter and advance in construction trades in Oregon. This assistance includes traditional pre-apprenticeship and apprenticeship programs, as well as programs to help address long-term retention and workplace culture.

ODOT should continue to invest in these workforce development programs to reduce barriers to entry and advancement in the construction industry, as this will place more minorities and women on a path toward potential ownership of businesses in the Oregon transportation contracting industry.

4. Transparency

Many of the other recommendations presented in Chapter 11 also serve to increase the transparency of ODOT processes before contract award, during selection and while contracts are underway. For example, distributing notices of when ODOT has paid the prime contractor (Recommendation 3-b) serves a transparency objective.

ODOT is highly transparent in its award process for construction contracts, but it might do more to educate firms about where to find that information. It might be able to increase its transparency concerning A&E and other consultant contracts, as discussed below.

(a) Expand awareness of information about construction contract awards, including subcontractors. ODOT provides extensive information about the bids submitted on its construction contracts, including prices from those bidders and the first-tier subcontractors and DBEs involved. It might do more to ensure subcontractors are aware of these processes and know where to look for this information.

(b) Provide comprehensive information about consultant contract awards, including subconsultants. It appears that ODOT information about consultant contract awards is not as easy to find on its website as its construction contract awards.

5. Impact

There are a number of ways for ODOT to increase the impact of its programs for DBEs and other small businesses.

Keen Independent recommends that ODOT tier its levels of outreach and assistance to DBEs, ESBs and other small businesses so that sufficient resources can be devoted to core highway-related businesses.

- When the group of businesses is large and varied across industries, and the types of business needs are very general, ODOT should partner with other groups that specialize in providing that assistance to those types of businesses. When it does not contribute funding, ODOT can at least serve as a referral source.
- For the smaller set of core transportation contracting businesses with highly specific needs, ODOT should make more substantial investments in tailoring assistance to those firms. Its partners might be TriMet, Port of Portland and large cities or counties, plus trade associations and other groups specializing in heavy construction and related engineering.

ODOT does not have the expertise or resources to deliver both types of assistance effectively, so it should focus on core transportation contracting businesses, including related services. In general, any assistance outside this focus should typically be as a partner to another group.

This recommendation is in line with the success of City of Portland, TriMet and Port of Portland with targeted assistance programs.

The other recommendations under “Impact” pertain to improving ODOT’s set-aside and subcontract goals program tools, including the Small Contracting Program, ESB Program (and potential SBE Program) and DBE contract goals program.

(a) Continue partnerships to provide general business assistance to a broad set of DBEs, ESBs and other small businesses. ODOT should not become a direct provider of general small business assistance, but rather continue to partner with other organizations that focus on different types of assistance. ODOT should also continue to serve as a small business assistance clearinghouse. For example:

- As part of its ongoing DBE assistance, ODOT should continue to financially support training and other assistance for DBEs provided by other groups.
- ODOT should continue to co-sponsor certain workshops and other training.
- ODOT prepared the Small Business Resources Guide in 2010. ODOT should consider updating this guide and preparing a web-based version of the guide.

(b) Build stronger DBEs and other small businesses within the core transportation contracting disciplines. As presented in Chapter 3, most of ODOT contract dollars are in core areas of highway and bridge construction, and engineering services. It will be difficult for ODOT to substantially increase DBE participation through work that is not directly highway-related. Thus, ODOT should focus its efforts on core highway-related businesses.

However, core construction activities are specialized, capital intensive, require larger bonds for the prime contractor (and sometimes as a subcontractor) and often are performed by larger companies. Traditional small business assistance might be ill-suited to address the types of constraints for these contractors.

- **Specialized assistance.** ODOT might research providing more specialized assistance for DBEs in core highway construction disciplines than is offered through its current programs. It might target mentor-protégé efforts for these types of businesses. Another tool is individualized Business Development Plans and customized assistance designed for each firm.

ODOT might consider reimbursements or other financial incentives to encourage prime contractor and consultant use and mentorship of DBEs in core highway and design disciplines (i.e., beyond flagging and trucking).

Nationally, Keen Independent has found greater opportunities to encourage primes to provide specialized assistance to DBEs on alternative delivery method projects. Some interviewees and those submitting written comments as part of the study were supportive of more ODOT use of alternative bidding to better achieve outcomes for DBEs.

- **Bonding and access to capital.** Interviews with businesses, trade associations, ODOT staff and other local agencies identified bonding assistance and access to capital as two areas where more assistance was needed in Oregon. ODOT might partner with other organizations to increase assistance for core highway construction disciplines.
- **Monitoring how contractors meet DBE contract goals.** If it continues to use DBE contract goals, ODOT should continue to monitor whether prime contractors on construction contracts meet those goals primarily through disciplines such as traffic control, trucking, fencing and guardrail and supplies. ODOT will need to ensure that non-DBEs are not unduly burdened by DBE contract goals (see Chapter 4). The DBE contract goals might also have maximum long-term impact if core highway construction disciplines are involved as well.

(c) Developing an ESB contract goals program for state-funded contracts. ODOT appears to have the authority to set ESB contract goals on its state-funded contracts. It might further research whether it could operate such a program in parallel with the DBE contract goals program.

ODOT might also consider developing a Small Business Enterprise (SBE) contract goals program for FHWA- and FTA-funded contracts.

- As the size limits for ESBs are smaller than the U.S. Small Business Administration definitions of small businesses, ODOT would need to consult with FHWA to determine whether the revenue limits in the ESB Program can be used for an SBE Program on federally-funded contracts.
- ODOT would need to develop a mechanism for SBEs from outside Oregon to be certified for participation in the program (required when federal dollars are used in these contracts).

- ODOT would operate the SBE contract goals program for certain contracts where it would not set DBE contract goals (DBE and SBE goals would not be combined on a single contract).

(d) Pursue changes in state law to allow expansion of Small Contracting Program and ESB Program. ODOT and other groups might pursue changes in state statutes that might allow larger construction, consulting and other contracts to be included under the Small Contracting Program and the ESB Program.

ODOT might learn from the success of the City of Portland with its Prime Contractor Development Program, which builds on the ESB Program. The City of Portland includes contracts up to \$350,000 in Tier 2 of its Program. MBEs, WBEs and ESBs with annual gross receipts of more than \$1.7 million that also meet other program eligibility rules can compete for those contracts. The City has a larger tier of contracts (up to \$500,000) and MBE/WBE/ESB participants as well.

ODOT, and perhaps other state agencies, might consider pursuing legislative authority to operate a Small Contracting Program and an ESB Program that include contracts up to \$350,000 or \$500,000.

(e) Consider including each DBE group as eligible for DBE contract goals program. ODOT might operate its DBE contract program differently in the future based on its consideration of 2016 Disparity Study results.

The evidence suggests that ODOT will need to continue to use DBE contract goals to meet its overall DBE goal. The information in Chapter 10 indicates that ODOT will need to continue to use DBE contract goals to meet an overall DBE goal in the range of 11.63 percent or more.

ODOT might consider the evidence for the Oregon transportation contracting industry as a whole. If it chooses to continue to use DBE contract goals on its FHWA-funded contracts, Keen Independent recommends that it consider the evidence of disparities for each MBE group and for white women-owned firms for its overall transportation contracts. In the past, ODOT separately examined results for construction and for engineering-related contracts; however, a review of the Oregon transportation contracting industry as a whole may be more consistent with guidance from the Ninth Circuit in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*³

ODOT should consider the evidence of disparities between the utilization and availability for WBEs and each MBE group for ODOT contracts, as well as other quantitative and qualitative information. As discussed in Chapter 7, there is evidence of disparities in ODOT transportation contracting for firms owned by African American, Asian-Pacific American-, Subcontinent Asian American-,

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

Hispanic American-, Native American- and white women-owned firms. The evidence of disparities in ODOT contracting for Hispanic American-owned firms is for FFY 2013 and FFY 2014, as discussed in detail in Chapter 7. For the reasons discussed in Chapter 7, these two years are more indicative of current and future conditions regarding Hispanic American-owned firms than results for FFY 2011 and FFY 2012.

Effect of including all DBE groups as eligible to meet DBE contract goals. The DBE contract goals program will be a stronger tool in meeting ODOT's overall DBE goal with inclusion of more DBE groups. ODOT can set higher DBE contract goals as there will be a larger pool of DBEs in more disciplines available to work on those contracts across the state. This may also avoid potential overconcentration of DBE participation in only a few specialty fields. When ODOT discussed this possible change in the spring 2016 public meetings, it received strong support from many DBEs and majority-owned prime contractors.

If ODOT chooses to include more groups, it will need to monitor any negative effects on the sole groups now eligible to meet DBE contract goals on its FHWA-funded construction contracts: DBEs owned by African Americans and by Subcontinent Asian Americans. Even with eligibility to meet DBE contract goals for FFY 2010 through FFY 2014, there was a disparity in the utilization of African American-owned firms in ODOT transportation contracts. The targeted assistance efforts and other programs described elsewhere in Chapter 11 will be needed to further build opportunities for African American-owned DBEs as well as other DBEs.

6. Monitored and improving

ODOT will need to consider the results of the 2016 Disparity Study, plan for future studies and expand its contract and bidders list-related data collection and reporting. Recommendations for these three components are addressed below.

(a) Expanded data collection and reporting, including a comprehensive business contact list.

ODOT can expand its efforts to collect and report utilization data. It can also build a more comprehensive business contact list.

Utilization data collection and tracking. ODOT has a sophisticated, internally-developed tracking system for not only DBE but also MBE/WBE participation in its FHWA- and state-funded construction contracts. Keen Independent recommends that ODOT expand that system to include FHWA- and state-funded engineering and related services contracts. ODOT has not successfully tracked utilization on FHWA- or state-funded engineering-related contracts. This will require expanded efforts to capture information about subcontracts on engineering contracts.

ODOT might also research whether it can better gauge participation of non-DBEs in trucking and supplies to monitor potential future overconcentration of DBE participation in those types of work.

Separate ongoing analysis of participation of former DBEs and other MBE/WBEs. Keen Independent recommends that ODOT continue to prepare reports on MBE/WBE participation parallel to reports on DBE participation, including review of the participation of former DBEs in ODOT contracts.

- One of the reasons that ODOT might not have met its overall DBE goal in past years, and might not meet it in the future, is that its measurement of DBE participation is properly limited to businesses that are DBE-certified at the time of a contract. Potential DBEs are accounted for in ODOT's overall DBE goal but not in its participation reports (currently and as proposed in the 2016 Disparity Study). Based on past Keen Independent communications with USDOT, analysis of the utilization of potential DBEs might be a valid reason to submit to FHWA when explaining any shortfalls in DBE participation.
- In addition, state DOTs such as ODOT would benefit from information about the success or failure of former DBEs; that can provide a roadmap for ODOT programs to assist DBEs currently in the Federal DBE Program or those that might enter the program. And, one measure of whether ODOT is successful in operating the Federal DBE Program is whether DBEs grow to the level that they no longer qualify for certification.
- Ongoing collection of prime contract and subcontract data also expedites completion of future ODOT disparity studies.

Monitoring of DBE participation by discipline. There was concern among DBEs and non-DBEs participating in the in-depth interviews and public meetings that, under ODOT's current operation of the Federal DBE Program, prime contractors primarily meet DBE contract goals through just a few disciplines such as flagging and trucking. Inclusion of more DBE groups as eligible to meet DBE contract goals, coupled with higher goals on certain projects, will likely increase DBE participation in other trades. ODOT should continue to monitor any potential overconcentration of DBEs by developing a system to code and report types of work performed by non-DBEs as well as DBEs. With this information, ODOT can report DBE and non-DBE dollars by type of work and update the analyses of potential overconcentration that appear in Chapter 8 of this report.

Comprehensive bidders list. Keen Independent's availability database can be the start of a new ODOT bidders list (in compliance with 49 CFR Section 26.11), which ODOT can periodically update through surveys and other means (at least with each disparity study). When doing so, Keen Independent recommends that ODOT compile ownership information (beyond DBE status) to include race, ethnicity and gender ownership status of non-DBEs. It should also include information about ESB certification.

ODOT might also, on an annual basis, update its list of firms interested in ODOT prime contracts and subcontracts. ODOT staff and Keen Independent developed such a list as part of this disparity study.

Components might include the following:

- **Continued identification of bidders on construction contracts.** ODOT should continue to compile data on construction bidders and to request prime contractors to prepare lists of firms providing subcontract and supply quotes on construction contracts (perhaps on an annual basis rather than with each bid to reduce the burden on prime contractors and ODOT staff). It can also incorporate firms receiving notices of opportunities through eBIDS.
- **Identification of proposers on engineering and other consulting contracts.** ODOT should also systematically collect information on firms competing as prime consultants on its consulting contracts. It might also collect data on firms registered for certain types of bid notices through the ORPIN system.

(b) Continued use of external stakeholder groups that include DBEs and ESBs. ODOT works closely with several external groups, including Oregon chapters of the Associated General Contractors (AGC) and American Council of Engineering Companies (ACEC), as well as its Workforce and Small Business Advisory Council (WSBAC).

As it continues to work with AGC and ACEC leadership regarding DBE and small business issues, ODOT should expand inclusion of DBEs and other small businesses in those AGC and ACEC groups. If this is not possible, ODOT should consider forming other working groups for construction and consulting that are inclusive.

ODOT might also set a regular calendar of WSBAC meetings (perhaps quarterly meetings) and encourage members to take an active role in ODOT's ongoing contracting and assistance improvement efforts.

Some DBEs indicated that in-person participation in meetings, stakeholder groups, training sessions and other programs was sometimes difficult for firms in remote parts of the state. Several business owners encourage ODOT to provide opportunities for virtual participation in such meetings.

(c) Future disparity studies. The time between the last full disparity study for ODOT and the present study is five years. Keen Independent recommends that ODOT conduct certain updates within a shorter time frame.

Potential disparity study update by 2019. ODOT might consider conducting a utilization update prior to its 2019 submission of a DBE goal and projection for its FHWA-funded contracts for FFY 2020 through FFY 2022. That study would need to start in 2018 and be accepted by spring 2019. The update would analyze:

- Utilization of minority- and women-owned firms (by group) for ODOT FHWA- and state-funded contracts from October 2014 through September 2017, or perhaps a longer time period;
- Comparison of that utilization with availability benchmarks that could be developed from the availability data collected in the 2016 Disparity Study;

- Updates to the analysis of current and potential DBEs in the 2016 Disparity Study based on the new DBE Directory at that time, and up-to-date information about any denials of DBE certification and changes to the BOLI list;
- Analysis of the effectiveness of any new or expanded race- and gender-neutral programs, which would assist ODOT when projecting the portion of its future overall DBE goal to be met through new means;
- Updates to the base figure and potential step 2 adjustments; and
- Other aspects of ODOT’s operation of the Federal DBE Program, including review of compliance with any changes in federal regulations or guidance concerning the Program.

The 2019 study might not require an update to the comprehensive collection and analysis of quantitative and qualitative information about the local marketplace contained in the 2016 Disparity Study. However, ODOT could conduct public meetings and request public comments to obtain new information about local marketplace conditions and ODOT contracting.

Potential full disparity study within 5-6 years, or before. With or without an intervening study update, ODOT might consider a full disparity study within the next five to six years that would include each of the components listed above, and quantitative and qualitative information about the local marketplace. It might also be timed to support setting an overall DBE goal (perhaps FFY 2023 through FFY 2025), projecting the portion of the goal to be met through neutral means, and other aspects of a three-year plan for operating the Federal DBE Program for FHWA-funded contracts.

Summary

The challenges facing minority- and women-owned firms and other small businesses are long-standing and not easily addressed. ODOT will need to continue to work on long-term solutions. Therefore, ODOT should take the time to perform a thorough review of its processes and programs to ensure that improvements will be effective and long-lasting. Common threads throughout the above recommendations are that ODOT needs:

- Better tools;
- More use of existing tools;
- Willingness to change processes;
- Broader partnerships with other organizations;
- Expanded measurement and reporting of outcomes; and
- Sufficient resources to execute this long-term strategy.

Foremost, ODOT will need to continue to build long-term, organization-wide commitment to encouraging participation of DBEs and other small businesses. Based on the extensive involvement of its leadership in this disparity study, Keen Independent concludes that ODOT can be successful in meeting these challenges.

APPENDIX A.

Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2016 Disparity Study. The following definitions are only relevant in the context of this report.

A&E. “A&E” refers to architecture and engineering (i.e., “A&E contracts”).

Anecdotal evidence. Anecdotal evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee’s or participant’s perspective.

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

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms based on analysis of the specific type, location, size and timing of each ODOT prime contract and subcontract and the relative number of minority- and women-owned firms available for that work.

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

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

Business listing. A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a “listing” until the study team determines it to be an actual business establishment with a working phone number.

Certification Office of Business Inclusion and Diversity (COBID). As of January 1, 2016, the Certification Office of Business Inclusion and Diversity or “COBID” is the new name for the Office of Minority, Women and Emerging Small Business (OMWESB). COBID is the certification authority for certification of minority- and women-owned firms, Disadvantaged Business Enterprises, Airport Concessions Disadvantaged Business Enterprises (ACDBEs) and Emerging Small Businesses (ESBs) in Oregon. COBID also administers new Service Disabled Veteran (SDV) certification.

Code of Federal Regulations or CFR. Code of Federal Regulations (“CFR”) is a codification of the federal agency regulations. An electronic version can be found at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

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

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

Consultant. A consultant is a business performing professional services contracts.

Contractor. A contractor is a business performing construction contracts.

Controlled. Controlled means exercising management and executive authority for a business.

Disadvantaged Business Enterprise (DBE). A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26). Members of certain racial and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of social and economic disadvantage. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of \$1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a non-minority male may also be certified as a DBE on a case-by-case basis if the enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

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

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

Disparity index. A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity” or utilization “on par” with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). Hoover’s is the D&B company that provides these lists. Obtaining a DUNS number and being listed by D&B is free to listed companies; it does not require companies to pay to be listed in its database.

eBIDS. Electronic Bidding Information Distribution System, ODOT’s online bidding system for highway construction projects.

Emerging Small Business (ESB). Emerging small businesses (ESBs) are those certified by the State of Oregon as small businesses, with a time limit for participation in the program (hence “emerging”). Certification is limited to for-profit firms, not part of a larger company, with a principal place of business in Oregon. ESB certification includes two tiers:

- Tier 1 for businesses with 19 or fewer employees that have average annual gross receipts below \$1,846,996 for construction businesses or \$738,798 for non-construction firms; and
- Tier 2 for businesses with 29 or fewer employees that have annual gross receipts less than \$3,693,992 for construction firms or \$1,231,331 for non-construction firms. (Values are as of the time of this report.)

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

Engineering-related services. For purposes of this study, services such as surveying, transportation planning, environmental consulting, construction management and certain related professional services.

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

ESB. See “Emerging Small Business.”

Establishment. See “business establishment.”

Federal Disadvantaged Business Enterprise (DBE) Program. Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

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

Federal Transit Administration (FTA). The FTA is an agency of the United States Department of Transportation that administers federal funding to support local public transportation systems including buses, subways, light rail and passenger ferry boats.

Firm. See “business.”

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

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

Local agency. A local agency is any city, county, town, tribal government, regional transportation commission or other local government receiving money through ODOT.

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

MBE. Minority-owned business enterprise. See minority-owned business.

Minorities. Minorities are individuals who belong to one or more of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians.
- Asian-Pacific Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong.
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

Minority-owned business (MBE). An MBE is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, “MBE-certified businesses” are those that have been certified by the State of Oregon as a minority-owned company.

MWESB Program. The State of Oregon and a number of local governments in Oregon operate a Minority, Women and Emerging Small Business (MWESB) program which encourages utilization of minority- and women-owned firms and emerging small businesses in public contracting and procurement.

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

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

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

Oregon Association of Minority Entrepreneurs (OAME). The Oregon Association of Minority Entrepreneurs is a non-profit, tax-exempt organization focused on the promotion and development of entrepreneurship and economic development for ethnic minorities in the State of Oregon and Southwest Washington.

Oregon Bureau of Labor and Industries (BOLI). Oregon Bureau of Labor and Industries (BOLI) is the state agency responsible for enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations; enforcement of state laws related to wages, hours and terms and conditions of employment; education of employers concerning wage, hour and civil rights laws; and workforce development through apprenticeship programs and other efforts. This agency also maintains the List of Contractors Ineligible to Receive Public Works Contracts.

Oregon Department of Transportation (ODOT). ODOT is the steward of the State of Oregon's transportation system. ODOT is responsible for building, maintaining, and operating the state highway system. In addition, ODOT works with various partners to maintain and improve local transportation infrastructure. ODOT provides other transportation services related to Oregon's roads and bridges, railways, public transportation services, transportation safety, driver and vehicle licensing and motor carrier regulation.

Oregon Office of Minority, Women and Emerging Small Business (OMWESB). The Office of Minority, Women and Emerging Small Business is the certification authority for certification of minority- and women-owned firms, Disadvantaged Business Enterprises, Airport Concessions Disadvantaged Business Enterprises (ACDBEs) and Emerging Small Businesses (ESBs) in Oregon. Beginning January 1, 2016, OMWESB became the Certification Office of Business Inclusion and Diversity (COBID). (See Certification Office of Business Inclusion and Diversity (COBID) on page 1 of this appendix.)

Oregon Procurement Information Network (ORPIN). State of Oregon agencies use the ORPIN program to disseminate notices of certain contracting and procurement opportunities to interested companies that are registered in the system. Many local government agencies in Oregon participate in ORPIN as well.

Owned. Owned indicates at least 51 percent ownership of a company. For example, a "minority-owned" business is at least 51 percent owned by one or more minorities.

Potential DBE. A potential DBE is a minority- or woman-owned business that appears that it could be DBE-certified (and not currently DBE certified) based on revenue requirements specified as part of the Federal DBE Program.

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

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the project owner, such as ODOT.

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

Project. A project refers to an ODOT or local agency transportation construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race- and gender-conscious measures. Race- and gender-conscious measures are programs in which businesses owned by some minority groups or women may participate but majority-owned firms typically may not. A DBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of “race-, ethnicity-, and gender-conscious measures.” For ease of communication, the study team has truncated the term to “race- and gender-conscious measures.”

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. A broader list of examples can be found in 49 CFR Section 26.51(b).

Note that the term is more accurately “race, ethnicity, and gender-neutral” measures. However, for ease of communication, the study team has shortened the term to “race- and gender-neutral measures.”

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most ODOT and local agency contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to race- and gender-conscious programs requires disparity analyses to focus on the “relevant geographic market area.”¹

Remedial measure. A remedial measure, sometimes shortened to “remedy,” is a program designed to address barriers to full participation of minorities or women, or minority- or women-owned firms.

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

SBA 8(a). SBA 8(a) is a U.S. Small business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

The Service Corps of Retired Executives (SCORE). The Service Corps of Retired Executives (SCORE) is a non-profit, volunteer-run organization that offers small business supportive services and business mentoring nationwide as a resource partner of the U.S. Small Business Administration (SBA). Oregon has SCORE chapters in Central Oregon, Portland, Salem and Willamette.

Service Disabled Veteran (SDV). Effective January 1, 2016, an SDV is a firm certified as owned by a service disabled veteran meeting the criteria of Oregon's Certification Office of Business Inclusion and Diversity (COBID). This new certification is an outcome of legislation passed during the 2015 session that created SDV certification.

Service-Disabled Veteran-Owned Small Business (SDVOSB). A firm certified as a service disabled veteran-owned small business according to the criteria of the federal Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program.

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

Small Business Enterprise (SBE). A firm certified as a small business according to the size criteria of the certifying agency.

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

Small Contracting Program. ODOT's Small Contracting Program (SCP) encourages small business participation as prime contractors in its architectural and engineering (and related services) contracts, construction contracts, and other services contracts.

State-funded contract. A state-funded contract is any contract or project that is entirely funded with State of Oregon, local government and other non-USDOT funds. As these contracts do not include federal funds, the Federal DBE Program does not apply.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant's contract for a customer such as ODOT.

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 the prime contractor's contract for a customer such as ODOT.

Subcontract goals program. A program in which a public agency sets a percent goal for participation of DBEs, MBE/WBEs, ESBs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.

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

Subrecipient. A subrecipient is a local agency receiving financial assistance from the United States Department of Transportation, passed through ODOT.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project (or in some cases sells supplies directly to ODOT).

United States Department of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

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

WBE. Woman-owned business enterprise. See women-owned business.

Women-owned business (WBE). A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a "WBE-certified businesses" is one certified as a woman-owned firm by the State of Oregon.

Women-Owned Small Businesses (WOSB). Under the WOSB Federal Contract Program, "WOSB" designation allows women-owned small businesses to compete on certain federal projects with set-asides in industries where women-owned small businesses are substantially underrepresented. Set-asides are also available on certain federal projects for Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs). This program applies to direct contracts with federal agencies, not on contracts with agencies such as ODOT.

APPENDIX B.

Legal Framework and Analysis

Prepared by Holland & Knight LLP

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”),¹ and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 known as the Federal Disadvantaged Business Enterprise (“DBE”) Program,² which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).³ The appendix also reviews recent cases involving local minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Oregon Department of Transportation (ODOT).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁴ *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,⁵ (“*Adarand P*”), 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 ODOT’s participation in the Federal DBE Program.

The legal framework then analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to ODOT’s disparity study and the strict scrutiny analysis. In particular, this analysis reviews the Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation* (“*Caltrans*”), *et al.*⁶ and *Western States Paving Co. v. Washington State DOT*,⁷ and the recent

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

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

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

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

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

⁶ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, (9th Cir. April 16, 2013); 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.*, 713 F. 3d 1187, (9th Cir. April 16, 2013)

⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

U.S. District Court decisions in the Ninth Circuit in *Mountain West Holding Co. v. Montana, Montana DOT, et. al.*⁸, and *M.K. Weeden Construction v. Montana, Montana DOT, et. al.*⁹

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

In *Mountain West Holding* and *M.K. Weeden*, two recent U.S. District Courts in the Ninth Circuit upheld the validity of the Montana and Montana DOT DBE Programs implementing the Federal DBE Program. The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁰

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency’s or recipient’s implementation of the DBE Program, including: *Dunnet Bay Construction Co. v. Illinois DOT*,¹¹ *Northern Contracting, Inc. v. Illinois DOT*,¹² *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹³ *Adarand Construction, Inc. v. Slater*¹⁴ (“*Adarand VII*”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁶ *Geod Corporation v. New Jersey Transit Corporation*,¹⁷ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁸

The analyses of *AGC, SDC v. Cal. DOT*, *Western States Paving*, *Mountain West Holding, Inc.*, *M.K. Weeden*, and these other recent cases are instructive to ODOT and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26. They also are applicable in terms of the preparation of its DBE Program by ODOT submitted in compliance with the Federal DBE regulations.

⁸ *Mountain West Holding Co., Inc. v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit.

⁹ *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹⁰ *Mountain West Holding v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

¹¹ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the U.S. Supreme Court, pending; *Dunnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹² *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹³ *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).

¹⁴ 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

¹⁵ 2015 WL 1396376 (N.D. Ill. March 24, 2015), *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit, Docket No. 15-1827.

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

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

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

Following *Western States Paving*, the USDOT, in particular for agencies in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.¹⁹ The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.²⁰ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.²¹

The USDOT's Guidance is recognized by the federal regulations as "valid and binding, and constitutes the official position of the Department of Transportation"²² for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."²³ Accordingly, the USDOT has advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.²⁴

Recently in the Ninth Circuit, the Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' current implementation of the Federal DBE Program is constitutional.²⁵ The Ninth Circuit held that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.²⁶

¹⁹ Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; see 49 CFR § 26.9; see also 49 CFR Section 26.45.

²⁰ USDOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

²¹ *Id.*

²² *Id.*, 49 CFR § 26.9.

²³ *Western States Paving*, 407 F.3d at 996; see also Br. for the United States, at 28 (April 19, 2004).

²⁴ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

²⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F. 3d 1187, (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing*, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, (9th Cir. April 16, 2013).

²⁶ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

The two recent District Court decisions in *Mountain West Holding*²⁷ and *M.K. Weeden*²⁸ followed the AGC, *SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional Montana and Montana DOT's DBE Programs implementing the Federal DBE Program.

Also, recently the Seventh Circuit Court of Appeals in Illinois in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.²⁹ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence IDOT exceeded its authority under federal law.³⁰

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.³¹ 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."³² 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.³³ 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-

²⁷ *Mountain West Holding*, 2014 WL 6686734, *appeal pending*.

²⁸ *M.K. Weeden*, 2013 WL 4774517.

²⁹ 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015).

³⁰ *Id.*

³¹ 488 U.S. 469 (1989).

³² 488 U.S. at 500, 510.

³³ 488 U.S. at 480, 505.

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.³⁴

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.³⁵ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”³⁶

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.”³⁷ “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.”³⁸

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.”³⁹ 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.”⁴⁰

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.”⁴¹ “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.”⁴²

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.”⁴³

³⁴ 488 U.S. at 507-510.

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

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

³⁷ 488 U.S. at 502.

³⁸ *Id.*

³⁹ 488 U.S. at 509.

⁴⁰ *Id.*

⁴¹ 488 U.S. at 509.

⁴² *Id.*

⁴³ 488 U.S. at 492.

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

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

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

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

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

1. The Federal DBE Program

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴⁴ 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”).⁴⁵ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁶

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁴⁷

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 must follow in establishing a goal, and USDOT considers and must approve the goal and the recipient’s DBE program. The implementation of the Federal DBE

⁴⁴ *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*.

⁴⁵ Pub. L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁴⁶ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴⁷ 49 CFR § 26.51.

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 § 26.45.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁴⁸ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁴⁹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵⁰ 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.⁵¹ 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.⁵²

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵³

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁴ A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.⁵⁵

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

⁴⁸ 49 CFR § 26.45(a), (b), (c).

⁴⁹ *Id.*

⁵⁰ *Id.* at § 26.45(d).

⁵¹ *Id.*

⁵² 49 CFR § 26.45(b)-(d).

⁵³ 49 CFR § 26.51.

⁵⁴ 49 CFR § 26.51(b).

⁵⁵ 49 CFR §§ 26.21–26.37.

Fixing America's Surface Transportation Act" or the "FAST Act" (December 3, 2015)

On December 3, 2015, Congress passed the Fixing America's Surface Transportation Act (the "FAST Act"). It was signed by the President on December 4, 2015 as the new five year surface transportation authorization law.⁵⁶ The FAST Act continues the Federal DBE Program and makes "Findings" in Section 1101 (b) of the Act, including

Congress finds that —

- (A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;
- (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;
- (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;
- (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and
- (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

Based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012, Congress, in the FAST Act, has again found: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

⁵⁶ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

US DOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)

DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).⁵⁷

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, “Disadvantaged Business Enterprise: Program Implementation Modifications” in the Federal Register.⁵⁸

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.⁵⁹

The Final Rule amending the Federal DBE Program at 49 C.F.R. Part 26 provides substantial changes and additions to the implementation and administration of the Federal DBE Program regulations in three primary areas:

- (1) The Rule revises the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;
- (2) The Rule revises the certification-related program provisions and standards; and
- (3) The Rule amends and modifies several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.⁶⁰

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.⁶¹

Several of the areas revised include:

- The size standard on statutory gross receipts has been increased for inflation;
- The ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE’s profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;

⁵⁷ 79 F.R. 59566-59122 (October 2, 2014).

⁵⁸ 77 F.R. 54952-55024 (September 6, 2012).

⁵⁹ 77 F.R. 54952.

⁶⁰ 79 F.R. 59566-59622 (October 2, 2014).

⁶¹ *Id.*

- Certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;
- The overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;
- The submission of good faith efforts as a matter of “responsiveness” or as a matter of “responsibility”, including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;
- Guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;
- Provisions relating to the replacing of DBEs; and
- Counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.⁶²

In terms of forms and data collection, the new Rule attempts to simplify the Uniform Certification Application; establishes a new U.S. DOT personal net worth form to be used by applicants; establishes a uniform report of DBE awards or commitments and payments; captures data on minority women-owned DBEs and actual payments to DBEs reporting; and provides for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.⁶³

The new Rule makes certain changes in connection with program administration, including: adding to the definitions of “immediate family members” and “spouse” domestic partnerships and civil unions; the retention of all records documenting a DBE’s compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.⁶⁴

The Rule also provides changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.⁶⁵

USDOT Order 4220.1 (February 5, 2014).

USDOT Order 4220.1 is the USDOT’s Order on the Coordination and Oversight of the DBE Program. According to the USDOT, this Order clarifies the leadership roles and responsibilities of

⁶² 79 F.R. 59566-59622.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE program. The Order further establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that the Departmental Office of Civil Rights will act as the lead office in the Office of Secretary for the DBE program. The Operating Administrations will continue to be the first points of contacts regarding, and primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

The USDOT Order also establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that these offices will engage in systematic coordination regarding the administration and implementation of the DBE program by DOT recipients.

The Order sets forth specific programmatic responsibilities for the Departmental Office of Civil Rights, the rules and responsibilities of the General Counsel as Chief Legal officer of the USDOT, and the Office of Small and Disadvantaged Business Utilization within the Office of the Secretary. The Order clarifies rules and responsibilities for the Operating Administrations in their overseeing of the day-to-day administration of the Federal DBE program by recipients, providing training and technical assistance, maintaining current and up-to-date DBE websites and, taking appropriate actions to ensure program compliance.

The USDOT Order also establishes the DBE Oversight and Compliance Council that will facilitate collaboration, communication, and accountability among the DOT components responsible for the DBE program oversight, and assist in the formulation of policy regarding DBE program management and operation. The Order provides that the Office of the General Counsel established DBE Working Group, which generates rules changes and official DOT guidance, will continue to coordinate the development of formal and informal guidance and interpretations, and to ensure consistent and clear communications regarding the application and interpretation of DBE program requirements.

The USDOT Order 4220.1 may be found at: www.civilrights.dot.gov/disadvantaged-business-enterprise.

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provides “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁶⁶ In MAP-21, Congress specifically finds as follows:

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

⁶⁶ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

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

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

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

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”⁶⁷

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is “a compelling need for the continuation of the” Federal DBE Program.⁶⁸

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to \$1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.⁶⁹

In particular, the 2011 Final Rule provided that a recipient’s DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.⁷⁰

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.⁷¹ The recipient’s DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be

⁶⁷ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶⁸ *Id.*

⁶⁹ 76 F.R. 5083-5101.

⁷⁰ *See* 49 CFR § 26.37, 76 F.R. at 5097.

⁷¹ 76 F.R. at 5097, January 28, 2011.

submitted to the appropriate DOT operating administration for approval.⁷² The 2011 Final Rule provided a list of “strategies” that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient’s overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.⁷³ The 2011 Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient’s DBE program.⁷⁴

The 2011 Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.⁷⁵ The 2011 Final Rule set out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.⁷⁶ The 2011 Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.⁷⁷

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁷⁸

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.⁷⁹ The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁸⁰ The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of

⁷² *Id.*

⁷³ *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

⁷⁴ *Id.* at 5097, amending 49 CFR § 26.39(c).

⁷⁵ 76 F.R. at 5098, amending 49 CFR § 26.47(c).

⁷⁶ *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

⁷⁷ *Id.*, amending 49 CFR § 26.47(c)(5).

⁷⁸ 76 F.R. at 5092.

⁷⁹ 76 F.R. at 5095.

⁸⁰ 76 F.R. at 5095.

Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁸¹ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁸²

2. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁸³ ODOT’s implementation of the Federal DBE Program also is subject to the strict scrutiny analysis if it utilizes race- and ethnicity-based efforts.⁸⁴ 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.⁸⁵

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.⁸⁶ 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.⁸⁷ 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.⁸⁸

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁸⁹ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁹⁰

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.

⁸⁴ *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁸⁸ *Id.*

⁸⁹ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Mountain West Holding*, 2014 WL 666734, *appeal pending*.

⁹⁰ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a

Specifically, the federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁹¹ 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).⁹² 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.⁹³
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.⁹⁴

compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe*’s Motion for Summary Judgment and granting Defendant DOD’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in *Rothe* below in Section G. See also the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al*, 885 F.Supp.2d 237, (D.D.C.). Recently, the district court in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 107 F.Supp. 3d 183, 2015 WL 3536271 (D D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-15176, upheld the constitutionality of the Section 8(a) Program on its face, finding the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. See the discussion of the 2015 decision in *Rothe* in Section G below.

⁹¹ *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.

⁹² 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”).

⁹³ *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.

⁹⁴ *Adarand VII*. at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

- **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.⁹⁵
- **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.⁹⁶
- **MAP-21.** In July 2012, Congress passed MAP-21 (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.⁹⁷ Congress also found that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.⁹⁸

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁹⁹ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹⁰⁰ The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”¹⁰¹

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.¹⁰² It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.¹⁰³ In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”¹⁰⁴

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”¹⁰⁵ “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number

⁹⁵ *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237.

⁹⁶ *Advanced VII*, 228 F.3d at 1174-75.

⁹⁷ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁹⁸ *Id.* at § 1101(b)(1).

⁹⁹ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *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); *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hersbell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

¹⁰⁰ *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916.

¹⁰¹ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721.

¹⁰² *Id.*; *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000).

¹⁰³ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

¹⁰⁴ *Croson*, 488 U.S. at 500.

¹⁰⁵ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *appeal pending*; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3rd at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.”¹⁰⁶ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹⁰⁷

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰

To successfully rebut the government's evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government's showing of a strong basis in evidence.¹¹¹ 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.¹¹² Conjecture and unsupported criticisms of the government's methodology are insufficient.¹¹³ 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.¹¹⁴

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.”¹¹⁵ It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.¹¹⁶ 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.¹¹⁷ It has been further held

¹⁰⁶ *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*; 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509).

¹⁰⁷ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, appeal pending.

¹⁰⁸ *Adarand Constructors, Inc. v. Peña*, (“*Adarand IIP*”), 515 U.S. 200 at 235 (1995); see, e.g., *Majeske v. City of Chicago*, 218 F.3d at 820.

¹⁰⁹ *Majeske*, 218 F.3d at 820; see, e.g., *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 2015 WL 1396376 *7.

¹¹⁰ *Id.*; *Adarand VII*, 228 F.3d at 1166.

¹¹¹ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241–242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at *7, appeal pending.

¹¹² *Id.*; See e.g., *Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹¹³ *Id.*

¹¹⁴ *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991.

¹¹⁵ *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)).

¹¹⁶ *H.B. Rowe Co.*, 615 F.3d at 241; see e.g., *Concrete Works*, 321 F.3d at 958.

¹¹⁷ *Croson*, 488 U.S. 509, see e.g., *H.B. Rowe*, 615 F.3d at 241.

that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹¹⁸

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.¹¹⁹ “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.”¹²⁰

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.¹²¹ 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.¹²² However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹²³

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.¹²⁴ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹²⁵ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹²⁶
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹²⁷

¹¹⁸ *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., *AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

¹¹⁹ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

¹²⁰ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); See *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197.

¹²¹ *Croson*, 448 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rotbe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* (“*Concrete Works IP*”), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736.

¹²² See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rotbe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.

¹²³ *Western States Paving*, 407 F.3d at 1001.

¹²⁴ See, e.g., *Croson*, 488 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rotbe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

¹²⁵ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586, 603 (3^d 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.”).

¹²⁶ *Id.*

¹²⁷ See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹²⁸ 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.”¹²⁹
- **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.¹³⁰

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.¹³¹ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹³² 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.¹³³

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.¹³⁴

¹²⁸ *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹²⁹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-244; *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.

¹³⁰ *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.

¹³¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹³² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹³³ *Concrete Works I*, 36 F.3d at 1520.

¹³⁴ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.¹³⁵

b. The Narrow Tailoring Requirement.

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The 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.¹³⁶

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹³⁷ The narrow tailoring requirement has several components.

It should be pointed out that in the *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹³⁸ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

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).

¹³⁵ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *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; *Mountain West Holding*, 2014 WL 668734, appeal pending; *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).

¹³⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted).

¹³⁷ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

¹³⁸ 473 F.3d at 722.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹³⁹ The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.¹⁴⁰ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁴¹ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁴²

The recent (August 19, 2015) Seventh Circuit Court of Appeals decision in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁴³ The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹⁴⁴ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁴⁵

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁴⁶ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁴⁷

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity - conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁴⁸

¹³⁹ *Id.* at 722.

¹⁴⁰ *Id.* at 723-24.

¹⁴¹ *Id.*

¹⁴² See, e.g., *Midwest Fence*, 2015 WL 1396376 (N.D. Ill. 2015), *appeal pending*; *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁴³ *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 at **18-22 (7th Cir. August 19, 2015).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁴⁷ *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

¹⁴⁸ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- 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.¹⁴⁹

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.”¹⁵⁰ 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.”¹⁵¹

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹⁵²

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁵³ 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.”¹⁵⁴ The Court found that the District failed to show it seriously considered race-neutral measures.

¹⁴⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornbass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

¹⁵⁰ *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).

¹⁵¹ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; see also *Adarand I*, 515 U.S. at 237-38.

¹⁵² *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

¹⁵³ 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

¹⁵⁴ 551 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).

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a 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.¹⁵⁵ 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.¹⁵⁶

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.”¹⁵⁷

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.¹⁵⁸ The courts have also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’¹⁵⁹

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;

¹⁵⁵ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

¹⁵⁶ 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.

¹⁵⁷ *Croson*, 488 U.S. at 509-510.

¹⁵⁸ 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” See, e.g., *Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that 10 years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

¹⁵⁹ See, e.g., *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 CFR § 26.51(a)).

- 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 to 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.¹⁶⁰

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁶¹

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT’s DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.¹⁶² The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded *Western States Paving* focused on whether the federal statute sufficiently considered race-neutral alternatives.¹⁶³ In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”¹⁶⁴

¹⁶⁰ See 49 CFR § 26.51(b); see, e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29.

¹⁶¹ *Western States Paving*, 407 F.3d at 993.

¹⁶² *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁶³ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁶⁴ *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

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.¹⁶⁵ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁶⁶ (2) good faith efforts provisions;¹⁶⁷ (3) waiver provisions;¹⁶⁸ (4) a rational basis for goals;¹⁶⁹ (5) graduation provisions;¹⁷⁰ (6) remedies only for groups for which there were findings of discrimination;¹⁷¹ (7) sunset provisions;¹⁷² and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁷³

3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁷⁴ The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁷⁵

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.¹⁷⁶

Intermediate scrutiny, as interpreted by the Ninth Circuit and other federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that

¹⁶⁵ *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁶⁶ *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).

¹⁶⁷ *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁶⁸ *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

¹⁷² *Peightal*, 26 F.3d at 1559.

¹⁷³ *Coral Constr.*, 941 F.2d at 925.

¹⁷⁴ See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁷⁵ *Id.*

¹⁷⁶ *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*.

the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁷⁷

The Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁷⁸

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

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

- *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003. (See Section D below.)
- *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section E below.)
- *Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015). Dunnet Bay submitted a Petition for a Writ of Certiorari in January 2016 to the U.S. Supreme Court, which is pending. Docket No. 15-906 (See Section E below).
- *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 2015 WL 3536271 (D.D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176. (See Section G below.)

Although not involving the Federal DBE Program, it is instructive to note the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 2015 WL 3536271 (D.D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176.

Plaintiff *Rothe Development, Inc.* filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) challenging the constitutionality of the Section 8(a) Program on its face. The Constitutional challenge is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional.

¹⁷⁷ *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁷⁸ 122 F.3d at 929 (internal citations omitted.)

Plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic*, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face. The court in *Rothe* agrees with the court's findings, holdings and reasoning in *DynaLantic*, and thus concludes that Section 8(a) is constitutional on its face.

The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government demonstrated a compelling interest for the racial classification, the need for remedial action is supported by strong and un rebutted evidence, and the Section 8(a) program is narrowly tailored.

Rothe has appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.

This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact recipients of federal funds implementing the Federal DBE Program.

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

D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Ninth Circuit

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

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

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

This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure

upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (*citing* regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (*citing* regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (*citing* regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (*citing* regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (*citing* regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (*citing* regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (*citing* regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (*citing* regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations . . . are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the

contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did

not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

4. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163 (W.D. Wash. 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City

were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff’s 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff’s 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that “a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI.” The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT’s DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff’s claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff’s §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff’s race when calculating the annual utilization goal. The court held that since the policy was not “facially neutral” — and was in fact “specifically race conscious” — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT’s program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT’s Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

5. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, Plaintiff Mountain West Holding Co., Inc. (“Mountain West”), 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 decision in *Western States*, 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. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian-Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly 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 asserted 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.

Western States Paving Co. v. Washington DOT. The 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*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The 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 Court stated the Ninth Circuit 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." *Id.* at *2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit 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*, 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 998.

MDT study. The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The 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 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 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 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 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 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 seeks 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*, at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at *4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at *3, *citing Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows 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.'" *Mountain West*, at *5, *quoting* AGC, *San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West*, at *5, *citing* AGC, *San Diego*, 713 F.3d at 1199.

The Court in *Mountain West*, following AGC, *San Diego*, concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West*, at *5, *quoting* AGC, *San Diego*, at 1200.

Statistical evidence. The Court held that Montana’s DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana’s transportation contracting market. *Mountain West*, at *5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian-Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana’s transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana’s transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at *6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George “Lanoue” (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at *6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

Anecdotal evidence. The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana’s transportation contracting market, including evidence of a “good ole boy network.” *Id.* at *6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted “federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination.” *Mountain West*, at *6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue’s report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at *6. Contrary to Mountain West’s assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state’s DBE program must be supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana’s transportation contracting industry. *Id.* at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that “substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster.” *Mountain West* at *6, quoting *AGC, San Diego*, 713 F.3d at 1196.

Precipitous drop in utilization. The Court in *Mountain West* also found that neither Dr. LaNoue’s report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana’s transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at *6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at *6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

Conclusion and holding. In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at *7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.

6. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont. 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .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.

7. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186.* Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186.* The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187.* The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186.*

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186.* At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187.*

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

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

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

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

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-

38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

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

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

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

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Crosby* 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.

10. *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.

E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the United States Supreme Court (January 2016), pending, Docket No. 15-906.

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 judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 2015 WL 4934560 at *1. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at *2. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at *3. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at *3. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at *3-1. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at *5. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at *9, *17. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid project, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages, a declaratory judgment that the IDOT DBE Program is unconstitutional, and injunctive relief to enjoin the enforcement of the IDOT DBE Program.

The district court granted the IDOT Defendants' motion for summary judgment and denied Dunnet Bay's motion. *Id.* at *9. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* *Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at *31. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *10. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at *10. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.*

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at *13. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at *14. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 28.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at *15. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.*

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at *16. The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causation or redressability. *Id.* at *17. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.* at *17.

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at *17-18.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at *18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *19, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *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 *20. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *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 *20. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *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 20.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at *20. 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.*

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 *21. 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, including that 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 21-22.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at *22. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgment to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Petition is pending at the time of this report. *See* Docket No. 15-609.

2. 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 IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that

the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (citing 49 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.*

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

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

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

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

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

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

becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

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

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

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

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

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

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically

disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

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

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

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

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

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports

Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

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

4. *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.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[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 held that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

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

Recent District Court Decisions

5. *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), appeal pending in U.S. Court of Appeals, Seventh Circuit, Docket No. 15-1827.

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and

fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

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

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

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality’s prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing “hard proof” to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at *7. While narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court said it does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*, citing *Grutter v. 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. 2015 WL 1396376 at *7. To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own. *Id.*

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

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

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

Facial challenge to the Federal DBE Program. The court found that 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 *11. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

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

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id.* at *11. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation

rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *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* *12, *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. at* *12.

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

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

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id. at* *13. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id. at* *13. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id. at* *13. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.*

Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

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

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

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

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

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id. at *14.* The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. *Id. at *14.* Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id. at *14.* The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

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

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

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

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

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

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

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

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

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

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at *16. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* at *16. The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at *16. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

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

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

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

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

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

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at *17, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at *17.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at *18. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

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

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

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

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

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at *19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at *19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* at *19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at *20. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in

practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at *20.

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

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

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

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

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

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

issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

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

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

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

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

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at *23.

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment.

Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.⁶

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 assessing the evidence offered in support of a finding of discrimination, the Court concluded that Defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that Plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *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. Plaintiff's 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.

7. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).*

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

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

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

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

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

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of

22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

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

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

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

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

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The

Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. “ *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

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

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

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

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

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

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

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

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

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

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

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

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

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

Appeal. Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision in August 2015. See above at E1. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which is pending at the time of this report.

9. *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 Sberbrooke 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.

10. *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.R. § 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.

11. 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.

12. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff’d 473 F.3d 715 (7th Cir. 2007)

This decision is the district court’s order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments’ implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties’ Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

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

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

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

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

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

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

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

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

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

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

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

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

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

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

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

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

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also

found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.’

Id. at *21, *citing Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

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

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

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

Id. at *23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking

prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, Plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

13. *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 VIP*”), *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 woman 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.

14. *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.

15. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 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.

16. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program

to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Crosby’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.*

F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010)

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that]

shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting* *Alexander v. 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 *Crosson*, 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 Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

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

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

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

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

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

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

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 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 Viridi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Viridi to lose a contract that he would have otherwise received. *Id.* Thus, because Viridi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

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

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored

because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

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

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

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

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime

contractors.” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

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

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

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

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

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

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

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

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

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

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

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

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

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

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no

similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

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

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

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

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority

opinion in *Crosen* 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 *Crosen*, 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 *Crosen*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver

MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, *quoting*, *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, *quoting* *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to

give rise to an inference of discriminatory exclusion.” *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver’s disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm’s size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver’s argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver’s argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver’s expert testified that discrimination by banks or bonding companies would reduce a firm’s revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, “suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms.” *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver’s disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City’s position that a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver’s disparity studies because they did not control for firm specialization. The court noted the district court’s criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City’s expert, that the data he reviewed showed that MBEs were represented “widely across the different [construction] specializations.” *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver’s studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver’s studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver’s argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. *Id.* at 984.

Consistent with the court’s mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

Summary. The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage. The district court had ruled that the City could not introduce the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“VMI”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy

in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts. The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

The court was mindful of the fact that it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not reconcilable” with the Ohio Supreme Court’s decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

9. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City’s enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

10. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan 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.

Recent District Court Decisions

11. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 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 to the Memorandum and Recommendation. The district court subsequently in its Order, 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, dated March 22, 2016.

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 narrowly 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 narrowly 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.*

The 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 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. Kossman'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 Kossman'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 MWBEs 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.

12. *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 Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held

that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 19A, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the

lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F.3d 233 (4th Cir. 2010), discussed above.

13. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (“VOP”) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City’s work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City’s projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various “good faith” requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff’s claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the 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.

14. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta’s local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to

differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson's Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City's motion to continue plaintiff's Motion for Summary Judgment, denied the City's Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff's Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City's challenge to the plaintiffs' standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

15. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in

the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

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

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

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court

made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished . . . it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the

County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional." *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual

studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

16. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of "MBEs" in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is "encouraged" to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were "precatory." The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated

reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 928, quoting *Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

17. *The Builders Ass’n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)

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

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation”

revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

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

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

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

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

18. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

19. *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 Intervenor 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 Intervenor 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 Intervenor's evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenor 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 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 *Crosson* 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.

20. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

21. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *a'ff'd per curiam* 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

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

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

22. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

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

This opinion underscored that governments must show four factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

23. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

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

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

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

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

G. Recent Decisions and Authorities Involving Federal Procurement that May Impact DBE and MBE/WBE Programs

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

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small

businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially

and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization 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.

2. *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015), appeal pending in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176.

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 un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

Appeal pending at the time of this report. Plaintiff Rothe has appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.

3. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 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 Tenth Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to Plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the Plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not

required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court

points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O’Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party’s definition of “industry” at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with Plaintiff’s industry definition, and more significantly,

it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the Plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay Plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

4. *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 *Rotbe* 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.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay Plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

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APPENDIX C.

Contract Data Collection

Keen Independent compiled data about ODOT and local agency transportation contracts and the firms used as prime contractors and subcontractors on those contracts. Keen Independent sought sources of data that consistently included information about prime contractors and subcontractors on FHWA- and state-funded contracts, regardless of firm ownership or DBE status. The study team compiled data on construction, engineering and other transportation-related contracts. Data collection included contracts awarded by local agencies receiving funds through the Local Agency Certification Program.

Appendix C describes the study team's utilization data collection processes in six parts:

- A. ODOT contract and agreement data;
- B. Local Certification Program contract data;
- C. ODOT bid and proposal data;
- D. Characteristics of utilized firms and bidders;
- E. ODOT and External Stakeholder review; and
- F. Data limitations.

A. ODOT Contract and Agreement Data

Keen Independent collected data on transportation-related construction and engineering contracts that ODOT awarded during the study period.

The study team examined:

- 476 ODOT-awarded contracts totaling \$1.6 billion from Construction; and
- 1,759 Purchasing and Contract Management System (PCMS) contracts or work order contracts for \$367 million.

ODOT construction projects. Keen Independent collected data on transportation-related construction prime contracts and associated subcontracts that ODOT awarded from October 2010 through September 2014. Throughout, the data collection focused on transportation-related contracts such as highway construction, bridge construction, road maintenance and related activities.

The primary information sources for construction contracts were ODOT Office of Civil Rights databases identifying dollars going to prime contractors and subcontractors for each project. ODOT created these tables from its contract database to provide information such as:

- Project and contract number;
- Description of work;
- Award date;
- Award amount;
- Amendment or change order amounts (when applicable);
- Location of work (i.e., region);
- Whether the contract included FHWA funding;
- Prime contractor name;
- Whether DBE goals were applied, and if so, level of goal; and
- For subcontractors, firm names, dollar amounts and type of work performed.

Engineering-related, other professional services and other services contracts. The study team also collected data on transportation-related engineering and other services contracts. ODOT administers consulting work through consultant work order contracts and “agreements to agree.” Keen Independent identified engineering-related contracts from the Purchasing and Contract Management System (PCMS) access database provided by ODOT. The PCMS database tables included consulting and other contracts that had activity (work order contracts — either standard or direct) during the October 2010 through September 2014 study period. Keen Independent reviewed these data to develop a refined list of contracts.

- ODOT administered a number of price agreements during the study period. Consultants received work through work order contracts issued under those agreements. Keen Independent analysis focused on work order contracts issued during the study period. This included work order agreements executed during the study period for price agreements awarded prior to October 2010. Keen Independent treated each work order contract as a stand-alone contract element.
- Keen Independent augmented engineering-related subcontract data with additional data that was collected from ODOT Procurement Office’s electronic file folders by Merina and Co.
- Some engineering-related contracts in the utilization analysis were not work order contracts and were awarded within the October 2010 through September 2014 time period. In the utilization analysis, Keen Independent counted total dollars for these contracts including any contract amendments.

The final data for engineering-related contracts included the following information about the agreement or work order contract:

- Agreement number (and work order contract or amendment number);
- Description of work;
- Award date;
- Award amounts;
- Project location;
- Whether the contract involved federal funding;
- Prime consultant name and address; and
- For each subconsultant (if any), name, address, work type and dollar amount.

After collecting the necessary data about transportation-related engineering prime contracts and subcontracts, the study team created electronic prime contract and subcontract tables for use in the utilization and other analyses.

Review of in- and out-of-scope contracts. The study team identified contracts that were out-of-scope for several reasons including funding type (e.g., FTA-funded), contract date (out of study period), contract type (Agreement to Agree or Price Agreements) or work type. Contracts that were marked as out-of-scope were reviewed by ODOT.

B. Local Certification Program Contract Data

Under its Stewardship Agreement with FHWA, ODOT administers FHWA funding that goes to local agencies throughout the state. ODOT established the Certified Program Office, Statewide Program Unit to administer these local agency contracts. Sometimes ODOT awards those contracts on behalf of the local agencies. In other instances, cities, counties, regional transportation agencies, other local agencies and tribal entities award transportation contracts and ODOT reimburses the local agencies using federal or state funds.

When federal funds are involved, USDOT requires local agencies to comply with federal requirements including implementation of the Federal DBE Program. In addition to any federal requirements, Oregon state law governs local government public works contracting.

Certification Acceptance agencies. Twelve Certification Acceptance (CA) agencies self-advertise, award and manage their own engineering and construction contracts awarded using local agency money from ODOT. The twelve agencies are six counties (Clackamas, Linn, Jackson, Lane, Marion and Multnomah) and six cities (Corvallis, Eugene, Gresham, Medford, Portland and Salem). ODOT administers the advertising, awarding and managing of all other local agency construction and engineering contracts.

Data collection. ODOT's Construction database included data for local agency contracts during the October 2010 through September 2014 study period. The study team examined 46 local agency prime contracts and 586 subcontracts totaling \$184 million from Construction data.

C. ODOT Bid and Proposal Data

To complete case studies of ODOT's contracting processes, Keen Independent analyzed firms bidding and proposing on a sample of ODOT construction contracts and engineering-related agreements.

- ODOT provided bidder information for all construction contracts, including from October 2009 through September 2014. Keen Independent examined the bidders on a sample of ODOT construction contracts.
- Keen Independent also collected information concerning proposers on all ODOT engineering-related contracts from October 2009 through September 2014. For a sample of these contracts, Keen Independent examined outcomes for proposals submitted by MBEs, WBEs and majority-owned firms.

D. Characteristics of Utilized Firms and Bidders

For each firm identified as working on an ODOT or local agency contract, Keen Independent attempted to collect business characteristics including the race, ethnicity and gender of the business owner. Keen Independent collected similar information for a sample of bidders and proposers (including those not receiving work). Firm-level data included company name, address, race/ethnicity and gender ownership, and whether the firm was DBE-certified.

Sources of information to determine whether firms were owned by minorities or women (including race/ethnicity) and whether companies were DBE-certified, included:

- State of Oregon DBE, MBE and WBE certification data;
- Study team telephone interviews with firm owners and managers (attempted with each utilized firm with a contract over \$10,000);
- Past ODOT data on firms certified as DBEs;
- Other review of firm information (i.e., information about ownership on firm websites);
- Information from Dun & Bradstreet; and
- ODOT staff and External Stakeholder review.

E. ODOT and External Stakeholder Review

ODOT and the External Stakeholder Group reviewed Keen Independent contract data during several stages of the study process. The study team met with ODOT staff and the External Stakeholder Group multiple times to review data collection, information the study team gathered, sample data for specific contracts and preliminary results.

ODOT and the External Stakeholder Group also reviewed the race, ethnicity and gender coding of firm ownership for utilized firms as Keen Independent prepared the utilization and disparity analyses.

F. Data Limitation

As discussed in Chapter 3, prime contractors do not typically use subcontracts to procure trucking services and materials supply on ODOT construction projects. Therefore, ODOT has information for trucking firms and materials suppliers used to meet DBE contract goals, but has very little information on other trucking companies and suppliers participating in ODOT contracts. This limitation would not appear to have a meaningful effect on overall study results, but limits the study team's ability to compare non-DBE and DBE participation as truckers and materials suppliers in the Chapter 8 overconcentration analysis.

ODOT had more comprehensive information about contract and subcontract awards than payments for those contracts and subcontracts. Therefore, for most contracts, Keen Independent collected and analyzed data on awarded amounts. This does not appear to materially affect results, however, based on further analysis described below.

- The study team obtained an ODOT analysis for FFY 2010 through FFY 2015 that compared awarded amounts to paid amounts for DBEs and for all firms. After removing one year that appeared to be an anomaly (FFY 2013), payments for DBEs were only 2 percent lower than total award amounts for these combined years, and total contract payments for all firms (DBEs and non-DBEs) were 1 percent lower than total award amounts.
- Because of how closely payments matched contract award data, the percentage of contract dollars going to DBEs was nearly identical when calculated based on payments or contract awards (differed by only one-tenth of a percentage point).

APPENDIX D.

General Approach to Availability Analysis

The study team used an approach similar to a “custom census” to compile data on MBEs, WBEs and majority-owned firms available for ODOT contracts and developed dollar-weighted estimates of MBE/WBE availability based on analysis of individual ODOT and local agency transportation-related construction and engineering prime contracts and subcontracts. Appendix D further explains the availability methodology and results in five parts:

- A. General approach to collecting availability information;
- B. Development of the survey instruments;
- C. Execution of surveys;
- D. Additional considerations related to measuring availability; and
- E. The survey instrument.

A. General Approach to Collecting Availability Information

Keen Independent collected information from firms about their availability for ODOT and local government contracts through telephone surveys.

Listings. The firms contacted in the availability surveys came from several sources:

- Company representatives who had previously identified themselves to ODOT as interested in learning about future work by registering with the State of Oregon’s Oregon Procurement Information Network (ORPIN), through ODOT’s electronic Bidding Information Distribution system/database (eBIDS), through OWMESB directory of certified firms, or by bidding on or performing work on ODOT contracts.
- Businesses that Dun & Bradstreet (D&B) identified in certain transportation contracting-related subindustries in Oregon or Southwest Washington (D&B’s Hoover’s business establishment database).

The availability analysis focused on companies in Oregon and two counties in Washington (Clark and Skamania Counties) performing types of work most relevant to ODOT and local agency transportation construction and engineering contracts (including subcontracts, trucking and supplies for those contracts). As such, Keen Independent did not include all of the listings in the bidder/vendor lists or D&B database in the availability surveys, as described below.

ORPIN and other ODOT bidder, vendor and planholder lists. ODOT provided several lists of construction and professional services goods and other services bidders, vendors and planholders. The individuals and businesses on these lists identified that they are interested in bidding on ODOT construction- and engineering-related contracting opportunities. The lists include:

- ORPIN – Individuals and businesses interested in bidding on Oregon state agency (including ODOT) and many local government opportunities can register as a vendor on the Oregon Procurement Information Network (ORPIN), an online database of firms that have indicated they are ready, willing and able to perform work on public agency projects in the State of Oregon. ODOT provided a list of over 28,000 subscribers as of May 2015. Keen Independent analyzed the list and removed subscribers that did not pertain to transportation contracting.
- OCR updates – Businesses and individuals can sign up to receive ODOT Office of Civil Rights updates via email. This list includes more than 4,000 firms.
- Construction prequalified contractors – This is a list of prime construction contractors that have been approved to bid on ODOT construction contracts. Contractors must apply to be prequalified.
- Construction prime bidder – The construction prime bidder list includes all construction contractors who have submitted a prime bid for an ODOT construction project during the study period.
- Construction sub bidder – Prime bidders are asked to submit a Subcontractor Solicitation and Utilization Report (SSUR) form within 10 days of a project bid date showing all sub-proposers they sought or received sub-proposals from for the project, and whether or not the firm was utilized. The construction sub bid data was comprised of the sub bidder data from the SSUR.
- Construction planholders – Prime and subcontractors can sign up for ODOT’s electronic Bidding Information Distribution system/database (eBIDS). This enables them to view the plans and specifications for ODOT’s advertised projects. Contractors who want to bid as a prime must place themselves on the Holders of Bidding Plans list. Subcontractors and other interested parties (e.g., plan centers) who would like to download the plans and specifications must place themselves on the Holders of Informational Plans list. eBIDS users can view the planholders lists to find who to submit sub-quotes to or from which to request sub-quotes. Businesses who have registered on eBIDS comprise this list.
- Construction vendors – This list of firms includes all prime and subcontractors who have bid or been awarded an ODOT project.
- A&E bid respondents – this list was comprised of data collected on vendors who responded to RFPs for A&E and related services, Price Agreements and direct contracts.

- A&E sub bidders – Prime A&E bidders are also required to submit an SSUR form detailing all sub-proposers. Data in this list includes those A&E sub bidders included on all SSUR forms during the study period.
- A&E vendors – A&E vendors list includes all contractors that responded to an RFP, ITB or were added to an SSUR form by a prime proposer/bidder.

Keen Independent attempted to exclude any listings for government agencies or not-for-profit organizations. (Not all were excluded on the list, but representatives indicated that the organization was not a business when surveyed.)

Dun & Bradstreet Hoover’s database. There might be other firms available for ODOT work that do not appear on ODOT lists. Therefore, Keen Independent supplemented the firms on the ODOT lists by acquiring Dun & Bradstreet data for firms in Oregon and Southwest Washington doing business in relevant subindustries.

Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially-available database of U.S. businesses. The study team used D&B listings to supplement the companies identified in ODOT’s databases of bidders, vendors and planholders.

Keen Independent determined the types of work involved in ODOT contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes.¹ Figure D-1 on the following page identifies the work specialization codes the study team determined were the most related to the study contract dollars.

Keen Independent obtained a list of firms from the D&B Hoover’s database within relevant work codes that had locations within Oregon and the two Washington counties. D&B provided phone numbers for these businesses.

Total listings. Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, the data sources provided 14,678 unique listings for the availability surveys.

Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a “custom census.”

¹ D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Telephone surveys. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses. After receiving the list described above, CRI used the following steps to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the Oregon Department of Transportation for purposes of expanding its list of companies interested in performing ODOT transportation-related work.
- Some firms indicated in the phone calls that they did not work in the transportation contracting industry or had no interest in ODOT work, so no further survey was necessary. (Such surveys were treated as complete at that point.)

Online surveys. For firms from the ODOT sources described above that had email addresses, ODOT Office of Civil Rights distributed a request to complete the online availability survey through the eGovDelivery list service.

Other avenues to complete a survey. Even if a company was not directly contacted by the study team, business owners could complete a survey for their company online or request a fax version of the survey.

Figure D-1. D&B 8-digit codes for availability list source

Code	Description	Code	Description
07820207	Sodding contractor	17919902	Concrete reinforcement, placing of
07829903	Landscape contractors	17919905	Iron work, structural
14420000	Construction sand and gravel	17919907	Precast concrete struct. frmng or panels, placing
14420200	Gravel and pebble mining	17940000	Excavation work
14420201	Gravel mining	17949901	Excavation and grading, building construction
16110000	Highway and street construction	17950000	Wrecking and demolition work
16110100	Highway signs and guardrails	17959901	Concrete breaking for streets and highways
16110101	Guardrail construction, highways	17959902	Demolition, buildings and other structures
16110102	Highway and street sign installation	17990900	Building site preparation
16110200	Surfacing and paving	17990901	Boring for building construction
16110202	Concrete construction: roads, hwys, sidewalks	17990903	Shoring and underpinning work
16110203	Grading	17999906	Core drilling and cutting
16110204	Highway and street paving contractor	17999907	Dewatering
16110205	Resurfacing contractor	17999908	Diamond drilling and sawing
16110206	Sidewalk construction	17999912	Fence construction
16110207	Gravel or dirt road construction	17999929	Sign installation and maintenance
16119900	Highway and street construction, nec	17999932	Welding on site
16119901	General contractor, hwy and street construction	29110501	Asphalt or asphaltic matls, made in refineries
16119902	Highway and street maintenance	29110505	Road materials, bituminous
16119903	Highway reflector installation	29110506	Road oils
16220000	Bridge, tunnel, and elevated hwy construction	29510000	Asphalt paving mixtures and blocks
16229900	Bridge, tunnel, and elevated highway, nec	29510200	Paving mixtures
16229901	Bridge construction	29510201	Asphalt/asphaltic pvng mixtures (not from ref.)
16229902	Highway construction, elevated	29510202	Coal tar paving materials (not from refineries)
16229903	Tunnel construction	29510203	Concrete, asphaltic (not from refineries)
16229904	Viaduct construction	29510204	Concrete, bituminous
16239902	Manhole construction	29510206	Road materials, bituminous (not from ref.)
16290400	Land preparation construction	32720000	Concrete products, nec
16299901	Blasting contractor, except building demolition	32720710	Pier footings, prefabricated concrete
16299902	Earthmoving contractor	32720711	Piling, prefabricated concrete
16299903	Land clearing contractor	32729903	Paving materials, prefabricated concrete
16299904	Pile driving contractor	32729904	Prestressed concrete products
16299906	Trenching contractor	32730000	Ready-mixed concrete
17210300	Industrial painting	33120400	Structural and rail mill products
17210302	Bridge painting	33120405	Structural shapes and pilings, steel
17210303	Pavement marking contractor	33120500	Bar, rod, and wire products
17310000	Electrical work	34410200	Fabricated structural metal for bridges
17319903	General electrical contractor	34410201	Bridge sections, prefabricated, highway
17410100	Foundation and retaining wall construction	34490100	Fabricated bar joists, concrete reinforcing bars
17410102	Retaining wall construction	34490101	Bars, concrete reinforcing: fabricated steel
17710000	Concrete work	42120000	Local trucking, without storage
17710200	Curb and sidewalk contractors	42120200	Liquid transfer services
17710201	Curb construction	42120201	Liquid haulage, local
17710202	Sidewalk contractor	42120202	Petroleum haulage, local
17710301	Blacktop (asphalt) work	42129904	Draying, local: without storage
17719901	Concrete pumping	42129905	Dump truck haulage
17719902	Concrete repair	42129908	Heavy machinery transport, local
17719904	Foundation and footing contractor	42129912	Steel hauling, local
17910000	Structural steel erection	42130000	Trucking, except local
17919900	Structural steel erection, nec	42139902	Building materials transport

Figure D-1. D&B 8-digit codes for availability list source (cont.)

Code	Description	Code	Description
42139904	Heavy hauling, nec	87110402	Civil engineering
42139905	Heavy machinery transport	87110404	Structural engineering
42139908	Liquid petroleum transport, non-local	87119903	Consulting engineer
49590102	Sweeping service: road, airport, parking lot, etc.	87120101	Architectural engineering
50320100	Paving materials	87130000	Surveying services
50320101	Asphalt mixture	87139900	Surveying services, nec
50320102	Paving mixtures	87139901	Photogrammetric engineering
50320504	Concrete mixtures	87139902	Aerial digital imaging
50329901	Aggregate	87310302	Environmental research
50329904	Cement	87349909	Soil analysis
50329905	Gravel	87419902	Construction management
50329908	Stone, crushed or broken	87420402	Construction project management consultant
50399912	Soil erosion control fabrics	87420410	Transportation consultant
50510209	Forms, concrete construction (steel)	87480200	Urban planning and consulting services
50630504	Signaling equipment, electrical	87480204	Traffic consultant
50990304	Reflective road markers	87489905	Environmental consultant
52110502	Cement	89990700	Earth science services
52110506	Sand and gravel	89990701	Geological consultant
73530000	Heavy construction equipment rental	89990702	Geophysical consultant
73539901	Cranes and aerial lift equipment, rental or leasing		
73539902	Earth moving equipment, rental or leasing		
73599912	Work zone traffic eqpt (flags, cones, barrels, etc.)		
73890800	Mapmaking services		
73890801	Mapmaking or drafting, including aerial		
73890802	Photogrammatic mapping		
73899909	Crane and aerial lift service		
73899921	Flagging service (traffic control)		
73899937	Pilot car escort service		
87110000	Engineering services		
87110400	Construction and civil engineering		

B. Development of the Survey Instruments

Keen Independent developed the survey instruments through the following steps:

- Keen Independent drafted an availability survey instrument; and
- ODOT staff and the Quality Service Provider reviewed the draft survey instrument.

The final telephone survey instrument is presented at the end of this appendix.

Survey structure. The availability survey included nine sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the survey.

Areas of survey questions included:

- **Identification of purpose.** The surveys began by identifying ODOT as the survey sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working on road, highway and bridge projects”).
- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.
- **Contact information.** CRI then collected complete contact information for the establishment and the individual who completed the survey.
- **Verification of work related to transportation-related projects.** The interviewer asked whether the organization does work or provides materials related to construction, maintenance or design on transportation-related projects (Question 1). Interviewers continued the survey with businesses that responded “yes” to that question.
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question 2). Interviewers continued the survey with businesses that responded “yes” to that question.
- **Identification of main lines of business.** Businesses then chose from a list of work types that their firm performed in categories of construction-related work, engineering-related work and supply activities. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question.
- **Sole location or multiple locations.** The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)
- **Past bids or work with government agencies and private sector organizations.** The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts.
- **Qualifications and interest in future transportation work.** The interviewer asked about businesses’ qualifications and interest in future work with ODOT and other government agencies in connection with both prime contracts and subcontracts.
- **Geographic areas.** Interviewees were asked whether they could do work in several geographic areas in Oregon: Portland/Hood River region, Willamette Valley and Northwest Oregon region, Southwestern Oregon, Central Oregon and Eastern Oregon.
- **Largest contracts.** The study team asked businesses to identify the value of the largest transportation-related contract or subcontract on which they had bid on or had been awarded in Oregon during the past seven years.

- **Ownership.** Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources such as DBE and MBE directories.
- **Business background.** The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.
- **Potential barriers in the marketplace.** Establishments were asked a series of questions concerning general insights about the marketplace and ODOT contracting practices including obtaining loans, bonding and insurance. The survey also included two open-ended questions; one asking how firms find out about ODOT prime and subcontracting opportunities, and one asking for any general thoughts about contracting with ODOT. In addition, the survey included a question asking whether interviewees would be willing to participate in a follow-up survey about marketplace conditions.

C. Execution of Surveys

Keen Independent held planning and training sessions with CRI as part of the launch of the availability surveys. CRI began conducting full availability surveys in June of 2015 and completed the surveys in mid-August.

To minimize non-response, CRI made at least five attempts at different times of day and on different days of the week to reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

Establishments that the study team successfully contacted. Figure D-2 on the following page presents the disposition of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning list of 14,678 unique businesses).

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (2,212); or
- Wrong numbers for the desired businesses (84).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.

Figure D-2.
Disposition of
attempts to
survey business
establishments

Note:
Study team made at
least five attempts to
complete an interview
with each establishment.

Source:
Keen Independent from
2015 Availability Surveys.

	Number of firms	Percent of business listings
Beginning list	14,678	
Less non-working phone numbers	2,212	
Less wrong number	84	
Firms with working phone numbers	12,382	100.0 %
Less no answer	4,781	38.6
Less could not reach responsible staff member	351	2.8
Less could not continue in English or Spanish	11	0.2
Less unreturned fax/email	87	0.7
Less said already completed online survey, but hadn't	33	9.4
Firms successfully contacted	7,119	57.5 %

Working phone numbers. As shown in Figure D-2, there were 12,382 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (4,781) establishments.
- **Could not reach responsible staff member.** For a small number of businesses (351), a responsible staff person could not be reached to complete the after repeated attempts.
- **Could not complete the survey in English or Spanish.** Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, as appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, Questions 1 and 2 of the instrument were asked in Spanish. If the firm appeared that it performed transportation related work, the interviewer asked if the company would like to complete an email or faxed questionnaire (in English), which was then sent. This approach appeared to nearly eliminate any language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for only 11 companies (mix of languages such as Russian, Romanian, etc.).
- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax. There were 87 businesses that requested such surveys but did not return them.
- **Respondent indicated that they had already completed an online survey.** There were 33 respondents who said that they had already completed an online survey that were not found within the online survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 7,119 businesses, or 57.5 percent of those with working phone numbers.

Establishments included in the availability database. Figure D-3 presents the disposition of the 7,119 businesses the study team successfully contacted and how that number resulted in the 1,639 businesses the study team included in the availability database.

Figure D-3.
Disposition of
successfully
contacted
businesses

Source:
Keen Independent from
2015 Availability Surveys.

	Number of firms
Firms successfully contacted	7,119
Less businesses not interested in discussing availability for ODOT work	1,170
Less no longer in business	807
Firms that completed interviews about business characteristics	5,142
Less no road and highway related work	2,918
Less not a for-profit business	90
Less residence, not a business	407
Less duplicate responses	143
Qualified firms from initial list	1,584
Plus other firms that completed online survey	55
Total firms included in availability database	1,639

Establishments not interested in discussing availability for ODOT work. Of the 7,119 businesses that the study team successfully contacted, 1,170 were not interested in discussing their availability for ODOT work. In Keen Independent’s experience, those types of responses are often firms that do not perform relevant types of work. Another 807 respondents indicated that their companies were no longer in business.

Businesses included in the availability database. Many firms completing availability surveys were not included in the final availability database because they indicated that they did not perform work related to transportation contracting or reported that they were not a for-profit business:

- Keen Independent excluded 2,918 businesses that indicated that they were not involved in transportation contracting work.
- Of the completed surveys, 90 indicated that they were not a for-profit business (including non-profits or government agencies). Another 407 indicated that the call was to a residence and that there was no active business at that location. Surveys ended when respondents reported that their establishments were not for-profit businesses.
- There were 143 duplicate responses excluded at this point of the analysis (answers were consolidated).

After those final screening steps, the survey effort produced a database of 1,639 businesses potentially available for ODOT work.

Coding responses from multi-location businesses. As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

D. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability, particularly as they related to ODOT's implementation of the Federal DBE program.

Not providing a count of all businesses available for ODOT work. The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for ODOT work. The research appropriately focused on firms in highway-related subindustries and the relevant geographic area for ODOT transportation contracting. Subindustries that comprised a very small portion of ODOT highway-related work were not included. Keen Independent did not purchase Dun & Bradstreet data for firms outside Oregon and Southwest Washington. And, not all firms on the list of businesses completed surveys, even after repeated attempts to contact them. Therefore, the availability analysis did not provide a comprehensive listing of *every* business that could be available for all types of ODOT work and should not be used in that way.

There were some firms receiving ODOT work that did not complete an availability survey. Further research indicated that some were out of business by the time that the survey was conducted or might have been no longer interested in ODOT work. Keen Independent's review of each of the 25 firms receiving the most ODOT work that were not on the availability list found that each were either located outside Oregon and Southwest Washington or performed types of businesses outside the focus of the availability survey. And, Keen Independent's analysis of MBE/WBE and majority-owned firms receiving ODOT work found that MBE/WBEs were as or more likely to have completed an availability survey as majority-owned firms.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.²

Not using a "headcount" based solely on ODOT lists. USDOT guidance for determining MBE/WBE availability recommends dividing the number of businesses in an agency's DBE directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of MBE/WBEs for an agency's prime contracts and subcontracts.

Keen Independent used ODOT lists that included firms that expressed interest in ODOT work, but included other firms potentially available for ODOT contracts as well. This helps capture firms that might have been discouraged from pursuing ODOT work and would not appear on ODOT lists.

Keen Independent's approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses' qualifications, size of contracts they bid on and interest in ODOT work, which allowed the study team to take a more refined approach to measuring availability.

² Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

Using D&B lists. Keen Independent supplemented business lists obtained from ODOT with Dun & Bradstreet business listings for Oregon and Southwest Washington. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Oregon due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.
- Some businesses providing transportation construction or engineering-related work might not be classified as such in the D&B data.

Because Keen Independent used several ODOT data sources of business listings for the availability analysis as well as D&B lists, the final survey list captures some firms not included in the D&B data. (The study team estimates that about one-quarter of the completed surveys were firms not on the D&B list.)

Selection of specific subindustries. Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent's use of additional ODOT data (ORPIN, eBids, bidders/proposers lists, planholders lists, etc.) for Oregon mitigates this potential concern.

Large number of companies reporting that they do not perform highway-related work or were not interested in discussing ODOT work. Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in ODOT work. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

For example, Dun & Bradstreet does not have a subindustry code that identifies the subset of electrical firms or trucking firms that perform highway-related work. Therefore, Keen Independent acquired a general list of electrical firms (code 17310000) and local trucking firms (code 42120000), and through surveys identified which firms would perform highway or other transportation work. Most did not. Most of the firms indicating that they were not interested in discussing ODOT work were in electrical, trucking, site work and engineering services.

There were some companies that had actually performed ODOT contracts that responded in the availability survey that they were not interested in discussing their availability for ODOT work or did not perform relevant work. These firms accounted for only 3 percent of the total of such responses, and there was no indication that MBE/WBEs were underrepresented in the final availability database due to these types of responses.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees; and
- Language barriers.

Research sponsorship. Interviewers introduced themselves by identifying ODOT as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences did not lead to lower estimates of MBE/WBE availability than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete a survey is less important because the number of MBE/WBE trucking firms is compared with the number of total trucking firms when calculating availability for trucking work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B source) that were successfully contacted, MBE/WBE firms were just slightly more likely to be successfully contacted than majority-owned firms (7.4% of initial list and 8.0% of successfully surveyed firms). There is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

Potential language barriers. Because of the methods explained previously in this appendix, any language barriers were minimal. Study results do not appear to have been affected by conducting the principal portions of the availability survey in English. Callbacks to firms in Spanish when an initial call identified an individual who only spoke Spanish appeared to be effective.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources such as ORPIN and other vendor information that the study team collected from ODOT. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses and was compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past seven years with actual ODOT and local agency contract data.
- Keen Independent used DBE directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys. The study team re-contacted companies for clarification in the event of any inconsistencies in race, ethnicity and gender ownership information for the firm.

A copy of the survey instrument for construction and engineering follows.

E. ODOT Disparity Study — Standard Availability Survey Instrument

Hello. My name is [interviewer name]. We are calling on behalf of the Oregon Department of Transportation (ODOT). [pronounced ore'-u-gun] This is not a sales call. ODOT [pronounced "Oh-dot"] is compiling a list of companies interested in working on road, highway and bridge projects. This includes any construction, engineering and design, trucking and materials supply on highways, roads, bridges and related projects for state and local governments.

Who can I speak with to get the information we need from your firm?

[After reaching THE OWNER OR an appropriately senior staff member, the interviewer should re-introduce the purpose of the survey and begin with questions]

[IF NEEDED ... We are contacting thousands of contractors, engineering firms, trucking companies, suppliers and other types of businesses in Oregon.]

IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION ... You can visit the study website at www.ODOTdbestudy.com to learn more. And, you can call Tiffany Hamilton at ODOT, (503) 986-4355.

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO ODOT'S EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE DEPARTMENT]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

- Right company – SKIP TO 1
- Not right company
- Refuse to give information – TERMINATE

Y1. Can you give me any information about [firm name]?

- Yes, same owner doing business under a different name – SKIP TO Y4
- Yes, can give information about named company
- Company bought/sold/changed ownership – SKIP TO Y4
- No, does not have information – TERMINATE
- Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [firm name]? – SKIP TO Y5

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

- STREET ADDRESS _____
- CITY _____
- STATE _____
- ZIP _____

Y4. And what is the new name of the business that used to be [firm name]?

- (ENTER UPDATED NAME)

Y5. Can you give me the name of the owner or manager of the new business?

- (ENTER UPDATED NAME)

Y6. Can I have a telephone number for him/her?

- (ENTER UPDATED PHONE)

Y7. Can you give me the complete address or city for [new firm name]?

- STREET ADDRESS _____
- CITY _____
- STATE _____
- ZIP _____

Y8. Do you work for this new company?

- Yes
- No - TERMINATE

1. Does your firm do any work related to road, highway and bridge projects? This includes any construction, engineering and design, trucking and materials supply on highways, roads, bridges and related projects.

- Yes
- No

2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

- Yes
- No

IF YOU ANSWER NO TO QUESTION 1 OR 2, THE SURVEY IS COMPLETE.

IF YES TO QUESTIONS 1 AND 2, CONTINUE TO QUESTION 3.

IF INTERVIEWEE IS UNWILLING TO COMPLETE THE REMAINDER OF THE INTERVIEW VIA PHONE...

Z1. You also have the option to complete the survey online at www.ODOTdbestudy.com, can we send you a link?

- Yes No

If Yes, record email address:

Z2. **[Answer if 'No' to Z1. Otherwise skip to Q3.]** Would you be interested in completing the survey via fax?

- Yes No

If Yes, record fax number: _____

Type of Work

3. What types of work does your firm perform related to construction, maintenance or design of road, highway or bridge projects? Please indicate all that apply.

Construction-related

- Bridge and elevated highway construction
- Asphalt and concrete paving
- General road construction and widening
- Excavation, site prep, grading and drainage
- Drilling and foundations
- Electrical work including lighting and signals
- Temporary traffic control
- Striping or pavement marking
- Installation of guardrails, fencing or signs
- Landscaping and related work including erosion control
- Painting for road or bridge projects
- Concrete flatwork (including sidewalk, curb and gutter)
- Other concrete work
- Structural steel work
- Pavement surface treatment (such as sealing)
- Pavement milling
- Concrete pumping
- Concrete cutting
- Trucking and hauling
- Wrecking and demolition
- Underground utilities
- Other _____

Engineering-related

- Engineering
- Transportation planning
- Construction management
- Environmental consulting
- Inspection and testing
- Surveying and mapping
- Other _____

4. Does your firm sell: (Check all that apply.)

- Aggregate materials supply
- Asphalt, concrete or other paving materials
- Traffic or highway signs
- Fence or guardrail materials
- Steel
- Petroleum
- Other _____

5. Please briefly describe the main line of business at your firm. In what industry would you classify the primary line of work at your firm?

6. Does your firm have offices in multiple locations?

- Yes No Don't know

7. Is your company a subsidiary or affiliate of another firm?

- Independent
- Subsidiary of another firm *Parent company name:* _____
- Affiliate of another firm *Affiliated company name:* _____
- Don't know

Role in Construction, Maintenance, Engineering or Other Work

The following questions pertain to your role in work related to transportation projects [For example: road, highway and bridge projects]

8. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in Oregon? [Examples include ODOT, cities or counties.]
- Yes No Don't know
9. [Answer if 'Yes' to Q8. Otherwise skip to Q10.] Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- Prime Contractor Trucker / Hauler
 Subcontractor Supplier
 Other _____
10. During the past five years, has your company worked on any part of a contract for a state or local government agency in Oregon?
- Yes No Don't know
11. [Answer if 'Yes' to Q10. Otherwise skip to Q12.] Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- Prime Contractor Trucker / Hauler
 Subcontractor Supplier
 Other _____
12. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector project in Oregon?
- Yes No Don't know
13. [Answer if 'Yes' to Q12. Otherwise skip to Q14.] Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- Prime Contractor Trucker / Hauler
 Subcontractor Supplier
 Other _____
14. During the past five years, has your company worked on any part of a contract for a private sector project in Oregon?
- Yes No Don't know

15. **[Answer if 'Yes' to Q14. Otherwise skip to Q16]** Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- Prime Contractor Trucker / Hauler
- Subcontractor Supplier
- Other _____
16. Thinking about future transportation work, is your company qualified and interested in working with ODOT as a prime contractor?
- Yes No Don't know
17. Thinking about future transportation-related work, is your company qualified and interested in working with cities, counties or other local agencies in Oregon as a prime contractor?
- Yes No Don't know
18. Thinking about future transportation-related work, is your company qualified and interested in working with ODOT as a subcontractor, trucker/hauler, or supplier?
- Yes No Don't know
19. Thinking about future transportation-related work, is your company qualified and interested in working with cities, counties or other local agencies in Oregon as a subcontractor, trucker/hauler, or supplier?
- Yes No Don't know

Geographic Areas Your Company Serves in Oregon

20. My next questions are about the geographic areas in Oregon where your company can work.
- 20a. Can your company do work in the Portland/Hood River region? [EITHER AREA IF HAVE A QUESTION]
- Yes No Don't know
- 20b. Willamette Valley and Northwest Oregon region. [pronounced will-a'-met, with a short a] **such as Salem, Newport and Eugene?**
- Yes No Don't know
- 20c. Southwestern Oregon **such as Roseburg and Medford?**
- Yes No Don't know
- 20d. Central Oregon **such as Bend and Klamath Falls?**
- Yes No Don't know
- 20e. Eastern Oregon **such as Pendleton, La Grande and Burns?**
- Yes No Don't know

Contract History

24. In rough dollar terms, what was the largest road-, highway-, or bridge-related contract or subcontract your company was awarded in Oregon during the past five years? Please include any government or private-sector contracts and any contracts not yet completed.
- | | |
|---|---|
| <input type="checkbox"/> Less than \$100,000 | <input type="checkbox"/> \$10 million up to \$20 million |
| <input type="checkbox"/> \$100,000 up to \$500,000 | <input type="checkbox"/> \$20 million up to \$50 million |
| <input type="checkbox"/> \$500,000 up to \$1 million | <input type="checkbox"/> \$50 million up to \$100 million |
| <input type="checkbox"/> \$1 million up to \$2 million | <input type="checkbox"/> More than \$100 million |
| <input type="checkbox"/> \$2 million up to \$5 million | <input type="checkbox"/> None |
| <input type="checkbox"/> \$5 million up to \$10 million | <input type="checkbox"/> Don't know |
- 24a. Was this the largest road-, highway-, or bridge-related contract or subcontract that your company bid on or submitted quotes for in Oregon during the past five years?
- Yes No Don't know
25. **[Answer if 'No' in Q24a.]** What was the largest road-, highway-, or bridge-related contract or subcontract that your company bid on or submitted quotes for in Oregon during the past five years?
- | | |
|---|---|
| <input type="checkbox"/> \$100,000 or less | <input type="checkbox"/> \$10 million up to \$20 million |
| <input type="checkbox"/> \$100,000 up to \$500,000 | <input type="checkbox"/> \$20 million up to \$50 million |
| <input type="checkbox"/> \$500,000 up to \$1 million | <input type="checkbox"/> \$50 million up to \$100 million |
| <input type="checkbox"/> \$1 million up to \$2 million | <input type="checkbox"/> More than \$100 million |
| <input type="checkbox"/> \$2 million up to \$5 million | <input type="checkbox"/> None |
| <input type="checkbox"/> \$5 million up to \$10 million | <input type="checkbox"/> Don't know |

Ownership

26. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is your firm a woman-owned business?
- Yes No Don't know
27. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?
- Yes No Don't know

28. **[Answer if ‘Yes’ in Q27.]** Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?
- | | |
|--|--|
| <input type="checkbox"/> African American | <input type="checkbox"/> Native American |
| <input type="checkbox"/> Asian-Pacific American | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Subcontinent Asian American | <input type="checkbox"/> Don’t know |
| <input type="checkbox"/> Hispanic American | |

Business Background

29. About what year was your firm established? _____

30. About how many employees did you have working out of just your location, on average, over the past three years?

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

31. Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past three years (or for the years your company was in business if started after 2012).

- | | |
|---|---|
| <input type="checkbox"/> Up to \$0.5 million | <input type="checkbox"/> \$10.1 million to \$15 million |
| <input type="checkbox"/> \$0.6 million to \$1 million | <input type="checkbox"/> \$15.1 million to \$24.0 million |
| <input type="checkbox"/> \$1.1 million to \$2.5 million | <input type="checkbox"/> \$24.1 million to \$36.5 million |
| <input type="checkbox"/> \$2.6 million to \$5 million | <input type="checkbox"/> \$36.6 million or more |
| <input type="checkbox"/> \$5.1 million to \$7.5 million | <input type="checkbox"/> Don’t know |
| <input type="checkbox"/> \$7.6 million to \$10 million | |

32. [IF “YES” TO 6] About how many employees did you have, on average, for all of your locations over the past three years? _____

33. [IF “YES” TO 6] Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past three years (or for the years your company was in business if started after 2012).

- | | |
|---|---|
| <input type="checkbox"/> Up to \$0.5 million | <input type="checkbox"/> \$10.1 million to \$15 million |
| <input type="checkbox"/> \$0.6 million to \$1 million | <input type="checkbox"/> \$15.1 million to \$24.0 million |
| <input type="checkbox"/> \$1.1 million to \$2.5 million | <input type="checkbox"/> \$24.1 million to \$36.5 million |
| <input type="checkbox"/> \$2.6 million to \$5 million | <input type="checkbox"/> \$36.6 million or more |
| <input type="checkbox"/> \$5.1 million to \$7.5 million | <input type="checkbox"/> Don't know |
| <input type="checkbox"/> \$7.6 million to \$10 million | |

Barriers or Difficulties

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

34. Has your company experienced any difficulties in obtaining lines of credit or loans?

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| <input type="checkbox"/> Don't know | <input type="checkbox"/> Does not apply |

35. Has your company obtained or tried to obtain a bond for a project?

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| <input type="checkbox"/> Don't know | <input type="checkbox"/> Does not apply |

36. **[Answer if 'Yes' in Q35. Otherwise skip to Q37.]** Has your company had any difficulties obtaining bonds needed for a project?

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| <input type="checkbox"/> Don't know | <input type="checkbox"/> Does not apply |

37. Have you had any difficulty in being prequalified for work in Oregon?

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| <input type="checkbox"/> Don't know | <input type="checkbox"/> Does not apply |

38. Have any insurance requirements on projects presented a barrier to bidding?

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| <input type="checkbox"/> Don't know | <input type="checkbox"/> Does not apply |

39. Has the size of large projects presented a barrier to bidding?
- Yes No
- Don't know Does not apply
40. Has your company experienced any difficulties learning about bid opportunities with ODOT?
- Yes No
- Don't know Does not apply
41. Has your company experienced any difficulties learning about bid opportunities with cities, counties and other local agencies in Oregon?
- Yes No
- Don't know Does not apply
42. Has your company experienced any difficulties learning about bid opportunities in the private sector in Oregon?
- Yes No
- Don't know Does not apply
43. Has your company experienced any difficulties learning about subcontracting opportunities in Oregon?
- Yes No
- Don't know Does not apply
44. Has your company experienced any difficulties networking with prime contractors or customers?
- Yes No
- Don't know Does not apply
45. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?
- Yes No
- Don't know Does not apply
46. Has your company experienced any difficulties receiving payment in a timely manner?
- Yes No
- Don't know Does not apply

47. How does your company find out about ODOT prime contract or subcontract opportunities? (Examples include but are not limited to, newspaper or trade journal ads, on-line postings, email, plan centers, plan holders lists, word-of-mouth.) And, which sources are most effective?

48. Do you have any final comments for ODOT about its construction and professional services contracting?

49. Would you be willing to participate in a follow-up interview about the local marketplace?

- Yes No

Interviewee and other Contact Information

50. Just a few last questions. What is your name at [*firm name / new firm name*]?

(RECORD FULL NAME)

51. What is your position?

Receptionist

Assistant to Owner/CEO

Owner

Sales manager

Manager

Office manager

CFO

President

CEO

OTHER: _____

52. For purposes of receiving procurement information from ODOT, is your mailing address [*firm address*]:

Yes – SKIP TO 54

No

DON'T KNOW

53. What mailing address should ODOT use to get any materials to you?

54. What fax number could ODOT use to fax any materials to you?

55. What e-mail address could ODOT use to get any materials to you?

55a. (RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM'
SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)

End of survey message:

Thank you for your time. This is very helpful for ODOT.

APPENDIX E.

Entry and Advancement in the Oregon Construction and Engineering Industries

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”¹ Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Oregon.

Potential barriers to business formation include barriers associated with entry and advancement in the construction and engineering industries. Appendix E examines recent data on education, employment and workplace advancement that may ultimately influence business formation in the Oregon construction and engineering industries.^{2, 3}

A. Introduction

Keen Independent examined whether there were barriers to the formation of minority- and women-owned businesses in Oregon. Business ownership often results from an individual entering an industry as an employee and then advancing within that industry. Within the entry and advancement process, there may be some barriers that limit opportunities for minorities and women. Figure E-1 presents a model of entry and advancement in the construction and engineering industries. Note that in addition to using data from Oregon, Keen Independent also considers Clark and Skamania counties in Washington as part of the Oregon marketplace due to their inclusion in the Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. Any discussion of the Oregon marketplace or Oregon construction and engineering industries in the following analysis also includes firms and individuals located in these two Washington counties.

Appendix E uses 2000 Census data and 2008–2012 American Community Survey (ACS) data to analyze education, employment, and workplace advancement — all factors that may influence whether individuals start construction or engineering businesses. Keen Independent studied barriers to entry into construction and engineering separately, because entrance requirements and opportunities for advancement differ for those industries.

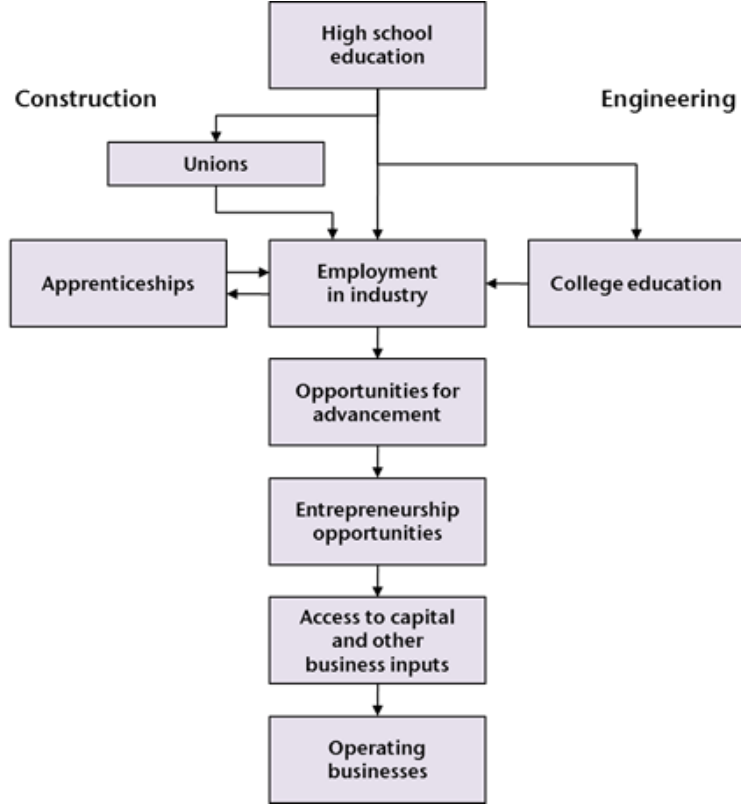
¹ *Sherbrooke Turf, Inc.*, 345 F.3d 964 (8th Cir. 2003) at 970 (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167–76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005) at 992.

² In Appendix E and other appendices that present information about local marketplace conditions, information for “engineering” refers to architectural, engineering and related services. Each reference to “engineering” work pertains to those types of services. In the 2000 Census industrial classification system, “Architectural, engineering and related services” was coded as 729. In the 2008–2012 ACS, the same industry was coded as 7290.

³ Several other report appendices analyze other quantitative aspects of conditions in the Oregon marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Figure E-1.
Model for studying entry
into the construction and
engineering industries

Source:
Keen Independent.



Representation of minorities among workers and business owners in Oregon. Keen

Independent began the analysis by examining the representation of racial/ethnic minorities among business owners and workers in Oregon. Figure E-2 shows the demographic distribution of business owners in construction and engineering, business owners in other industries (excluding construction and engineering) and the labor force, based on 2008–2012 ACS data. (Demographics of the construction and engineering workforce are presented separately later in Appendix E.) Analysis for Oregon in 2008–2012 indicated the following:

- African Americans accounted for less than 1 percent of business owners in construction and engineering, less than 2 percent of business owners in other industries and 2 percent of all workers.
- Asian Americans accounted for less than 2 percent of business owners in construction and engineering compared to 5 percent of business owners in other industries and 5 percent of all workers.
- Hispanic Americans accounted for 5 percent of business owners in construction and engineering, 7 percent of business owners in other industries and more than 10 percent of all workers were Hispanic American.

- Native Americans and other minorities accounted for approximately 2 percent of all business owners in construction and engineering, 2 percent of owners in other industries and 2 percent of all workers.
- Non-Hispanic whites accounted for about 91 percent of business owners in construction and engineering, higher than the 85 percent of business owners in other industries and 80 percent of all workers.

Figure E-2.
Demographic distribution of business owners and the workforce, 2008–2012

Oregon	Business owners in construction and engineering	Business owners in all other industries	Workforce in all industries
Race/ethnicity			
African American	0.8 % **	1.4 %	2.0 %
Asian American	1.6 **	5.1	4.9
Hispanic American	5.1	6.5	10.5
Native American or other minority	1.6	2.0	2.3
Total minority	<u>9.1 %</u>	<u>14.9 %</u>	<u>19.7 %</u>
Non-Hispanic white	90.9 **	85.1	80.3
Total	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>
Gender			
Female	9.1 % **	47.7 %	47.2 %
Male	90.9 **	52.3	52.8
Total	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>

Note: *,** Denote that the difference in proportions between business owners in construction and engineering and business owners in all other industries for the given race/ethnicity/gender group is statistically significant at the 90% or 95% confidence level, respectively. The engineering industry includes “architectural, engineering and related services.”

Source: Keen Independent Research from 2008–2012 ACS Public Use Microdata Sample (PUMS). The 2008–2012 raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Keen Independent analyzed demographic data to determine if the differences in business ownership in construction and engineering and business ownership in other industries by race and ethnicity were statistically significant and found:

- Relatively fewer African American business owners in construction and engineering compared to African American business owners in other industries;
- Relatively fewer Asian American business owners in construction and engineering compared to Asian American business owners in other industries; and
- Relatively more non-Hispanic white business owners in construction and engineering compared to non-Hispanic white business owners in other industries.

Representation of women among business owners and workers in Oregon. Figure E-2 also examines the percentage of Oregon business owners and workers who are women. In 2008–2012, women accounted for about 9 percent of business owners in construction and engineering, significantly less than their representation among business owners in other industries (48 percent). During this period, women comprised 47 percent of the Oregon labor force.

B. Construction Industry

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that individuals of different races/ethnicities and genders owned in the Oregon construction industry in 2000 and in 2008–2012.

Education. College education is not a prerequisite for most construction jobs. For that reason, the construction industry has traditionally attracted individuals who have relatively less formal education than in other industries. Based on 2008–2012 ACS data, 35 percent of construction workers in Oregon were high school graduates without post-secondary education and 13 percent had not graduated high school. Only 12 percent of construction workers had a four-year college degree or more, less than the 31 percent found for other industries combined.

Race/ethnicity. Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in Oregon, one would expect a relatively high representation of those groups in the Oregon construction industry, especially in entry-level positions.

- Hispanic Americans represented a large population of Oregon workers without post-secondary education. In 2008–2012, only 11 percent of all Hispanic American workers 25 and older who worked in Oregon held at least a four-year college degree, far below the figure for non-Hispanic whites 25 and older working in the state (32%).
- The percentage of Native American (17%) and African American (24%) workers in Oregon with a four-year college degree was also substantially lower than that of non-Hispanic whites (32%) in 2008–2012.

However, almost one-half (42%) of Asian American workers 25 and older in Oregon had four-year college degrees in 2008–2012. One might expect representation of Asian Americans in the Oregon construction industry to be lower than in other industries given this level of education.

Gender. On average, female workers in Oregon have similar years of education as men. Based on 2008–2012 data, 34 percent of female workers and 32 percent of male workers age 25 and older had at least a four-year college degree.

Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other employer-provided training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.⁴ In response to limited construction employment opportunities during the Great Recession, apprenticeship programs have limited the number of new apprenticeships⁵ as well as access to knowing when and where apprenticeships are occurring.⁶ Apprenticeship programs often refer to an “out-of-work list” when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, apprentices in highway construction are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journeyworkers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.⁷

Employment. With educational attainment for minorities and women as context, Keen Independent examined employment in the Oregon construction industry. Figure E-3 presents data from 2000 and 2008–2012 to compare the demographic composition of the construction industry with the total workforce in Oregon.

Race/ethnicity. Based on 2008–2012 ACS data, 17 percent of people working in the Oregon construction industry were minorities, up from 11 percent in 2000. The increase was due to growth in the number of Hispanic American construction workers. Examination of the Oregon construction industry workforce in 2008–2012 shows that:

- About 13 percent were Hispanic Americans;
- 1 percent were African Americans;
- Asian Americans made up about 1 percent; and
- Less than 3 percent were Native Americans and other minorities.

In Oregon, Hispanic Americans were a significantly larger percentage of workers in construction (13%) than in other industries (10%). In contrast, African Americans (1%) and Asian Americans (1%) accounted for a smaller percentage of workers in the construction industry than in other industries (2% and 5%, respectively). Representation of other minorities, including Native Americans, was about the same in construction as all other industries (less than 3%). Figure E-3 provides these results.

⁴ Bureau of Labor Statistics, U.S. Department of Labor. (2013, Summer). Apprenticeship: Earn while you learn. *Occupational Outlook Quarterly*, 3–5.

⁵ Kelly, M., Pisciotto, M., Wilkinson, L., & Williams, L. S. (2015). When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades. *Sociological Forum*, 30(2), 415–438.

⁶ Chaudhry, N., Frohlich, L., Goss Graves, F., Hogan, V., Khouri L., Lane, L., & Rao, D. (2014). *Women in Construction: Still Breaking Ground*. Retrieved September 2, 2015, from http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

⁷ *Ibid.*

The average educational attainment of African Americans is consistent with requirements for construction jobs, so education does not explain the relatively low number of African American workers in the Oregon construction industry. Several studies throughout the United States have reported that racial discrimination by construction unions has contributed to the low employment of African Americans in construction trades.⁸ The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

Asian Americans made up 1 percent of the construction workforce and 5 percent of all other workers in Oregon in 2008–2012. The fact that Asian Americans were more likely than other groups to have a college education may explain part of that difference.

Figure E-3 also shows the rapid growth of Hispanic Americans as a share of the construction workforce between 2000 (6.5% of workers) and 2008–2012 (12.5%). This change was greater for construction than for other industries in Oregon.

Figure E-3.
Demographics of workers in construction and all other industries, 2000 and 2008–2012

Oregon	Construction		All other industries	
	2008-2012	2000	2008-2012	2000
Race/ethnicity				
African American	0.9 % **	1.0 % **	2.1 %	1.7 %
Asian American	1.4 **	1.2 **	5.1	3.7
Hispanic American	12.5 **	6.5	10.4	6.8
Native American or other minority	2.5	2.7	2.3	2.6
Total minority	<u>17.3 %</u>	<u>11.4 %</u>	<u>19.9 %</u>	<u>14.8 %</u>
Non-Hispanic white	82.7 **	88.6 **	80.1	85.2
Total	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>
Gender				
Female	10.6 % **	11.6 % **	49.7 %	48.4 %
Male	89.4 **	88.4 **	50.3	51.6
Total	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>

Note: *,** Denote that the difference in proportions between workers in the construction industry and all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender. There are large differences in the representation of women in construction compared with women in all industries. For 2008–2012, women represented 11 percent of all construction workers and 50 percent of workers in all other industries in Oregon.

⁸ Thomas B., & Waldinger, R. (1991). The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction. *Politics & Society*, 19(3).

Academic research concerning any effect of race- and gender-based discrimination. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.⁹ Research concerning highway construction projects in three major U.S. cities (Boston, Los Angeles, and Oakland) identified evidence of prevailing attitudes that women do not belong in construction, and that such discrimination was worse for women of color than for white women.¹⁰ More recently, Kelly et al. found that white men were the least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.¹¹

Multiple studies report that race and gender inequalities are visible in a workplace often evidenced through the acceptance of the “good old boys’ club” culture.¹² There may also be an attachment to the idea that “working hard” will bring success. However, the quantitative and qualitative evidence indicates that “hard work” alone does not ensure success for women and people of color.¹³ In 2014, the National Women’s Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including experiencing outright gender discrimination and harassment.¹⁴

Research has well documented the idea that managers often hire individuals who are similar to themselves which creates a culture of similarity¹⁵ or homologous reproduction.¹⁶ In the construction industry, Kelly et al. found that, in Oregon, women and people of color had a more difficult time establishing personal relationships and building professional networks with their white male journeyman, supervisors and foremen in the highway trades. Thirty-five percent of women of color,

⁹ See for example, Erickson, J. A., & Palladino, D. E. (2009). Women Pursuing Careers in Trades and Construction. *Journal of Career Development, 36*(1), 68–89.

¹⁰ Note that those interviews took place between 1996 and 1999. Price, V. (2002). Race, Affirmative Action and Women’s Participation in U.S. Highway Construction. *Feminist Economics, 8*(2), 87–113.

¹¹ Kelly, M., Pisciotto, M., Wilkinson, L., & Williams, L. S. (2015). When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades. *Sociological Forum, 30*(2), 415–438.

¹² Lapchick, R. E. (2014, September). Numbers Unacceptable For Women in Decision-Making Roles. *Sports Business Journal, 13*. Retrieved August 17, 2015, from <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/15/Opinion/Richard-Lapchick.aspx>; Kanter, R. M. (1977). *Men and Women of the Corporation*. New York: Basic Books.

¹³ Kelly, M., Pisciotto, M., Wilkinson, L., & Williams, L. S. (2015). When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades. *Sociological Forum, 30*(2), 415–438.

¹⁴ Chaudhry, N., Frohlich, L., Goss Graves, F., Hogan, V., Khouri L., Lane, L., & Rao, D. (2014). *Women in Construction: Still Breaking Ground*. Retrieved September 2, 2015, from http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

¹⁵ Chelladurai, P., & Doherty, A. (1999). Managing Cultural Diversity in Sport Organizations: A Theoretical Perspective. *Journal of Sport Management, 19*(3), 280–297.

¹⁶ Kanter, R. M. (1977). *Men and Women of the Corporation*. New York: Basic Books.

32 percent of white women and 21 percent of men of color reported problems with journeyworkers, compared to only 13 percent of white men.¹⁷

Research on the Oregon highway construction industry reports an underrepresentation of minorities and women in apprenticeship programs.¹⁸ Kelly et al. identified informal hiring practices that relied on personal relationships and networking. While 76 percent of white men agreed that jobs were fairly assigned during their most recent apprenticeship, only 57 percent of women of color, 58 percent of white women, and 55 percent of men of color agreed. In addition, both construction company staff and apprentices indicated that they believed that women and men of color were more likely to be laid off even if there were other apprentices who were newer to the project or were less effective. Burd-Sharps et al. found that almost 68 percent of female apprentices in Oregon's highway trades experienced workplace discrimination or harassment in comparison to 28 percent of men, and women of color reported more discrimination than white female apprentices (66 and 52, respectively).¹⁹

Importance of unions to entry in the construction industry. Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.²⁰ The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.²¹ Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering into the industry.²²

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be the best road for African Americans and other underrepresented groups into the industry.

¹⁷ Kelly, M., Pisciotta, M., Wilkinson, L., & Williams, L. S. (2015). When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades. *Sociological Forum*, 30(2), 415–438.

¹⁸ Hegewisch, A., Henrici, J., Hooper, T., & Shaw, E. (2014). *Untapped Resources, Untapped Labor Pool: Using Federal Highway Funds to Prepare Women for Careers in Construction*. Washington, DC: Jobs for the Future.

¹⁹ Burd-Sharps, S., Kelly, M., & Lewis, K. (2014). *Building a More Diverse Skilled Workforce in the Highway Trades: Are Oregon's Current Efforts Working?* Portland, OR: Portland State University.

²⁰ Applebaum, H. (1999). *Construction Workers, U.S.A.* Westport, CT: Greenwood Press.

²¹ Bailey, T., & Waldinger, R. (1991). The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction. *Politics & Society*, 19(3).

²² Feagin, J. R., & Imani, N. (1994). Racial Barriers to African American Entrepreneurship: An Exploratory Study. *Social Problems*, 41(4), 562–584.

However, some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.²³ Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.²⁴
- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.²⁵
- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.²⁶
- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.²⁷
- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.²⁸
- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.²⁹

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have

²³ U.S. Department of Justice. (1996). Proposed Reforms to Affirmative Action in Federal Procurement. *Federal Register*, 61(101), 26042.

²⁴ *Ibid.* See *United States v. Iron Workers Local 86* (1971), *Sims v. Sheet Metal Workers International Association* (1973) and *United States v. International Association of Bridge, Structural and Ornamental Iron Workers* (1971).

²⁵ Applebaum, H. (1999). *Construction Workers, U.S.A.* Westport, CT: Greenwood Press.

²⁶ *Ibid.* 299. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

²⁷ Bailey, T., & Waldinger, R. (1991). The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction. *Politics & Society*, 19(3).

²⁸ U.S. Department of Justice. (1996). Proposed Reforms to Affirmative Action in Federal Procurement. *Federal Register*, 61(101), 26042. See *United Steelworkers of America v. Weber* (1979) and *Taylor v. United States Department of Labor* (1982).

²⁹ Feagin, J. R., & Imani, N. (1994). Racial Barriers to African American Entrepreneurship: An Exploratory Study. *Social Problems*, 41(4), 562–584.

compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.³⁰
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.³¹
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.³² Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Other research focusing on specific states also indicates a more productive relationship between unions and minority workers than that which may have prevailed in the past. A study by Berik, Bilginsoy and Williams found minority and white women were overrepresented in union apprenticeship programs in Oregon. Although white women and minorities were less likely to graduate compared to white men, graduation rates for those groups in the union apprenticeship programs were higher than for nonunion programs.³³ Similar research conducted over a ten-year period in Massachusetts found women and minorities were recruited at a higher rate for union apprenticeship programs compared to nonunion programs and that the completion rates for these groups in union programs were consistently higher than those of nonunion programs.³⁴

Recent union membership data support those findings as well. For example, 2012 Current Population Survey (CPS) data indicate that union membership rates for African Americans is slightly higher than for non-Hispanic whites and union membership rates for Hispanic Americans are similar

³⁰ Bilginsoy, C., & Glover, R. (2005). Registered Apprenticeship Training in the U.S. Construction Industry. *Education & Training*, 47(4/5), 337.

³¹ Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: women training for the construction trades in the USA. *International Journal of Manpower*, 27(4), 321–341.

³² Bilginsoy, C. (2005). How Unions Affect Minority Representation in Building Trades Apprenticeship Programs. *Journal of Labor Research*, 57(1).

³³ Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and Racial Training Gaps in Oregon Apprenticeship Programs. *Labor Studies Journal*, 36(2), 221–244.

³⁴ Argyres, A., & Moir, S. (2008). Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997–2007. *Labor Resource Center Publications*. Boston, MA: University of Massachusetts Boston.

to those of non-Hispanic whites.³⁵ The CPS asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed union membership to be 13 percent for African American workers, 10 percent for Hispanic American workers and 11 percent for non-Hispanic white workers. In the construction industry, the union membership rates for both African American workers and non-Hispanic white workers is 17 percent but the rate for Hispanic American construction workers is only 8 percent.

Although union membership and union program participation varies based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Oregon are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through “insourcing.”³⁶

Overall, union membership is relatively stable in Oregon. Keen Independent researched union membership in Oregon and found about 16 percent of all employed wage and salary workers were members of a labor union or an employee association similar to a union in 2014. Membership had been at 17 percent of employed persons in 2009. Union membership among private sector construction workers in Oregon has increased, however, from less than 12 percent in 2009 to 19 percent in 2014.³⁷ Oregon construction workers’ membership in unions is consistent with national averages of about 19 percent of individuals either being members of unions or working on jobs that are covered by unions.³⁸

Advancement. To research opportunities for advancement in the Oregon construction industry, Keen Independent examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.³⁹ Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2000 Census and 2008–2012 ACS for analysis.

³⁵ 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

³⁶ Judd, R. (2015, June 25). Seattle’s Building Boom is Good News for a New Generation of Workers. *The Seattle Times, Pacific NW Magazine*. Retrieved September 2, 2015, from <http://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-for-a-new-generation-of-workers>

³⁷ Hirsch, B. T., & Macpherson, D. A. (2015). *Union Membership and Coverage Database from the CPS*. Retrieved August 4, 2015, from <http://unionstats.com>

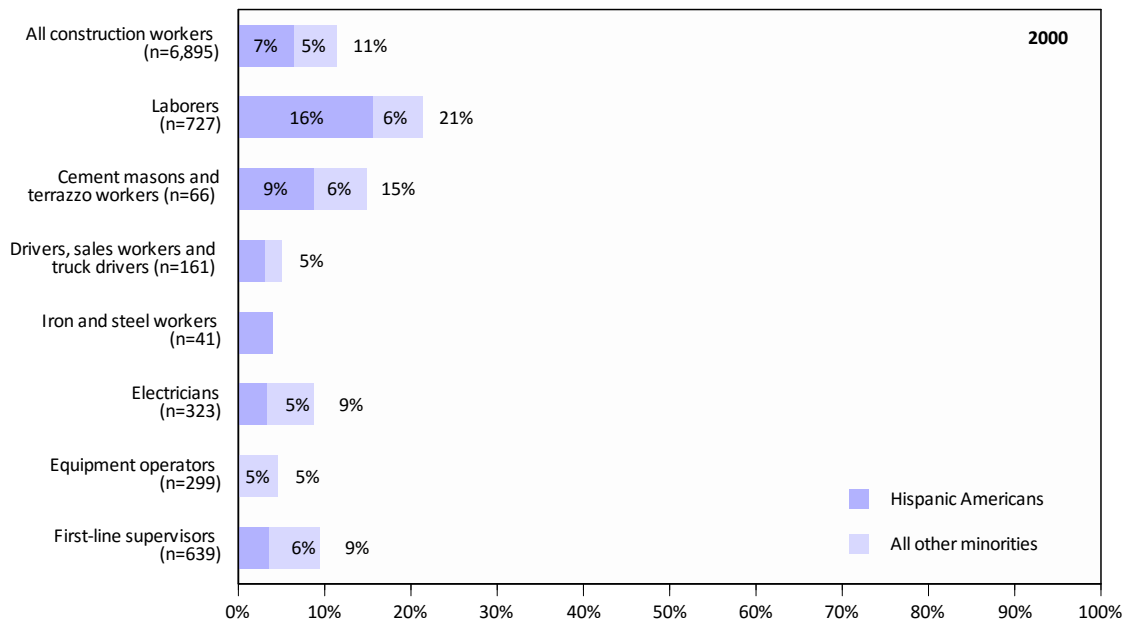
³⁸ Hirsch, B. T., & Macpherson, D. A. (2003). Union Membership and Coverage Database from the Current Population Survey: Note. *Industrial and Labor Relations Review*, 56(2), 349–354; Hirsch, B. T., & Macpherson, D. A. (2014). *U.S. Historical Tables: Union Membership, Coverage, Density, and Employment: Private Construction, 1973–2014*. Retrieved August 18, 2015, from <http://www.unionstats.com>; Hirsch, B. T., & Macpherson, D. A. (2014). *State: Union Membership, Coverage, Density, and Employment: Private Construction, 1973–2014*. Retrieved August 18, 2015, from <http://www.unionstats.com>

³⁹ Bureau of Labor Statistics, U.S. Department of Labor. *SOC Major Groups*. Retrieved February 15, 2007, from http://www.bls.gov/soc/major_groups.htm

Racial/ethnic composition of construction occupations. Figures E-4 and E-5 present the race/ethnicity of workers in select construction-related occupations in Oregon, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians), and supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-4 and E-5 present those data for 2000 and 2008–2012, respectively.

Based on 2000 Census and 2008–2012 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in Oregon. Overall, minorities comprised 11 percent of construction workers in 2000 and 17 percent in 2008–2012, as shown in Figures E-4 and E-5.

Figure E-4.
Minorities as a percentage of selected construction occupations in Oregon, 2000



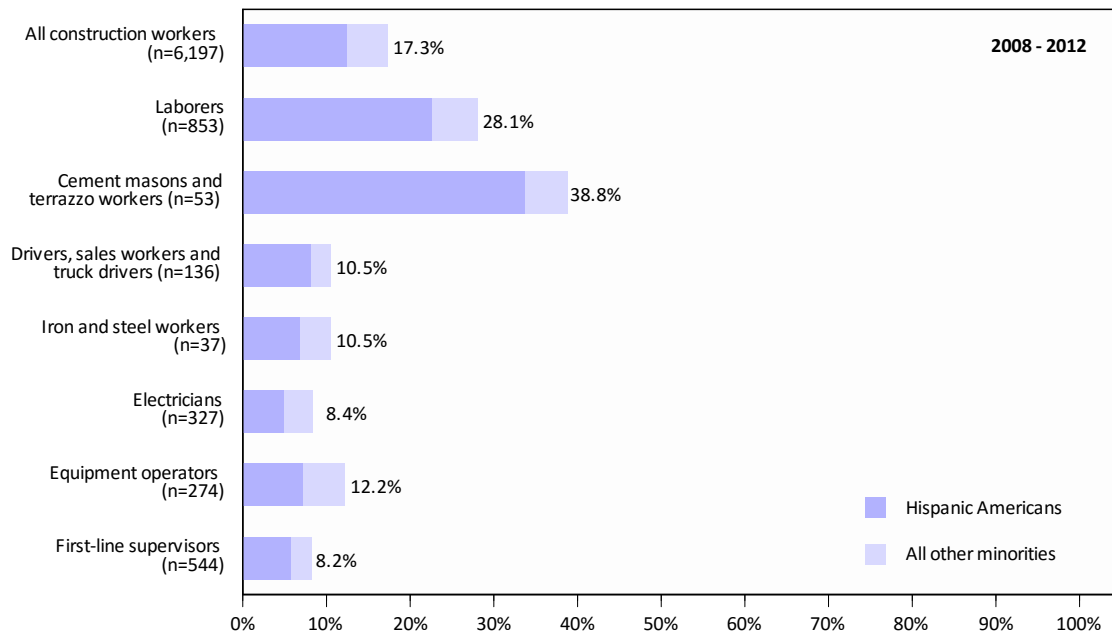
Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of equipment operators.

Source: Keen Independent Research from 2000 U.S. Census 5% sample Public Use Microdata samples. The 2000 Census raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

About 9 percent of first-line supervisors were minorities in 2000, less than the total percentage of Oregon construction workers that were minorities (11%). Minorities made up a smaller percentage of first-line supervisors (8%) in 2008–2012, despite an increase in the total percentage of construction workers who were minorities during those years (17%).

Most minorities working in the Oregon construction industry in 2008–2012 were Hispanic Americans (see Figure E-5). The representation of Hispanic Americans was substantially greater among cement masons (34%) and laborers (23%) than among all construction workers (13%). Those occupations tend to be lower-skill occupations. Only 6 percent of first-line supervisors in 2008–2012 were Hispanic Americans.

Figure E-5.
 Minorities as a percentage of selected construction occupations in Oregon, 2008–2012



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of equipment operators.

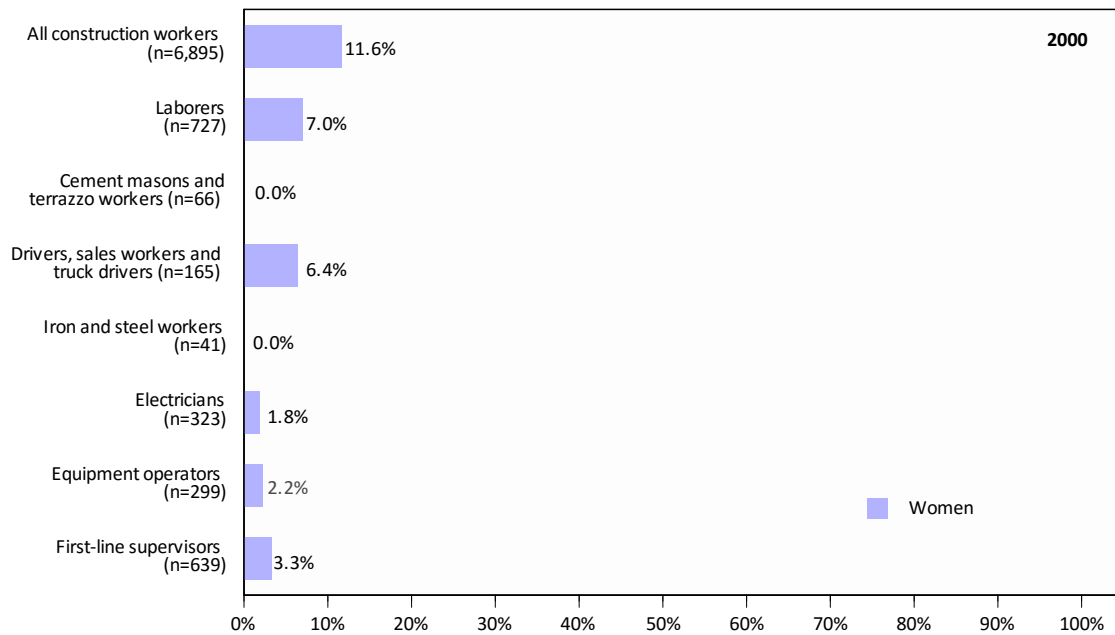
Source: Keen Independent Research from 2008–2012 ACS Public Use Microdata samples. The 2008–2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender composition of construction occupations. Keen Independent also analyzed the proportion of women in construction-related occupations. Figures E-6 and E-7 summarize the representation of women in select construction-related occupations for 2000 and 2008–2012, respectively. Overall, women made up only 12 percent of workers in the industry in 2000 and 11 percent in 2008–2012. Representation of women in all trades either declined during this period or remained relatively unchanged.

In both 2000 and 2008–2012, women comprised no more than 4 percent of workers in the following trades:

- Cement masons and terrazzo workers;
- Iron and steel workers;
- Electricians; and
- Equipment operators.

Figure E-6.
Women as a percentage of construction workers in selected occupations in Oregon, 2000

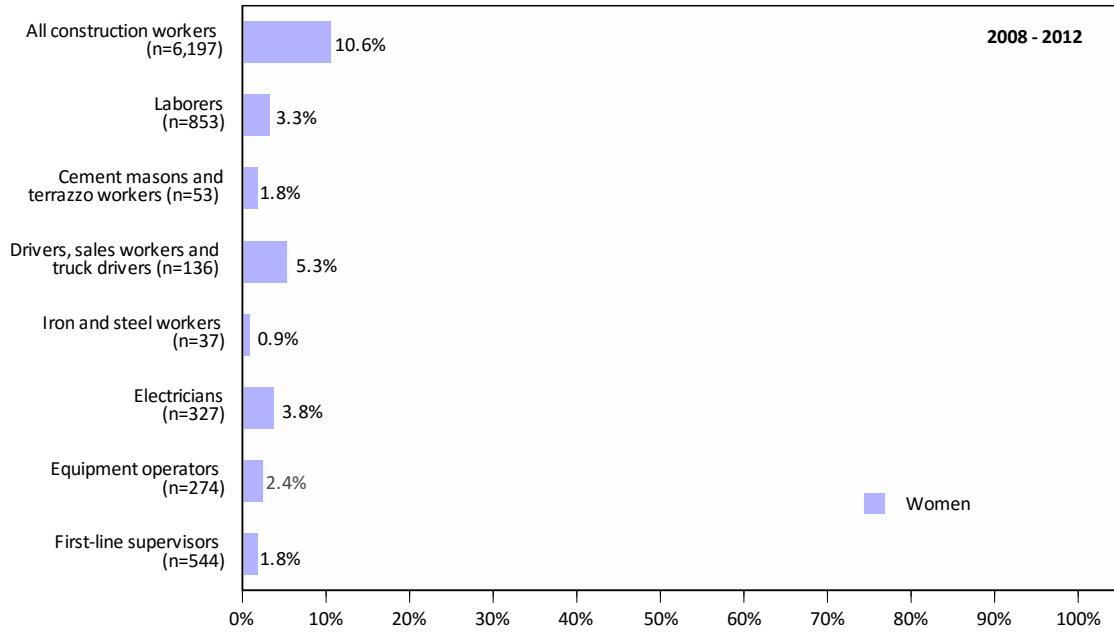


Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of equipment operators.

Source: Keen Independent Research from 2000 U.S. Census 5% sample Public Use Microdata samples. The 2000 Census raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

As shown in Figures E-6 and E-7, women comprised just 3 percent of first-line supervisors in 2000 and about 2 percent in 2008–2012.

Figure E-7.
Women as a percentage of construction workers in selected occupations in Oregon, 2008–2012



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of equipment operators.

Source: Keen Independent Research from 2008–2012 ACS Public Use Microdata samples. The 2008–2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Percentage of minorities and women who are managers. To further assess advancement opportunities for minorities and women in the Oregon construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-8 presents the percentage of construction employees who reported working as managers in 2000 and 2008–2012 for Oregon and the nation, by racial, ethnic and gender group.

Figure E-8.
Percentage of construction workers who worked as a manager
in 2000 and 2008–2012

Oregon	2008-2012	2000
Race/ethnicity		
African American	9.2 %	1.7 % **
Asian American	9.1	8.8
Hispanic American	3.6 **	4.8 **
Native American or other minority	6.1	5.0
Non-Hispanic white	9.3 %	8.8 %
Gender		
Female	6.6 %	4.0 % **
Male	8.7	8.9
All individuals	<u>8.5 %</u>	<u>8.3 %</u>

Note: *, ** Denote that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

In 2008–2012, about 9 percent of non-Hispanic whites in the Oregon construction industry were managers. A similar percentage of African American and Asian American workers were managers. However, less than 4 percent of Hispanic American workers were managers, a statistically significant different from non-Hispanic whites.

The percentage of construction workers working as managers increased from 2000 to the 2008–2012 time period for African Americans, but appeared to decrease for Hispanic Americans.

Gender composition of managers. In the Oregon construction industry in 2008–2012, there was not a statistically significant difference in the percentage of women and men who were managers (see Figure E-8). About 9 percent of male construction workers were managers in 2008–2012. Approximately 7 percent of female construction workers were managers during the same time period. The proportion of female construction workers who were managers increased from 2000 to 2008–2012.

C. Engineering Industry

Keen Independent also examined how education and employment may influence the number of potential minority and female entrepreneurs working in the Oregon engineering industry.

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the engineering industry. Many occupations require at least a four-year college degree and some require licensure. According to the 2008–2012 ACS, 68 percent of individuals working in the Oregon engineering industry had at least a four-year college degree. Approximately 25 percent had an associate's degree. Focusing on civil engineering, about 87 percent of civil engineers had at least a four-year college degree in 2008–2012.

Therefore, any barriers to college education can restrict employment opportunities, advancement opportunities, and, consequently, business ownership in the engineering industry. Any disparities in business ownership rates in engineering-related work may in part reflect the lack of higher education for particular racial, ethnic and gender groups.⁴⁰ Keen Independent explores this issue below.

Race/ethnicity. Figure E-9 presents the percentage of workers age 25 and older with at least a four-year college degree in Oregon. In Oregon, about 35 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2008–2012. For other racial/ethnic groups, the data for Oregon indicated the following percentage of workers age 25 and older with at least a four-year college degree:

- 84 percent for Subcontinent Asian Americans;
- 42 percent for Asian-Pacific Americans;
- 29 percent for African Americans that had at least a four-year college degree;
- 19 percent for Native Americans; and
- 13 percent for Hispanic Americans.

The level of education necessary to work in the engineering industry may affect employment opportunities for groups for which college education lags that of non-Hispanic whites. In Oregon, Native American and Hispanic American workers were far less likely to have at least a four-year college degree than non-minority workers.

All minority groups showed an increase between 2000 and 2008–2012 in the proportion of workers with a bachelor's (four-year) degree.

⁴⁰ Feagin, J. R., & Imani, N. (1994). Racial Barriers to African American Entrepreneurship: An Exploratory Study. *Social Problems*, 41(4), 562–584; Macionis, J. J. (2014). *Sociology, Fifteenth Edition*. Saddle River, NJ: Pearson.

Gender. Since 2000, the proportion of women in Oregon with at least a four-year college degree has surpassed that of men; in 2008–2012, about 34 percent of women and 32 percent of men had a bachelor’s degree.

Figure E-9.
Percentage of all workers 25 and older with at least a four-year degree, 2000 and 2008–2012

Oregon	2008-2012	2000
Race/ethnicity		
African American	28.5 % **	23.2 % **
Asian-Pacific American	42.1 **	36.7 **
Subcontinent Asian American	84.4 **	71.9 **
Hispanic American	12.7 **	11.2 **
Native American	19.2 **	15.3 **
Other minority group	29.7	25.2
Non-Hispanic white	34.9 %	29.9 %
Gender		
Female	33.7 % **	28.4 %
Male	32.1	29.0
All workers	32.9 %	28.7 %

Note: **, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male gender groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Additional indices of educational attainment. Other data sources showcase trends in post-secondary education among different racial/ethnic groups:

College participation. The U.S. Department of Labor Bureau of Labor Statistics reported that nearly 3 million students ages 16 to 24 graduated high school in 2013 and about two-thirds enrolled in college, a rate unchanged from 2012.⁴¹ The enrollment rate was highest for Asian American students (79%), followed by non-Hispanic whites (67%), African Americans (59%) and Hispanic Americans (60%).

⁴¹ College enrollment rates have remained relatively unchanged over the past 10 years, ranging from 66 to 70 percent.

- **Engineering-related degrees.** Recent data from the National Science Foundation show approximately 12 percent of all bachelor's degrees in engineering fields in the United States in 2012 were awarded to Asian American students. Hispanic Americans were awarded 9 percent of bachelor's degrees in engineering and African Americans were awarded 4 percent of the engineering degrees. Native Americans were awarded less than 1 percent of engineering degrees in 2012.⁴²

Employment. Figure E-10 compares the demographic composition of workers in the Oregon engineering industry to that of all workers in Oregon who are 25 years or older and have a college degree.

Race/ethnicity. In 2008–2012, about 10 percent of the workforce in the Oregon engineering industry was represented by minorities. Of that workforce:

- About 1 percent was made up of African Americans;
- About 4 percent was made up of Asian Americans;
- About 3 percent was made up of Hispanic Americans; and
- About 1 percent was made up of Native Americans or other minorities.

In 2008–2012, all minorities considered together comprised a smaller percentage of workers in engineering-related industries (10%) than minority workers 25 and older with a four-year college degree in other industries (14%). This was primarily due to a smaller representation of Asian Americans in the Oregon engineering workforce than in other industries.

Gender. Compared to their representation among workers 25 and older with a college degree in all industries, relatively fewer women work in the engineering industry. According to the Society for Women Engineers, the number of undergraduate degrees awarded to women in engineering disciplines steadily increased from 1966 to 2000. Between 2000 and 2005, the proportion of undergraduate engineering degrees awarded to women leveled off at about 20 percent, and dropped to about 18 percent by 2010.⁴³ The number of graduate degrees awarded to women has consistently increased since the 1960s; in 2004 22 percent of Master of Engineering degrees awarded to women and 18 percent of Doctorates in Engineering were awarded to women.⁴⁴ In 2008–2012, women represented about 26 percent of engineering-related workers in Oregon with a four-year degree, and 49 percent of workers with a four-year college degree in other industries.

⁴² The percentage of bachelor degrees in engineering awarded to non-Hispanic white students has remained relatively unchanged over the last decade of data (71% in 2002 and 68% in 2012).

⁴³ Education Statistics on Women in Engineering in the USA. (2012, February 8). Retrieved August 17, 2015, from <http://societyofwomenengineers.swe.org/trends-stats/3294-education>

⁴⁴ *Ibid.*

Figure E-10.
Demographic distribution of workers age 25 and older with a four-year college degree in engineering and all other industries, 2008–2012

Oregon	Engineering	All other industries
Race/ethnicity		
African American	1.1 %	1.6 %
Asian American	4.4 **	7.0
Hispanic American	3.3	3.8
Native American or other minority	1.2	1.4
Total minority	<u>10.0 %</u> **	<u>13.8 %</u>
Non-Hispanic white	90.0 **	86.2
Total	<u>100.0 %</u>	<u>100.0 %</u>
Gender		
Female	25.7 % **	48.6 %
Male	74.3 **	51.4
Total	<u>100.0 %</u>	<u>100.0 %</u>

Note: *,** Denote that the difference in proportions between engineers and workers in all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively. The engineering industry includes “architectural, engineering and related services.”

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Civil engineers. Keen Independent also examined the number of minorities and women among civil engineers in Oregon in 2008–2012 (see Figure E-11). Overall, in 2008–2012, the percentage of civil engineers who were minorities (8%) was below the percentage of all Oregon workers with college degrees in other industries who were minorities (14%).

Only 11 percent of civil engineers in Oregon were women in 2008–2012, substantially less than the percentage of workers with college degrees working in other industries who were women (49%).

Figure E-11.
Demographics of workers age 25 and older with a college degree in civil engineering and all other industries, 2008–2012

Oregon	Civil engineering	All other industries
Race/ethnicity		
African American	1.1 %	1.6 %
Asian American	4.0 **	7.0
Hispanic American	1.8	3.8
Native American or other minority	1.4	1.4
Total minority	<u>8.4 %</u>	<u>13.8 %</u>
Non-Hispanic white	<u>91.6 **</u>	<u>86.2</u>
Total	100.0 %	100.0 %
Gender		
Female	11.2 % **	48.6 %
Male	<u>88.8 **</u>	<u>51.4</u>
Total	100.0 %	100.0 %

Note: *,** Denote that the difference in proportions between civil engineers and workers in all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

D. Summary

Keen Independent's analyses suggest that there are barriers to entry for certain minority groups and for women in the construction and engineering industries in Oregon, as summarized below.

Although racial and ethnic minorities comprise 20 percent of the Oregon workforce, only 9 percent of business owners in construction and engineering are minority. Women are 47 percent of the Oregon workforce and 9 percent of construction and engineering business owners. Keen Independent explored whether barriers to entry and advancement might partly explain these overall differences.

- Fewer African Americans work in the Oregon construction industry than what might be expected based on representation in the overall workforce and analysis of educational requirements in the industry.
- Fewer Asian Americans work in the Oregon engineering industry than what might be expected based on analyses of workers 25 and older with a four-year college degree.
- Women account for a very small portion of the Oregon construction and engineering workforce compared with other industries.

Any barriers to entry in construction and engineering might affect the relative number of minority and female business owners in these industries in Oregon.

Keen Independent also examined advancement in the Oregon construction industry.

- Representation of minorities and women is much lower in certain construction trades (including first-line supervisors) compared with other trades.
- Compared to non-Hispanic whites working in the construction industry, Hispanic Americans are less likely to be managers.

Any barriers to advancement in the Oregon construction industry may also affect the number of business owners among those groups.

Appendix F, which follows, examines rates of business ownership among individuals working in the Oregon construction and engineering industries.

APPENDIX F.

Business Ownership in the Oregon Construction and Engineering Industries

Focusing on construction and engineering, Keen Independent examined business ownership for different racial, ethnic and gender groups in Oregon using Public Use Microdata Samples (PUMS) from the 2000 Census and from the 2008–2012 American Community Survey (ACS). (Appendix F uses “self-employment” and “business ownership” interchangeably.)

As discussed in Appendix E, Keen Independent considers Clark and Skamania counties in Washington as part of the Oregon marketplace due to their inclusion in the Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. Any discussion of the Oregon marketplace or Oregon construction and engineering industries in the following analysis also includes firms and individuals located in these two Washington counties.

A. Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level.¹ Although self-employment rates have increased for minorities and women over time, a number of studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and from state to state.

Construction industry. Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2008–2012, 27 percent of workers in the Oregon construction industry were self-employed compared with 12 percent of workers across all industries.

Rates of self-employment in the Oregon construction industry vary by race, ethnicity and gender. Figure F-1 shows the percentage of workers who were self-employed in the construction industry by group for 2000 and 2008–2012 in Oregon.

¹ See, for example, Aldrich, H. E., & Waldinger, R. (1990). Ethnicity and Entrepreneurship. *Annual Review of Sociology*, 16, 111–135; Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*, 31(4), 757–793; Fairlie, R. W., & Robb, A. M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289–323; Fairlie, R. W., & Robb, A. M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; and Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment. Working paper. Retrieved from <http://www.nber.org/papers/w18884>

Figure F-1.
 Percentage of workers in the construction industry who were self-employed, 2008–2012 and 2000

Oregon	2008-2012	2000
Race/ethnicity		
African American	24.7 %	12.7 % **
Asian American	28.8	15.5 **
Hispanic American	11.6 **	11.2 **
Native American or other	18.5 **	19.9 **
Non-Hispanic white	29.3	27.8
Gender		
Female	21.5 % **	19.5 % **
Male	27.4	27.0
All individuals	26.8 %	26.2 %

Note: *, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Business ownership rates in 2000. In 2000, 28 percent of non-Hispanic whites were self-employed. Business ownership rates were approximately half of that rate for African Americans, Hispanic Americans and Asian Americans (statistically significant differences).

- About 13 percent of African Americans working in the Oregon construction industry owned businesses, less than half the rate of non-Hispanic whites.
- About 16 percent of Asian Americans working in the Oregon construction industry owned businesses.
- About 11 percent of Hispanic Americans in the construction industry owned businesses, also less than half the rate of non-Hispanic whites.
- The ownership rate of Native Americans and other minorities in the construction industry was 20 percent.

In 2000, there were also differences in business ownership rates between men and women working in the industry: 27 percent of men in the Oregon construction industry owned businesses and about 20 percent of women owned businesses in 2000, a statistically significant difference.

Business ownership in 2008–2012. Between 2000 and 2008–2012, business ownership rates in the Oregon construction industry grew for non-Hispanic whites and most minority groups, and for women. Business ownership rates increased for African Americans and Asian Americans working in the industry to the point where there were no longer any statistically significant differences in self-employment rates compared with non-Hispanic whites.

In 2008–2012, disparities in business ownership rates persisted between non-Hispanic whites (25%) and other minority groups:

- Although business ownership among Hispanic Americans in the construction industry increased to 12 percent in 2008–2012; the difference in ownership rates from non-Hispanic whites remained statistically significant.
- About 19 percent of Native Americans in the construction industry in 2008–2012 were self-employed. The business ownership rate for this group remained less than the rate for non-Hispanic whites (statistically significant difference).

The business ownership rate among women increased to about 22 percent for 2008–2012, still less than that for men (a statistically significant difference).

Engineering industry. Keen Independent also examined business ownership rates in the Oregon engineering industry. Figure F-2 presents the percentage of workers who were self-employed in the engineering industry in 2000 and 2008–2012. (Note that the 0 percent results for African American owners of engineering firms are only for the Census data sample for those years; Keen Independent did identify African American-owned engineering-related firms from other sources.)

Figure F-2.
Percentage of workers in the engineering industry who were self-employed, 2000 and 2008–2012

Oregon	2008-2012	2000
Race/ethnicity		
African American	0.0 % **	0.0 % **
Asian American	10.6	7.7 **
Hispanic American	9.3	11.8
Native American or other minority	6.8 *	24.4
Non-Hispanic white	19.0	19.3
Gender		
Female	10.6 % **	10.6 % **
Male	20.5	21.5
All individuals	17.9 %	18.5 %

Note: **, * Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Business ownership rates in 2000. In 2000, 19 percent of non-Hispanic whites working in the Oregon engineering industry were self-employed. Business ownership rates were considerably lower for African Americans, Asian Americans and Hispanic Americans working in the industry (statistically significant differences for African Americans and Asian Americans). The Census data did not contain any African American owners of engineering businesses in the sample data for that year. Figure F-2 shows these results.

In 2000, the rate of self-employment for women working in the engineering industry was about one-half that of men (statistically significant difference). The right-hand column of Figure F-2 provides results for self-employment rates in 2000.

Business ownership rates in 2008–2012. As shown in Figure F-2, there was little change in business ownership for workers in the engineering industry from 2000 to 2008–2012. Business ownership rates decreased for some minority groups as well as non-Hispanic whites. Asian Americans were the only group to see an increase in business ownership rates, while there was no change for African Americans (0%) and women (11%).

In the Oregon engineering industry in 2008–2012, there were large differences in business ownership rates for minority groups compared with non-Hispanic whites, as discussed below:

- There were no self-employed African Americans in the sample data for the engineering industry in 2008–2012, so the calculated business ownership rate for that group was 0 percent (statistically significant difference).
- Among those working in the engineering industry, about one-half as many Asian Americans and Hispanic Americans were self-employed as found for non-Hispanic whites. These differences were not statistically significant, in large part because of the small sample size of these groups in the Oregon engineering industry.
- The rate for Native Americans was about 7 percent in 2008–2012. Native Americans were self-employed at less than half the rate of non-Hispanic whites (statistically significant difference).

Figure F-2 also compares business ownership rates for women and men working in the Oregon engineering industry. For 2008 to 2012, about 11 percent of women in the engineering industry were self-employed compared with 21 percent of men. The difference between the two groups was statistically significant.

Potential causes of differences in business ownership rates. Nationally, researchers have examined whether there are disparities in business ownership rates after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion and survival.² In addition, one study found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.³ However, unexplained differences still exist when statistically controlling for those factors.⁴ Access to capital is discussed in more detail in Appendix G.
- **Education.** Education has a positive effect on the probability of business ownership in most industries. However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.⁵ Recent research confirms a significant relationship between education and ability to obtain startup capital.⁶
- **Intergenerational links.** Intergenerational links affect one’s likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.⁷
- **Immigration to the United States.** Time since immigration and assimilation into American society are also important determinants of self-employment, but unexplained differences in business ownership between minorities and non-minorities still exist when accounting for those factors.⁸

² See Lofstrom, M., & Wang, C. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. Working paper, Institute for the Study of Labor. Retrieved from <http://ftp.iza.org/dp2101.pdf>; Fairlie, R. W., & Robb, A. M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment. Working paper. Retrieved from <http://www.nber.org/papers/w18884>

³ Fairlie, R. W., & Krashinsky, H. A. (2006). Liquidity Constraints, Household Wealth and Entrepreneurship Revisited. IZA Discussion Paper No. 2201.

⁴ Lofstrom, M., & Wang, C. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. Working paper, Institute for the Study of Labor. Retrieved from <http://ftp.iza.org/dp2101.pdf>

⁵ See Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*, 31(4), 757–793; and Butler, J. S., & Herring, C. (1991). Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*, 79–94.

⁶ Fairlie, R. W., Robb, A. M., & Robinson, D. T. (2009). Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey. Working paper, Federal Reserve Bank of Cleveland.

⁷ See Fairlie, R. W., & Robb, A. M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; and Fairlie, R. W., & Robb, A. M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289–323.

⁸ See Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*, 31(4), 757–793; and Butler, J. S., & Herring, C. (1991). Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*, 79–94.

B. Business Ownership Regression Analysis

Race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status. Recent research using data from 2007 through 2010 indicates that minorities (including African Americans and Hispanic Americans) face greater credit constraints at business startup and throughout business ownership than non-Hispanic whites, even after controlling for other factors including credit score.⁹

To further examine business ownership, Keen Independent developed multivariate regression models to explore patterns of business ownership in Oregon. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for other personal and family characteristics.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age, and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and engineering industries persist after statistically controlling for race- and gender-neutral personal characteristics.^{10, 11} Those studies have incorporated probit econometric models using PUMS data from the 2000 Census, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables,¹² such as:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household, and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.

⁹ Robb, A. M. (2012). Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms. *Small Business Administration*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment. Working paper. Retrieved from <http://www.nber.org/papers/w18884>

¹⁰ National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

¹¹ National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

¹² Probit models are often used in the literature that examines business ownership rates. A probit model estimates the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed and “0” for individuals who are not self-employed. The model enables estimation of the probability that workers in a given sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

Keen Independent developed two probit regression models using PUMS data from the 2008–2012 ACS:

- A model for the Oregon construction industry that included 5,862 observations; and
- A model for the Oregon engineering industry that included 982 observations.

Oregon construction industry in 2008–2012. Figure F-3 presents the coefficients for the probit regression model for individuals working in the Oregon construction industry in 2008–2012. Several factors were important and statistically significant in predicting the probability of business ownership:

- Older workers were associated with a *higher* probability of business ownership, and this effect diminished for the oldest workers;
- Workers who owned a home were associated with a *higher* probability of business ownership;
- Higher home values were associated with a *higher* probability of business ownership; and
- Higher mortgage payments were associated with a *higher* probability of business ownership.

After statistically controlling for factors other than race, ethnicity and gender, there were statistically significant disparities in business ownership rates for Hispanic Americans, Native Americans and women working in the Oregon construction industry. Members of these minority groups and women working in the Oregon construction industry were less likely to own construction businesses than similarly-situated non-minorities or men.

Figure F-3.
Oregon construction industry
business ownership model, 2008–
2012

Note:

*,** Denote statistical significance at the 90%
and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2008–2012
ACS Public Use Microdata samples. The 2008–
2012 ACS raw data extract was obtained
through the IPUMS program of the MN
Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.0050 **
Age	0.0681 **
Age-squared	-0.0005 **
Married	-0.0050
Disabled	-0.0810
Number of children in household	0.0053
Number of people over 65 in household	-0.0166
Owns home	0.1270 *
Home value (\$0,000s)	0.0007 **
Monthly mortgage payment (\$0,000s)	0.0511 *
Interest and dividend income (\$0,000s)	0.0009
Income of spouse or partner (\$0,000s)	-0.0005
Speaks English well	0.2930
Less than high school education	-0.0196
Some college	0.0191
Four-year degree	0.1160
Advanced degree	0.1490
African American	0.1400
Asian American	0.0193
Hispanic American	-0.2760 **
Native American	-0.3550 **
Other Minority	0.3790
Female	-0.3010 **

Simulations of business ownership rates. Probit modeling allows for further analysis of the disparities identified in business ownership rates for Hispanic Americans, Native Americans and women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly situated non-Hispanic white males.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.¹³
2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of Hispanic American, Native American and non-Hispanic white women working in the Oregon construction industry (i.e., indicators of educational attainment as well as indicators of personal financial resources and constraints) to estimate the probability of business ownership of each group. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

¹³ That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

Figure F-4 presents the simulated business ownership rate (i.e., “benchmark” rate) for Hispanic Americans, Native Americans and non-Hispanic white women, and compares it to the actual, observed mean probabilities of business ownership for that group. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by that group’s benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers. Note that the “actual” self-employment rates are for the dataset used for these regression analyses and do not always exactly match results from the entire 2008–2012 data.

Results from these analyses show lower actual self-employment rates for Hispanic Americans, Native Americans and non-Hispanic white women than the simulated ownership rates for these groups:

- **Hispanic Americans.** The actual ownership rate for Hispanic American workers in the construction industry was 11.9 percent, which is less than the benchmark rate of 22.2 percent. Dividing 11.9 percent by 22.2 percent (and then multiplying by 100) gives a disparity index of 53 for Hispanic American business ownership. Because the index is less than 100, the results indicate a disparity. Because it is less than 80, it indicates a “substantial” disparity (Appendix B has a discussion of the use of substantial disparity in court cases). In other words, Hispanic Americans owned businesses at about one-half the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers.
- **Native Americans.** The actual business ownership rate for Native Americans was 16 percent, which is less than the benchmark rate of 26.4 percent. The corresponding disparity index was 61, indicating that Native Americans owned construction businesses at 61 percent of the rate that would be expected based on simulated ownership rates of non-Hispanic white males. This indicates a substantial disparity in the business ownership rates for Native Americans working in the Oregon construction industry.
- **Women.** The benchmark ownership rate for non-Hispanic white women was 32.6 percent, and the corresponding disparity index was 67, indicating that business ownership for non-Hispanic white women in the construction industry was about two-thirds of the rate that would be expected based on simulated rates of non-Hispanic white males.

Figure F-4.
Comparison of actual business ownership rates to simulated rates for Oregon construction workers, 2008–2012

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	11.9%	22.2%	53
Native American	16.0%	26.4%	61
Non-Hispanic white female	21.9%	32.6%	67

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: Keen Independent Research from 2008–2012 ACS Public Use Microdata samples. The 2008–2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Oregon engineering industry in 2008 through 2012. Keen Independent developed a separate business ownership model for the Oregon engineering industry using 2008–2012 ACS data. Figure F-5 presents the coefficients from that probit model.¹⁴ After controlling for personal and family characteristics, there were statistically significant disparities in business ownership rates among people working in the Oregon engineering industry for African Americans, Native Americans and women.

Figure F-5.
Oregon engineering industry business ownership model, 2008–2012

Note:

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2008–2012 ACS Public Use Microdata samples. The 2008–2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.6130
Age	-0.0013
Age-squared	0.0004
Married	-0.3420 **
Disabled	-0.1710
Number of children in household	0.1200
Number of people over 65 in household	-0.0299
Owns home	0.0967
Home value (\$0,000s)	0.0002
Monthly mortgage payment (\$0,000s)	0.1450
Interest and dividend income (\$0,000s)	-0.0003
Income of spouse or partner (\$0,000s)	0.0007
Less than high school education	-4.7630 **
Some college	-0.1840
Four-year degree	-0.2810
Advanced degree	0.0656
African American	-4.8040 **
Asian American	-0.2960
Hispanic American	-0.2810
Native American	-4.7030 **
Other Minority	0.0312
Female	-0.2970 **

¹⁴ Speaking English well was excluded from the engineering industry model because nearly every individual in the dataset spoke English well.

Simulations of business ownership rates. Using the same approach as for the construction industry, Keen Independent simulated business ownership rates in the Oregon engineering industry. Figure F-6 presents actual and simulated (“benchmark”) business ownership rates for African Americans and Hispanic Americans in the Oregon engineering industry. (The number of other minorities in the construction sample was too small to perform the analysis for that group.)

- **African Americans and Native Americans.** There were no African American or Native American business owners in the 2008–2012 engineering worker sample data. The benchmark business ownership rate for African Americans was about 11 percent based on similarly situated non-Hispanic white males. The benchmark rate for Native Americans was about 15 percent. As actual self-employment for both groups in these data was 0 percent, the resulting disparity index for business ownership was 0 for African Americans and Native Americans working in the Oregon engineering industry
- **Women.** Results of the probit simulation for women were similar to the disparity identified for Hispanic Americans, as shown in Figure F-6. The resulting disparity index for non-Hispanic white women compared with non-Hispanic white men was 70. In other words, non-minority women working in the Oregon engineering industry were about two-thirds as likely to own businesses as non-minority men with similar personal and family characteristics.

Figure F-6.
Comparison of actual business ownership rates to simulated rates for Oregon workers in the engineering industry, 2008–2012

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
African American	0.0%	11.4%	0
Native American	0.0%	14.6%	0
Non-Hispanic white female	11.6%	16.6%	70

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Source: Keen Independent Research from 2008–2012 ACS Public Use Microdata samples. The 2008–2012 raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

C. Summary of Business Ownership in the Construction and Engineering Industries

Disparities in business ownership were present in the Oregon construction industry:

- In both the 2000 and 2008–2012 time periods, business ownership rates for Hispanic Americans, Native Americans and women were substantially lower than that of non-Hispanic whites. Business ownership rates for African Americans and Asian Americans were lower than non-minorities in 2000 (a statistically significant difference).
- After statistically controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates persisted for Hispanic Americans, Native Americans and women working in the Oregon construction industry in 2008–2012.

There were also disparities in business ownership in the Oregon engineering industry:

- Compared to non-Hispanic whites, business ownership rates were lower for African Americans, Native Americans and women in 2008–2012; those differences were statistically significant. Business ownership rates were also lower for Asian Americans and Hispanic Americans, but the differences were not statistically significant.
- Using regression analysis to account for other personal characteristics, there were substantial disparities for African Americans, Native Americans and women in 2008–2012.

APPENDIX G.

Access to Capital for Business Formation and Success

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.^{1, 2} Researchers have also found that the amount of startup capital can affect long-term business success, and on average, minority- and women-owned businesses appear to have less startup capital than non-Hispanic white-owned businesses and male-owned businesses.³ For example:

- In 2007, 30 percent of majority-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had startup capital of \$25,000 or more; ⁴
- Only 17 percent of African American-owned businesses indicated a comparable amount of startup capital;
- Disparities in startup capital were identified for every other minority group except Asian Americans; and
- Nineteen percent of women-owned businesses reported startup capital of \$25,000 or more compared with 32 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Similar research using longitudinal data from 2004 through 2006 found African American-owned firms received significantly lower levels of external startup capital, after controlling for owner and business characteristics, and relied more on owner equity funding. This finding persisted in subsequent years of business operation.⁵

Race- or gender-based discrimination in startup capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.⁶

Keen Independent examined access to capital in Oregon. Appendix G begins by presenting information about homeownership and mortgage lending, as home equity can be an important source of capital to start and expand businesses. The appendix then presents information about

¹ For example, see Mitchell, K., & Pearce, D. K. (2005). "Availability of Financing to Small Firms Using the Survey of Small Business Finances." U.S. Small Business Administration Office of Advocacy, 57.

² Fairlie, R. W., & Robb, A. M. (2010). *Race and Entrepreneurial Success*. Cambridge: MIT Press.

³ *Ibid.*

⁴ Business owners were asked, "What was the total amount of capital used to start or acquire this business? (Capital includes savings, other assets, and borrowed funds of owner(s))." From U.S. Census Bureau, Statistics for All U.S. Firms by Total Amount of Capital Used to Start or Acquire the Business by Industry, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2007 Survey of Business Owners. Retrieved from http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table

⁵ Fairlie, R. W., Robb, A. M., & Robinson, D. T. (2009). Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey. Working paper, Federal Reserve Bank of Cleveland.

⁶ Fairlie, R. W., & Robb, Alicia M. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

business loans, assessing whether minorities and women experience any difficulties acquiring business capital.

A. Homeownership and Mortgage Lending

Keen Independent analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. Wealth created through homeownership can be an important source of capital to start or expand a business. In sum:

- A home is a tangible asset that provides borrowing power;⁷
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;⁸
- Next to business loans, mortgage loans have traditionally been the second largest loan type for small businesses;⁹ and
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses.¹⁰

Any barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. Recent research confirms the importance of homeownership on the likelihood of starting a business, even when examined separately by recent work history (independently examining workers that recently experienced a job loss and those that did not). A strong relationship exists between increases in home equity and entry into self-employment for both groups.¹¹ Keen Independent analyzed homeownership rates and home values before considering loan denial and subprime lending.

It is important to note that the Great Recession depressed homeownership rates, reduced home values and equity in homes, and changed the mortgage finance market. Nationally and in Oregon, lower (or negative) equity in a home and tighter lending standards during the Great Recession may have limited home equity as source of capital for many existing or potential business owners. Therefore, the following examination of homeownership and mortgage lending in Oregon considers conditions before and after the start of the Great Recession in 2007.

⁷ Nevin, A. (2006). Homeownership in California: A CBIA Economic Treatise. *California Building Industry Association*, 2.

⁸ Jackman, M. R., & Jackman, R. W. (1980). Racial Inequalities in Home Ownership. *Social Forces*, 58(4), 1221–1234.

⁹ Berger, A. N., & Udell, G. F. (1998). The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle. *Journal of Banking and Finance*, 22.

¹⁰ Cavalluzzo, K., & Wolken, J. (2005). Small Business Loan Turndowns, Personal Wealth and Discrimination. *Journal of Business*, 78(6), 2153–2178.

¹¹ Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity Constraints, Household Wealth and Entrepreneurship Revisited. *Review of Income and Wealth*, 58(2).

Homeownership rates. Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.¹² For example, in the past, a woman’s participation in homeownership was secondary to that of her husband and parents.¹³

Figure G-1 presents the percentage of households in each racial/ethnic group in Oregon that were homeowners in 2000 (based on Census of Population data) and 2008 through 2012 (based on U.S. Bureau of the Census American Community Survey, or “ACS” data). Substantially fewer minorities owned homes in Oregon in 2000 and in 2008–2012 compared with non-Hispanic whites. Keen Independent identified statistically significant disparities in homeownership for all racial and ethnic groups for both time periods. For example, about one-third of African American households owned homes in 2008–2012, less than one-half the rate of homeownership of non-Hispanic whites.

From 2000 to 2008–2012, homeownership rates dropped for African Americans, Native Americans, other minority groups and non-Hispanic whites. In 2000, 67 percent of households headed by non-Hispanic whites owned homes. Homeownership dropped to 65 percent for non-Hispanic whites in 2008–2012.¹⁴ Other minorities experienced the largest decline during this time period, from 44 percent homeownership in 2000 to 34 percent homeownership in 2008–2012. African Americans saw a similar drop, from 37 percent in 2000 to 32 percent in 2008–2012.

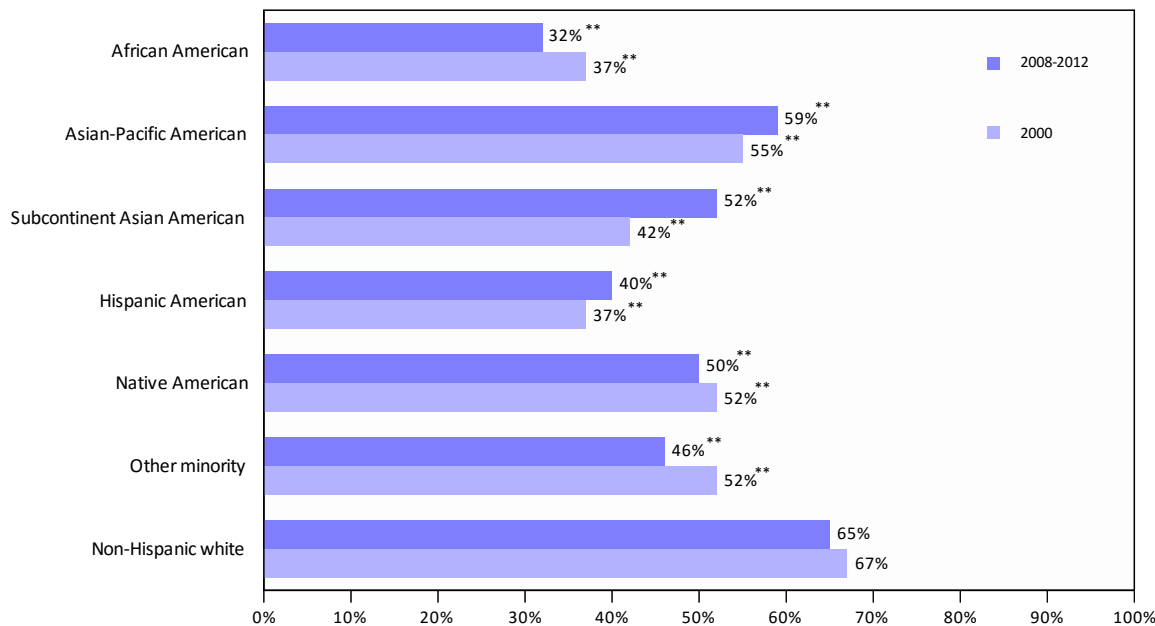
The data for Oregon indicate that relatively fewer minorities than non-Hispanic whites have had access to equity in a home for starting or expanding a business.

¹² Ladd, H. F. (1982). Equal Credit Opportunity: Women and Mortgage Credit. *The American Economic Review*, 72, 166–170.

¹³ Card, E. (1980). Women, Housing Access, and Mortgage Credit. *Signs*, 5(3), 215–219.

¹⁴ These data are consistent with national homeownership trends. Data from the U.S. Census Bureau Social, Economic and Housing Statistics Division show U.S. homeownership peaked in the first quarter of 2005 at 69.2 percent. Homeownership for the first quarter of 2014 was 65 percent.

Figure G-1.
Homeownership rates, 2000 and 2008–2012



Note: Note: The sample universe is all households. ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2010–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. An older study found that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.¹⁵ Recent research shows that while African Americans narrowed the homeownership gap in the 1990s, the first half of the following decade brought little change and the second half of the decade brought significant losses, resulting in a widening of the gap between African Americans and non-Hispanic whites.¹⁶

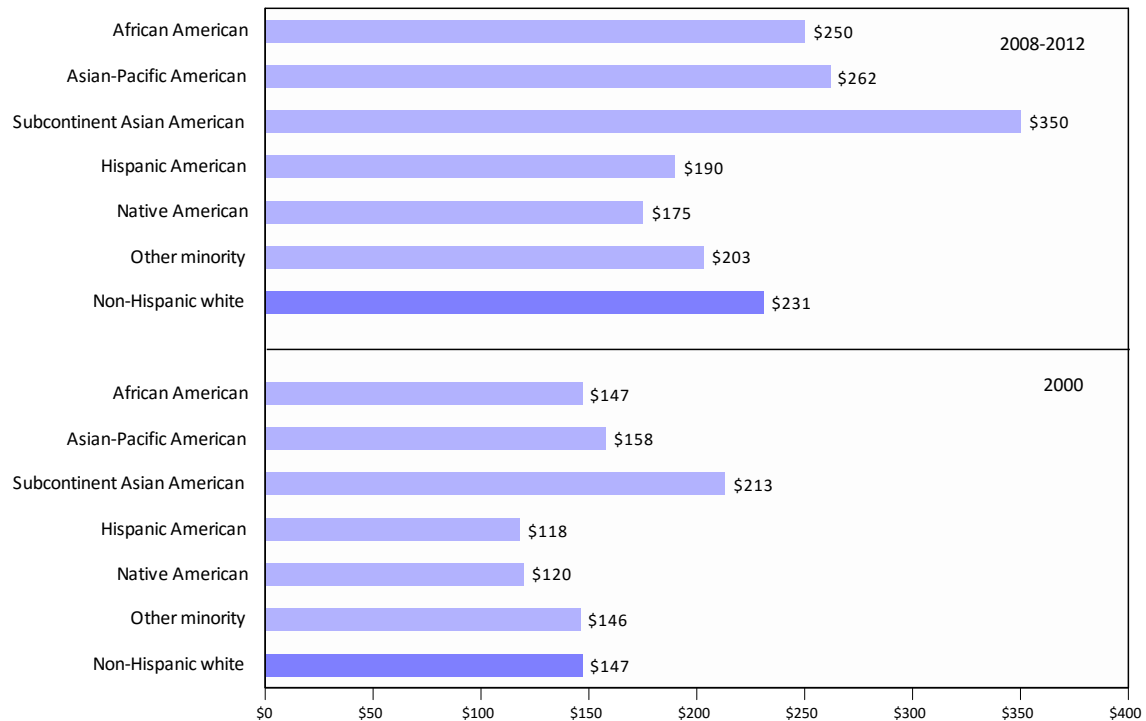
Home values. In addition to studying homeownership rates by gender and race/ethnicity, it is also important to consider the value of homes owned because the value represents an outside limit of accessible capital from the asset. Using 2000 Census data and 2008–2012 ACS data, Keen Independent compared median home values by racial/ethnic group in Oregon. The median value of homes owned by non-Hispanic whites was about \$147,000 in 2000 and \$231,000 in 2008–2012 (home prices rose in Oregon in the first half of the 2000s before declining during the Great Recession).

¹⁵ Jackman, M. R., & Jackman, R. W. (1980). Racial Inequalities in Home Ownership. *Social Forces*, 58(4), 1221–1234.

¹⁶ Rosebaum, E. (2012). “Home Ownership’s Wild Ride, 2001–2011.” U.S. 2010 Project, Census Brief. New York: Russell Sage Foundation.

The median value of homes owned by Native Americans, Hispanic Americans and other minorities in Oregon was considerably less than homes owned by non-Hispanic whites in both 2000 and 2008–2012. The median value of homes owned by Subcontinent Asian Americans and Asian-Pacific Americans was higher than non-Hispanic whites in both time periods. Median home values for African Americans who owned homes were about the same as for non-Hispanic whites in 2000 and greater than for non-Hispanic whites for 2008–2012. (Note that Figure G-1 shows that relatively few African Americans living in Oregon own homes compared with non-Hispanic whites.)

Figure G-2.
Median home values, 2000 and 2008–2012, thousands



Note: The sample universe is all owner-occupied housing units.

Source: Keen Independent Research from 2000 U.S. Census 5% sample and 2008–2012 ACS Public Use Microdata samples. The 2000 Census and 2008–2012 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when seeking home mortgages. Therefore, any such discrimination could have lasting effects on the financial resources minorities have to start and operate a business. In a recent lawsuit, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.¹⁷

¹⁷ Savage, C. (2011, December 22). \$335 Million Settlement on Countywide Lending Bias. *The New York Times*, p. B1. Retrieved from <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>

Keen Independent explored market conditions for mortgage lending in Oregon. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions, and some mortgage companies receive.¹⁸ Those data include information about the location, dollar amount, and types of loans made, as well as race, ethnicity, income, and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

Keen Independent examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007 and 2013. Although 2013 provides the most current representation of the home mortgage market, the 2007 data represent a more complete data set from before the recent mortgage crisis. Many of the institutions that originated loans in 2007 were no longer in business by the 2013 reporting date for HMDA data.¹⁹ In addition, the percentage of government-insured loans, which Keen Independent did not include in its analysis, increased dramatically between 2007 and 2013, decreasing the proportion of total loans analyzed in the 2013 data.²⁰

Mortgage denials. Keen Independent examined mortgage denial rates on conventional loan applications for high-income borrowers. Conventional loans are loans that are not insured by a government program. High-income borrowers are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.²¹ Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.²²

Figure G-3 presents loan denial results for high-income households in Oregon in 2007 and 2013. In 2007, African American, Asian American, Hispanic American, Native American and Native Hawaiian or other Pacific Islander high-income applicants exhibited higher loan denial rates compared with

¹⁸ Financial institutions were required to report 2013 HMDA data if they had assets of more than \$42 million, have a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies are required to report HMDA data if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year or equal \$25 million or more, are located in a Metropolitan Statistical Area (MSA; or originated five or more home purchase loans in an MSA) and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

¹⁹ According to an article by the Federal Reserve, the volume of reported loan applications and originations fell sharply from 2007 to 2008 after previously falling between 2006 and 2007. See Avery, R. B., Brevoort, K. P., & Canner, G. B. *The 2008 HMDA Data: The Mortgage Market during a Turbulent Year*. Retrieved from <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft.pdf>

²⁰ Loans insured by government programs have surged since 2006. In 2006, about 10 percent of first lien home loans were insured by a government program. More than half of home loans were insured by the government in 2009. See Avery, R. B., Brevoort, K. P., & Canner, G. B. (2010, December). *The 2009 HMDA Data: The Mortgage Market in a Time of Low Interest Rates and Economic Distress*, *Federal Reserve Bulletin*, pp. A39-A77.

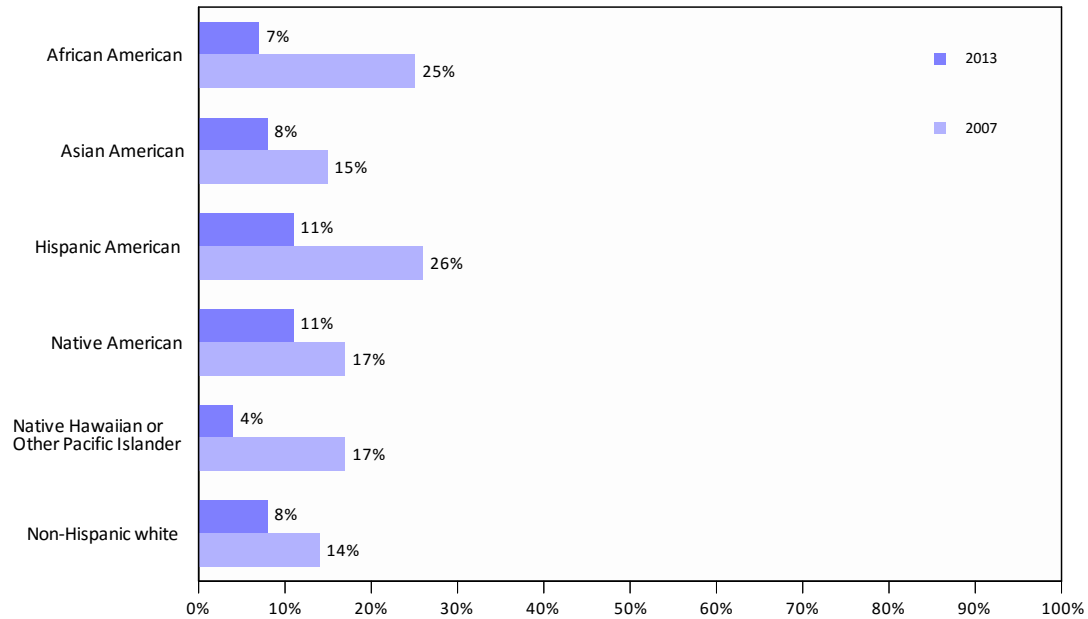
²¹ The median family income in 2013 was about \$64,400 for the United States as a whole and \$60,200 for Oregon. Median family income for 2007 was about \$59,000 for the United States as a whole and \$55,700 for Oregon. Source: U.S. Department of Housing and Urban Development, FY 2007 Income Limits and FY 2012 Income Limits.

²² For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

high-income non-Hispanic white applicants.²³ The denial rate for high-income African Americans (25%) was nearly twice the rate of high-income non-Hispanic white applicants (14%).

Even though mortgage loan denial rates for high-income households had fallen in Oregon by 2013 for most groups, each minority group except for African Americans and Native Hawaiians had higher loan denial rates than non-Hispanic whites.

Figure G-3.
Denial rates of conventional purchase loans to high-income households, Oregon, 2007 and 2013



Note: High-income borrowers are those households with 120% or more than the HUD area median family income (MFI).

Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.

Source: FFIEC HMDA data, 2007 and 2013.

Additional research. Several national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. For example:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination.²⁴ It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.²⁵ The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.²⁶

²³ HMDA data group Native Hawaiians and other Pacific Islanders into a single category. According to 49 CFR 26.5, Native Hawaiians are considered Native Americans, but other Pacific Islanders are considered Asian. Since the HMDA racial group cannot be split nor accurately included in Native Americans or Asian Americans, it is shown as an individual racial category.

²⁴ Munnell, A. H., Tootell, G., Browne, L., & McEneaney, J. (1996). Mortgage Lending in Boston: Interpreting HMDA Data. *The American Economic Review*, 86(1), 25–53.

²⁵ Ladd, H. F. (1998). Evidence on Discrimination in Mortgage Lending. *The Journal of Economic Perspectives*, 12(2), 41–62.

²⁶ Yinger, J. (1995). *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 71.

- Using the Federal Reserve Board’s 1983 Survey of Consumer Finances and the 1980 Census of Population and Housing data, analyses revealed that minority households were one-third as likely to receive conventional loans as non-Hispanic white households after taking into account financial and demographic variables.²⁷
- Results of a study in the Midwest indicated that mortgage loan applicants who were not the “traditional” non-Hispanic white opposite-sex couples encountered persistently higher mortgage application denial rates than “traditional” couples.²⁸
- Results of a Midwest study indicate a relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics revealed that African American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.²⁹

However, other studies have found that differences in preferences for Federal Housing Administration (FHA) loans — mortgage loans that the government insures — versus conventional loans among racial and ethnic groups may partially explain disparities found in conventional loan approvals between minorities and non-minorities.³⁰ Several studies have found that, historically, minority borrowers are far more likely to seek FHA loans than comparable non-Hispanic white borrowers across different income and wealth levels. The insurance on FHA loans protects the lender, but the borrower can be disadvantaged by paying higher borrowing costs.^{31, 32}

Subprime lending. Loan denial is only one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Until the Great Recession, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for \$330 billion of U.S. mortgages in 2003, up from \$35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.³³ With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Subprime loans also became available to homeowners who did not want to or could not make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost higher

²⁷ Canner, G. B., Gabriel, S. A., & Woolley, M. J. (1991). Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets. *Southern Economic Journal*, 58(1), 249–262.

²⁸ Allen, R., & Hirasuna, D. (2012). The Resurgence of Denial Rates for Home Loans: An Examination of Disparate Effects on Groups of Applicants in the Upper Midwest. *Housing Policy Debate*, 22(4), 573–603.

²⁹ Leahy, P. J. (1985). Are Racial Factors Important for the Allocation of Mortgage Money?: A Quasi-Experimental Approach to an Aspect of Discrimination. *American Journal of Economics and Sociology*, 44, 185–196.

³⁰ Canner, G. B. et al. (1991). Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets. *Southern Economic Journal*, 58(1), 249–262.

³¹ Yinger, J. (1995). *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 80.

³² See definition of subprime loans discussed on the following page.

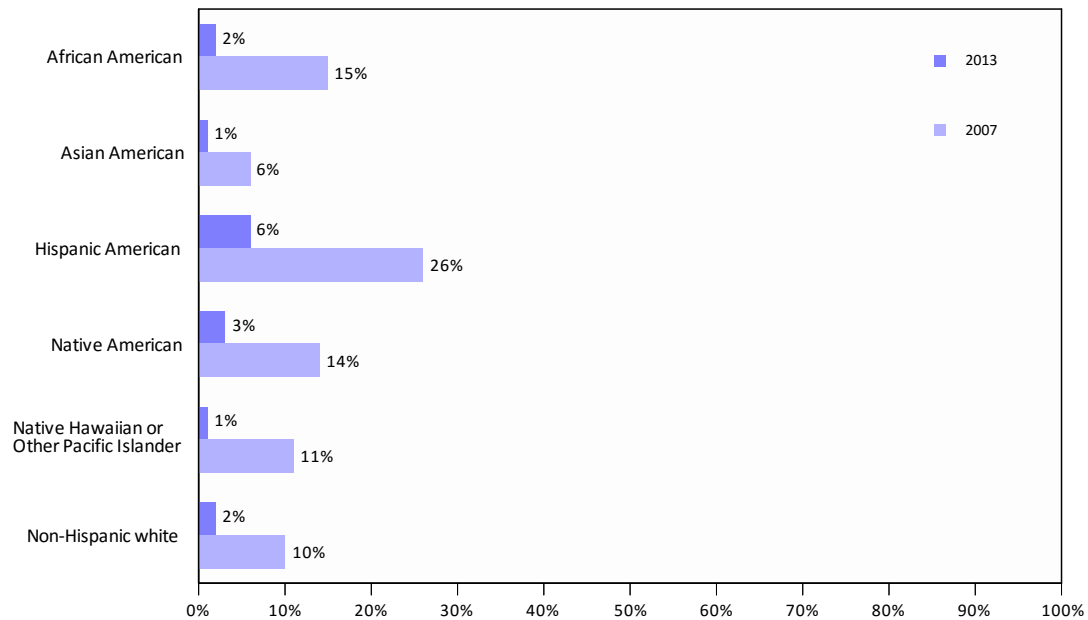
³³ Avery, R. B., Brevoort, K. P., & Canner, G. B. (2007, December). The 2006 HMDA Data. *Federal Reserve Bulletin*, pp. A73-A109.

than what they would qualify for from a prime lender.³⁴ The higher interest rates and additional costs of subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

There are several commonly used approaches to defining a subprime loan and examining rates of subprime lending. Keen Independent used a "rate-spread method" in which subprime loans are identified as those loans with substantially above-average interest rates.³⁵ Because lending patterns and borrower motivations differ depending on the type of loan sought, Keen Independent separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

Figure G-4 presents the percentage of conventional home purchase loans that were subprime in Oregon based on 2007 and 2013 HMDA data. The share of conventional home purchase loans that were subprime declined with the collapse of the mortgage lending market in the late 2000s.

Figure G-4.
Percent of conventional home purchase loans that were subprime, Oregon, 2007 and 2013



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

Source: FFIEC HMDA data, 2007 and 2013.

In Oregon in 2007, one-quarter of home purchase loans that were issued to Hispanic Americans were subprime, more than double the percentage for non-Hispanic whites (10%). Subprime loans

³⁴ Gerardi, K., Shapiro, A. H., & Willen, P. (2008). Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*, 7(15).

³⁵ Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. Keen Independent identified subprime loans according to those measures in the corresponding time periods.

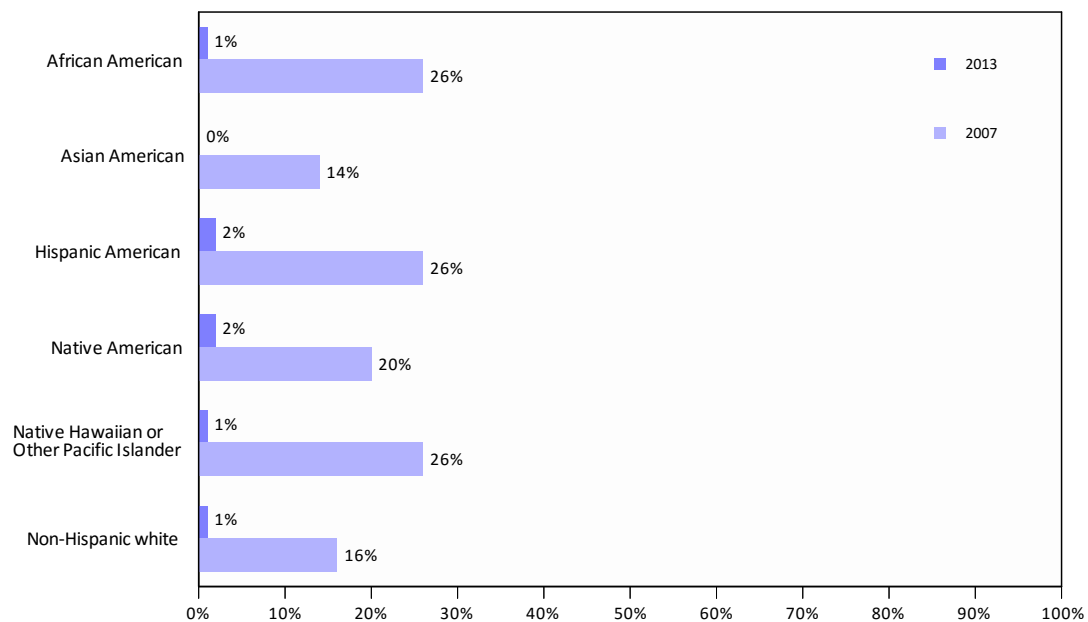
also accounted for a relatively large portion of conventional home mortgages for African Americans, Native Americans, and Native Hawaiian and other Pacific Islander borrowers.

By 2013, subprime loans as a percentage of all conventional home purchase loans issued in Oregon that year dropped for each racial/ethnic group. Subprime loans still accounted for a larger share of conventional home purchase loans for Native Americans and Hispanic Americans than for non-Hispanic whites (6% and 3% for each respective group compared with 2%).

Figure G-5 presents similar information for conventional home refinance loans in Oregon. In 2007, 16 percent of non-Hispanic white refinance borrowers in Oregon obtained subprime loans. Except for Asian Americans, subprime loans comprised a much larger share of refinance loans for minority borrowers (about one-quarter for African Americans, Hispanic Americans and Native Hawaiians).

In 2013, the share of conventional refinance mortgages that were subprime in Oregon dropped to 0 to 2 percent for each racial/ethnic group.

Figure G-5.
Percent of conventional refinance loans that were subprime, Oregon, 2007 and 2013



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

Source: FFIEC HMDA data, 2007 and 2013.

Additional research. Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”³⁶ Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.³⁷ Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities. A 2001 HUD study using 1998 HMDA data found that subprime loans were disproportionately concentrated in African American neighborhoods compared with white neighborhoods, even after controlling for income.³⁸ For example, borrowers in higher-income African American neighborhoods were six times more likely to refinance with subprime loans than borrowers in higher-income white neighborhoods. More recent analyses using 2006 HMDA data found that African American borrowers, going to the same lender and displaying similar financial characteristics, were significantly more likely to receive high-cost loans (those with an interest rate more than 3 percent higher than comparable U.S. Treasury instruments) compared to non-Hispanic whites.³⁹ More recent research using 2007 HMDA data analyzed differences between high-cost loans among borrowers of different racial and gender backgrounds at comparable income levels and found, on average, African American and Hispanic American borrowers were about twice as likely to receive high-cost loans relative to similarly situated non-minority borrowers in the Portland metropolitan area.⁴⁰

Implications of the recent mortgage lending crisis. The turmoil in the housing market since late 2006 has been far-reaching, resulting in the loss of home equity, decreased demand for housing, and increased rates of foreclosure.⁴¹ Much of the blame has been placed on risky practices in the mortgage industry, including substantial increases in subprime lending. As discussed above, the number of subprime mortgages increased at an extraordinary rate between the mid-1990s and mid-2000s. Those high-cost, high-interest loans increased from 8 percent of originations in 2003 to 20 percent in 2005 and 2006.⁴² The preponderance of subprime lending is important because households that were repaying subprime loans had a greater likelihood of delinquency or foreclosure. A 2008 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”⁴³

³⁶ Department of Housing and Urban Development (HUD) and the Department of Treasury. (2001). HUD-Treasury National Predatory Lending Task Force Report. *HUD*; Carr, J., & Kolluri, L. (2001). Predatory Lending: An Overview. *Fannie Mae Foundation*; and California Reinvestment Coalition, Community Reinvestment Association of North Carolina, Empire Justice Center, Massachusetts Affordable Housing Alliance, Neighborhood Economic Development Advocacy Project, Ohio Fair Lending Coalition and Woodstock Institute. (2008). “Paying More for the American Dream.”

³⁷ Freddie Mac. (1996, September). Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families. *Freddie Mac*. Accessed February 5, 2007; and Lanzerotti, L. (2006). Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California. Working paper, Federal Reserve Bank of San Francisco.

³⁸ Department of Housing and Urban Development (HUD) and the Department of Treasury. (2001). HUD-Treasury National Predatory Lending Task Force Report. *HUD*.

³⁹ Sen, M. (2012). *Quantifying Discrimination: Exploring the Role of Race and Gender and the Awarding of Subprime Mortgage Loans*. Retrieved from <http://ssrn.com/abstract=1593183>

⁴⁰ National Council of Negro Women. (2009). “Income is No Shield, Part III-Assessing the Double Burden: Examining Racial and Gender Disparities in Mortgage Lending.”

⁴¹ Joint Center for Housing Studies of Harvard University. (2008). “The State of the Nation’s Housing.”

⁴² *Ibid*.

⁴³ Gerardi, K., Shapiro, A. H., & Willen, P. (2008). Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*, 7(15).

Such problems substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses. That issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that “one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press.”⁴⁴
- On November 20, 2008, Randall Kroszner told the U.S. House of Representatives Committee on Small Business that “small business and household finances are, in practice, very closely intertwined. [T]he most recent Survey of Small Business Finances (SSBF) indicated that about 15 percent of the total value of small business loans in 2003 was collateralized by ‘personal’ real estate. Because the condition of household balance sheets can be relevant to the ability of some small businesses to obtain credit, the fact that declining house prices have weakened household balance-sheet positions suggests that the housing market crisis has likely had an adverse impact on the volume and price of credit that small businesses are able to raise over and above the effects of the broader credit market turmoil.”⁴⁵

Federal Reserve Chairman Ben Bernanke recognized the reality of those concerns in a speech titled “Restoring the Flow of Credit to Small Businesses” on July 12, 2010.⁴⁶ Bernanke indicated that small businesses have had difficulty accessing credit and pointed to the declining value of real estate as one of the primary obstacles.

Furthermore, the National Federation of Independent Business (NFIB) conducted a national survey of 751 small businesses in late 2009 to investigate how the recession impacted access to capital.^{47, 48} NFIB concluded that “falling real estate values (residential and commercial) severely limit small business owner capacity to borrow and strains currently outstanding credit relationships.” Survey results indicated that 95 percent of small business employers owned real estate and 13 percent held “upside-down” property — that is, property for which the mortgage is worth more than its appraised value.

Another study analyzed the Survey of Consumer Finances to explore racial/ethnic disparities in wealth and how those disparities were impacted by the recession.⁴⁹ The study showed that there are

⁴⁴ Mishkin, F. (2008). “Small business lending.” Statement of Frederic S. Mishkin, Member, Board of Governors of the Federal Reserve System before the Committee on Small Business and Entrepreneurship, U.S. Senate on April 16.

⁴⁵ Kroszner, R. (2008). “Effects of the financial crisis on small business.” Testimony before the Committee on Small Business, U.S. House of Representative on November 20.

⁴⁶ Bernanke, B. (2010). “Restoring the Flow of Credit to Small Businesses.” Presented at the Federal Reserve Meeting Series: Addressing the Financing Needs of Small Businesses on July 12.

⁴⁷ The study defined a small business as a business employing no less than one individual in addition to the owner(s) and no more than 250 individuals.

⁴⁸ National Federation of Independent Business (NFIB). (2010). “Small Business Credit in a Deep Recession.”

⁴⁹ McKernan, S. M., Ratcliffe, C., Steverle, E., & Zhang, S. (2013). *Less Than Equal: Racial Disparities in Wealth Accumulation*. *Urban Institute*.

substantial wealth disparities between African Americans and whites as well as Hispanic Americans and whites, and that those wealth disparities worsened between 1983 and 2010. In addition to growing over time, the wealth disparity also grows with age — whites are on a higher accumulation curve than blacks or Latinos. The study also reports that the 2007–2009 recession exacerbated wealth disparities, particularly for Latinos.

Opportunities to obtain business capital through home mortgages appear to be limited, especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business startup and growth.

Redlining. Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as African American or mixed-race neighborhoods.⁵⁰ That practice can perpetuate problems in already poor neighborhoods.⁵¹ Most quantitative studies have failed to find strong evidence in support of geographic dimensions of lender decisions. Studies in Columbus, Ohio; Boston, Massachusetts; and Houston, Texas found that racial differences in loan denial had little to do with the racial composition of a neighborhood but rather with the individual characteristics of the borrower.⁵² Some studies found the race of an applicant — but not the racial makeup of the neighborhood — to be a factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising, and other pre-application procedures.⁵³ Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business startup because local banking sectors often finance local businesses.⁵⁴ Redlining practices would deny that resource to minorities.

Steering by real estate agents. Historically, differences in the types of loans that are issued to minorities have also been attributed to “steering” by real estate agents, who serve as an information filter.⁵⁵ Despite the fact that steering has been prohibited by law for many decades, some studies claim that real estate brokers provide different levels of assistance and different information on loans

⁵⁰ Holloway, S. R. (1998). Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio. *Annals of the Association of American Geographers*, 88(2), 252–276.

⁵¹ Ladd, H. F. (1998). Evidence on Discrimination in Mortgage Lending. *The Journal of Economic Perspectives*, 12(2), 41–62.

⁵² See Holloway, S. R. (1998). “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”; Tootell, G. B. (1996). “Redlining in Boston: Do Mortgage Lenders Discriminate Against Neighborhoods?”; and Holmes, A., & Horvitz, P. (1994). Mortgage Redlining: Race, Risk, and Demand. *The Journal of Finance*, 49(1), 81–99.

⁵³ Yinger, J. (1995). *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 78–79.

⁵⁴ Holloway, S. R. (1998). “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”

⁵⁵ Kantor, A. C., & Nystuen, J. D. (1982). De Facto Redlining a Geographic View. *Economic Geography*, 58(4), 309–328.

to minorities than they do to non-minorities.⁵⁶ Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

In 2011, the Fair Housing Council of Oregon conducted an audit in Portland to determine if there were barriers in the housing market for black and Latino renters and found that out of 50 tests, 64 percent of property owners discriminated against them.⁵⁷ Four years later, a second audit administered by the Fair Housing Council confirmed that black and Latino renters continue to face this discrimination even after city officials had vowed to eliminate housing discrimination.⁵⁸

Research in the Portland area explains how bankers, property owners and real estate agents supported redlining, resulting in the segregation of African Americans in Albina, which lasted over 40 years.⁵⁹ Another article discusses Portland's Realty Board that established its "code of ethics" that required realtors to sell real estate to African Americans within Albina neighborhoods. Noncompliance with this ordinance resulted in the realtor's dismissal.⁶⁰

Gender discrimination in mortgage lending. Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Perceived risks associated with granting loans to women of childbearing age and unmarried women resulted in "income discounting," limiting the availability of loans to women.⁶¹

The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets. For example, there is some past evidence that lenders under-appraised properties for female borrowers.⁶²

B. Access to Business Capital

Barriers to accessing capital can have substantial impacts on small business formation and expansion. In-depth interviews with business owners and managers in Oregon indicated a strong link between capital and the ability to start and grow a business. In addition, several studies have found evidence that startup capital is important for business profits, longevity and other outcomes. For example:

⁵⁶ Yinger, J. (1995). *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 78–79.

⁵⁷ Hannah-Jones, N. (2011). Portland housing audit finds discrimination in 64 percent of tests; city has yet to act against landlords. *The Oregonian*.

⁵⁸ Schmidt, B. (2015). Portland housing audit shows blacks, Latinos face discriminatory barriers. *The Oregonian*.

⁵⁹ Gibson, K. J. (2007). Bleeding Albina: A History of Community Disinvestment, 1940–2000. *Transforming Anthropology*, 15(1), 18.

⁶⁰ Goodling, E., Green, J., & McClintock, J. (2015). Uneven development of the sustainable city: shifting capital in Portland, Oregon. *Urban Geography*, 36(4), 11.

⁶¹ Card, E. (1980). "Women, Housing Access, and Mortgage Credit."

⁶² Ladd, H. F. (1982). Equal Credit Opportunity: Women and Mortgage Credit. *The American Economic Review*, 72, 166–170.

- The amount of startup capital is associated with small business sales and other outcomes;⁶³
- Limited access to capital has affected the size of African American-owned businesses;^{64, 65} and
- Weak financial capital was identified as a reason that more African American-owned businesses closed over a four-year period compared with non-Hispanic white-owned businesses.⁶⁶

Bank loans are one of the largest sources of debt capital for small businesses.⁶⁷ Discrimination in the application and approval processes of those loans and other credit resources could be detrimental to the success of minority- and women-owned businesses. Previous studies have addressed racial/ethnic and gender discrimination in capital markets by evaluating:

- Loan denial rates;
- Loan values;
- Interest rates;
- Business owners' fears that loan applications will be rejected;
- Sources of capital; and
- Relationships between startup capital and business survival.

To examine the role of race/ethnicity and gender in capital markets, Keen Independent analyzed data from the Federal Reserve Board's 2003 Survey of Small Business Finances (SSBF) — the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The sample from 2003 contains records for 4,240 businesses. Keen Independent applied sample weights to provide representative estimates of loan denial and interest rates.

The SSBF records the geographic location of businesses by Census Division, not by city, county or state. The Pacific Census Division ("Pacific region" throughout this report) includes Alaska, California, Hawaii, Oregon, and Washington. The Pacific region is the level of geographic detail of SSBF data most specific to Oregon, and 2003 is the most recent information available from the SSBF as the survey was discontinued after that year. More recent national surveys show consistent results.

⁶³ See Fairlie, R. W., & Krashinsky, H. A. (2006). "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited"; and Grown, C., & Bates, T. (1991). Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies. *Journal of Urban Affairs*, 14(1), 25–41.

⁶⁴ Grown, C., & Bates, T. (1992). Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies. *Journal of Urban Affairs*, 14(1), 25–41.

⁶⁵ Fairlie, R. W., & Robb, A. M. (2010). *Race and Entrepreneurial Success*. Cambridge: MIT Press.

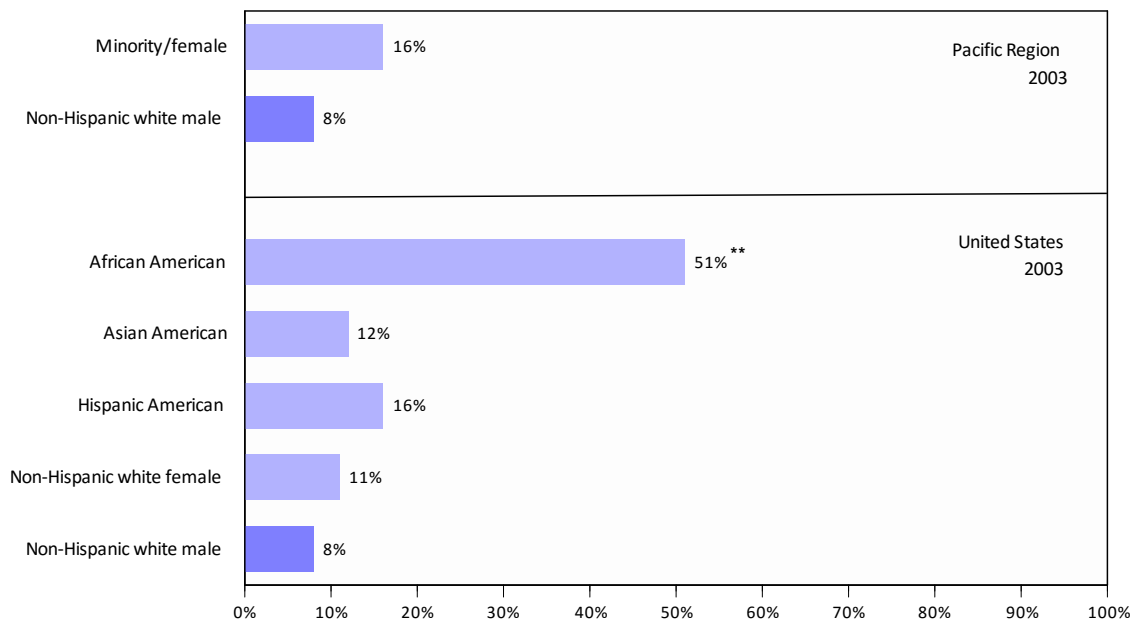
⁶⁶ Grown, C., & Bates, T. (1992). Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies. *Journal of Urban Affairs*, 14(1), 25–41.

⁶⁷ Data from the 1998 SSBF indicate that 70 percent of loans to small business are from commercial banks. That result is present across all gender and racial/ethnic groups with the exception of African Americans, whose rate of lending from commercial banks is even greater than other minorities. See Blanchard, L., Zhao, B., & Yinger, J. (2005). "Do Credit Market Barriers Exist for Minority and Woman Entrepreneurs?" Center for Policy Research, Syracuse University.

Loan denial rates. Figure G-6 presents loan denial rates from the 2003 SSBF for the Pacific region and for the United States.⁶⁸ National SSBF data for 2003 reveal that the loan denial rate for African American-owned businesses (51%) in the United States was higher than for non-Hispanic white male-owned businesses (8%), a statistically significant difference. Denial rates were also higher for other minority groups and non-Hispanic white females, but those differences were not statistically significant.

As shown in Figure G-6, about 16 percent of minority- and women-owned businesses in the Pacific region reported being denied loans in 2003, which is twice the percentage of non-Hispanic white male-owned businesses that reported being denied loans (8%). (Loan denial statistics on individual minority groups in the Pacific region are not reported in Figure G-6 due to relatively small sample sizes.)

Figure G-6.
Business loan denial rates, 2003



Note: ** Denotes that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

Other researchers’ regression analyses of loan denial rates. Several studies have investigated whether disparities in loan denial rates for different racial/ethnic and gender groups exist after controlling for other factors that affect loan approvals. Study results include the following:

- Commercial banks are less likely to loan to African American-owned businesses than to non-Hispanic white-owned businesses after statistically controlling for other factors.⁶⁹

⁶⁸ The denial rates represent the proportion of business owners whose loan applications over the previous three years were always denied, compared to business owners whose loan applications were always approved or sometimes approved.

⁶⁹ Cavalluzzo, K., Cavalluzzo, L., & Wolken, J. (2002). Competition, Small Business Financing and Discrimination: Evidence from a New Survey. *Journal of Business*, 75(4), 641–679.

- African American, Asian American and Hispanic American men are more likely to be denied loans than non-Hispanic white men. However, African American borrowers are more likely to apply for loans.⁷⁰
- Disparities in loan denial rates between African American-owned and non-Hispanic white-owned businesses tend to decrease with increasing competitiveness of lender markets. A similar phenomenon is observed when considering differences in loan denial rates between male- and female-owned businesses.⁷¹
- The probability of loan denial decreases with greater personal wealth. However, accounting for personal wealth does not account for the large differences in denial rates across African American-, Hispanic American-, Asian American- and non-Hispanic white-owned businesses. Specifically, information about personal wealth explained some differences between Hispanic American- and Asian American-owned businesses and non-Hispanic white-owned businesses, but they explained almost none of the differences between African American-owned businesses and non-Hispanic white-owned businesses.⁷²
- Loan denial rates are higher for African American-owned businesses than for non-Hispanic white-owned businesses after accounting for several factors such as creditworthiness and other characteristics. That result is largely insensitive to different model specifications. Consistent evidence on loan denial rates and other indicators of discrimination in credit markets was not found for other minorities or for women.⁷³
- One study concluded that women-owned businesses are no less likely to apply or to be approved for loans in comparison to male-owned businesses.⁷⁴
- A recent study using Kauffman Firm Survey data found that black/Hispanic-owned firms had a lower probability of loan approval than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010, even after accounting for firm and owner characteristics. In 2010, Asian-owned firms were also less likely to be approved. Women-owned firms had a lower likelihood of loan approval than male-owned firms, but only for 2008.⁷⁵

⁷⁰ Coleman, S. (2002). Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances. *The Journal of Business and Entrepreneurship*, 151–166.

⁷¹ Cavalluzzo, K. (2002). “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

⁷² Cavalluzzo, K., & Wolken, J. (2002). “Small Business Turndowns, Personal Wealth and Discrimination.” FEDS Working Paper No. 2002-35.

⁷³ Blanchflower, D. G., Levine, P. B., & Zimmerman, D. J. (2003). Discrimination in the Small Business Credit Market. *The Review of Economics and Statistics*, 85(4), 930–943.

⁷⁴ Coleman, S. (2002). “Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances.”

⁷⁵ Robb, A. M. (2012). “Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms.” U.S. Small Business Administration.

Regression model for denial rates in the SSBF. Keen Independent developed regression models to explore the relationships between loan denial and the race, ethnicity and gender of business owners while statistically controlling for other factors. As discussed above, there is extensive literature on business loan denials that provides the theoretical basis for the regression models. Many studies have used probit econometric models to investigate the effects of various owner, business, and loan characteristics on the likelihood of loan denial. They include three general categories of variables:

- Owners’ demographic characteristics (including race and gender), credit, and resources (13 variables);
- Business characteristics and credit and financial health (26 variables); and
- The environment in which businesses and lenders operate and characteristics of the loans (19 variables).⁷⁶

After excluding observations where loan denial was imputed, businesses where no individual held at least 10 percent ownership and businesses where the largest shareholders were firms, the 2003 national sample included 1,734 businesses that had applied for a loan during the three years preceding the 2003 SSBF.

Given the relatively small sample size for the Pacific region (231 businesses) and the large number of variables in the model, Keen Independent included all U.S. businesses in the model and estimated any Pacific region effects by including regional control variables — an approach commonly used in other studies that analyze SSBF data.⁷⁷ The regional variables include an indicator variable for businesses located in the Pacific region and interaction variables that represent businesses owned by minorities or women that are located in the Pacific region.⁷⁸

⁷⁶ See, for example, Blanchard, L., Zao, B., & Yinger, J. (2005). “Do Credit Barriers Exist for Minority and Women Entrepreneurs?” Center for Policy Research, Syracuse University.

⁷⁷ Blanchflower, D. G., Levine, P. B., & Zimmerman, D. J. (2003). Discrimination in the Small-Business Credit Market. *The Review of Economics and Statistics*, 85(4), 930–943; NERA Economic Consulting. (2008). “Race, Sex, and Business Enterprise: Evidence from the City of Austin.” Prepared for the City of Austin, Texas; and CRA International. (2007). “Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization.” Prepared for Santa Clara Valley Transportation Authority.

⁷⁸ Keen Independent also considered an interaction variable to represent firms that are both minority and female but the term was not significant.

Figure G-7 on the following page presents the marginal effects from the probit model predicting loan denials. The dependent variable represented whether a company's loan applications over the past three years were always denied. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of loan denial.

The following characteristics were associated with a *higher* probably of loan denial:

- Location in an MSA; and
- Being in the transportation, communications and utilities industry.

The following characteristics were associated with a *lower* probably of loan denial:

- Being an inherited business or older business;
- Having an existing line of credit or savings account; and
- Firm bankruptcy in the past seven years (an atypical result).

After statistically controlling for race- and gender-neutral influences, Keen Independent observed that businesses owned by African Americans were more likely to have their loans denied than other businesses.

The indicator variable for the Pacific region and the interaction terms for Pacific region and status as a minority- or women-owned business were not statistically significant. That result indicates that the probability of loan denials for minority- and women-owned businesses within the Pacific region is not significantly different from the U.S. as a whole after accounting for other factors.

Keen Independent simulated loan approval rates for African American-owned businesses by comparing observed approval rates with simulated approval rates. "Loan approval" means that a business owner always, or at least sometimes, had his or her business loan applications approved over the previous three years. "Rates" of loan approval means the percentage of businesses that received loan approvals (always or sometimes) during that time period. Approval rates were calculated by subtracting the denial rate from 100 (e.g., a denial rate of 40% would indicate an approval rate of 60%).

The probit modeling approach allowed for simulations of loan approval rates for African American-owned businesses as if they had the same probability of loan approval as similarly situated non-Hispanic white male-owned businesses. This allows one to calculate a disparity index for loan approval rates. To conduct the simulation, Keen Independent took the following steps:

- Performed a probit regression analysis predicting loan approval using only non-Hispanic white male-owned businesses in the dataset.⁷⁹
- Used the coefficients from that model and the mean characteristics of African American-owned businesses (including the effects of a business being in the Pacific region) to estimate the probability of loan approval of that group.

⁷⁹ That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

Figure G-7.
Likelihood of business loan denial (probit regression) in the U.S. in the 2003 SSBF,
Dependent variable: loan denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
African American	0.185 **	D&B credit score = moderate risk	-0.011	Partnership	-0.007
Asian American	-0.014	D&B credit score = average risk	0.032	S corporation	0.029
Hispanic American	-0.012	D&B credit score = significant risk	0.012	C corporation	0.039
Native American	0.021	D&B credit score = high risk	0.053	Construction industry	0.029
Other minority	0.013	Total employees	0.000	Manufacturing industry	0.015
Female	0.011	Percent of business owned by principal	0.000	Transportation, communications and utilities industry	0.192 **
Pacific region	0.037	Family-owned business	-0.024	Finance, insurance and real estate industries	0.010
Minority in Pacific region	0.062	Firm purchased	0.002	Engineering industry	-0.001
Female in Pacific region	-0.003	Firm inherited	-0.037 **	Other industry	0.002
Owner's characteristics, credit and resources		Firm age	-0.001 *	Herfindahl index = .10 to .18	-0.001
Age	-0.001	Firm has checking account	-0.153	Herfindahl index = .18 or above	0.028
Owner experience	0.002 **	Firm has savings account	-0.022 **	Located in MSA	0.024 **
Some college	-0.011	Firm has line of credit	-0.090 **	Sales market local only	0.014
Four-year degree	-0.003	Existing capital leases	-0.006	Loan amount	0.000
Advanced degree	-0.025 *	Existing mortgage for business	0.015	Capital lease application	-0.016
Log of home equity	0.001	Existing vehicle loans	0.020	Business mortgage application	-0.033 **
Owner has negative net worth	-0.004	Existing equipment loans	-0.012	Vehicle loan application	-0.053 **
Bankruptcy in past 7 years	0.101	Existing loans from stockholders	0.022	Equipment loan application	-0.021 *
Judgement against in past 3 years	0.017	Other existing loans	0.029	Loan for other purposes	-0.026 **
Log of net worth excluding home	0.000	Firm used trade credit in past year	0.000		
		Log of total sales in prior year	-0.012		
		Log of cost of doing business in prior year	-0.004		
		Log of total assets	0.003		
		Log of total equity	-0.002		
		Firm bankruptcy in past 7 years	-0.025 *		
		Firm delinquency in business transactions	0.013		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

For ease of interpretation, the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using chi-square test statistics from the probit coefficients associated with the marginal effects.

"Less than high school education," "Negative total assets," "Negative sales in prior year" and "Mining industry" perfectly predicted loan outcome and dropped out of the regression;

"Negative total equity" dropped because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

Based on 2003 SSBF data, the actual loan approval rate for African American-owned businesses was 53 percent. Model results showed that African American-owned businesses would have an approval rate of about 69 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses (disparity index of 77). The index of 77 suggests a substantial disparity between the actual loan approval rate and the rate for African American-owned businesses that might be expected for similarly-situated non-Hispanic white male-owned businesses. Figure G-8 presents these results.

Figure G-8.
Comparison of actual loan approval rates to simulated loan approval rates, 2003

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
African American	53.2%	69.0%	77

Note: Actual approval rates presented here may differ from denial rates in Figure G-6 because some observations were excluded from the probit regression.

“Loan approval” means that a business owner always, or at least sometimes, had his or her business loan applications approved over the previous three years.

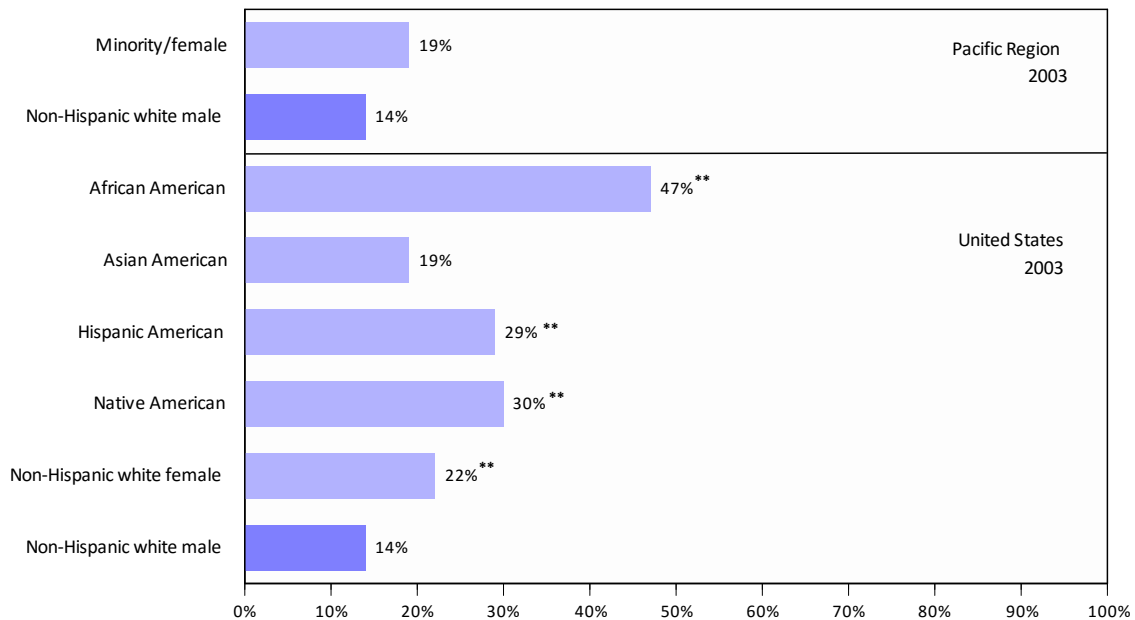
Source: Keen Independent Research analysis of 2003 SSBF data.

Applying for loans. Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. The SSBF includes a question that gauges whether a business owner did not apply for a loan due to fear of loan denial. Using data from the 2003 SSBF, Figure G-9 presents the percentage of businesses that reported needing credit but did not apply for loans because of fear of denial.

In the Pacific region, minority- and women-owned businesses that reported needing loans were more likely than non-Hispanic white-owned firms to say that they did not apply for those loans because of fear of loan denial, however, the difference was not statistically significant.

The bottom portion of Figure G-9 shows national results for fear of loan denial by race, ethnicity and gender of the business owners. Nationwide, African American, Hispanic American and Native American business owners were more likely to forgo applying for business loans due to a fear of denial compared to non-Hispanic white male-owned businesses (statistically significant differences). Non-Hispanic white women-owned businesses were also more likely to forgo applying for loans due to a fear of denial (also a statistically significant difference).

Figure G-9.
Businesses that needed loans but did not apply due to fear of denial, 2003



Note: *, ** Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

Other researchers’ regression analyses of fear of denial. Other studies have identified factors that influence the decision to apply for a loan, such as business size, business age, owner age, and educational attainment. Accounting for those factors can help in determining whether race/ethnicity or gender of business owners explains whether owners did not apply for a loan due to fear of loan denial. Results indicate that:

- African American and Hispanic American business owners are significantly less likely to apply for loans due to fear of denial.⁸⁰
- After statistically controlling for educational attainment, there were no differences in loan application rates between non-Hispanic white, African American, Hispanic American, and Asian American male business owners.⁸¹
- African American-owned businesses were more likely than other businesses to report being seriously concerned with credit markets, and were less likely to apply for credit for fear of loan denial.⁸²

⁸⁰ Cavalluzzo, K. (2002). “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

⁸¹ Coleman, S. (2004). Access to Debt Capital for Small Women- and Minority-Owned Firms: Does Educational Attainment Have an Impact? *Journal of Developmental Entrepreneurship*, 9(2), 127–144.

⁸² Blanchflower, D. G., Levine, P. B., & Zimmerman, D. J. (2003). Discrimination in the Small Business Credit Market. *The Review of Economics and Statistics*, 85(4).

- A Small Business Administration study found that African American- and Hispanic American-owned firms were less likely to apply for credit when needed for fear of having the loan application denied than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010 after accounting for firm and owner characteristics. Women-owned firms were less likely than male-owned firms to apply for loans for fear of denial in 2008, 2009 and 2010.⁸³

Regression model for fear of denial in the SSBF. Keen Independent conducted its own econometric analysis of fear of denial by developing a model to explore the relationships between fear of denial and the race/ethnicity and gender of businesses owners while statistically controlling for other factors. The model was similar to the probit regression for likelihood of denial, except that the fear of denial model included business owners who did not apply for a loan and excluded loan characteristics.

After excluding observations where fear of denial was imputed, businesses where no individual held at least 10 percent ownership and businesses where the largest shareholders were firms, the 2003 national sample included 3,957 businesses (690 of which were in the Pacific region). Similar to the likelihood of denial model, Pacific region effects are modeled using regional control variables in the national model.⁸⁴

Figure G-10 presents the marginal effects from the probit model predicting the likelihood that a business needs credit but will not apply for a loan due to fear of denial. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of forgoing application for a loan due to fear of denial.

Factors that are associated with a *higher* likelihood of not applying for a loan due to fear of loan denial include:

- The business owner having had a judgment against the business in the past 3 years;
- The business owner having filed for bankruptcy in the past 7 years;
- The business having a significant or high risk credit score;
- The business having an existing mortgage, existing vehicle loans, existing loans from stockholders or other existing loans;
- Having one or more delinquent business transactions (60 days or more) within the past 3 years; and
- Location in a metropolitan area.

⁸³ Robb, A. M. (2012). "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

⁸⁴ Again, Keen Independent considered an interaction variable to represent firms that are both minority and female but the term was not significant.

Factors that are associated with a *lower* likelihood of not applying for a loan due to fear of loan denial include:

- The business owner being older and having a four-year college degree;
- More equity in the business owner's home — if he or she is a homeowner — and more business owner net worth (excluding the business owner's home);
- Being an older business;
- More sales in the prior year;
- Negative sales in prior year:
- Greater firm equity;
- Being in the transportation, communications and utilities industry; and
- Having a local (as opposed to regional, national or international) sales market.

After statistically controlling for race- and gender-neutral influences, African American-owned firms were more likely to forgo applying for a loan due to fear of denial. Results for minority- and women-owned businesses within the Pacific region were not significantly different from the U.S. as a whole after accounting for other factors.

Figure G-10.
Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 2003 SSBF,
Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
African American	0.189 **	D&B credit score = moderate risk	-0.009	Partnership	0.001
Asian American	0.053	D&B credit score = average risk	0.041	S corporation	0.013
Hispanic American	0.063	D&B credit score = significant risk	0.047	C corporation	0.022
Native American	0.017	D&B credit score = high risk	0.108 **	Construction industry	0.033
Other minority	0.128	Total employees	0.000	Manufacturing industry	-0.015
Female	0.030	Percent of business owned by principal	0.001 **	Transportation, communications and utilities industry	-0.049 **
Pacific region	0.015	Family-owned business	-0.011	Finance, insurance and real estate industries	0.039
Minority in Pacific region	-0.044	Firm purchased	-0.010	Engineering industry	-0.028
Female in Pacific region	0.061	Firm inherited	-0.034	Other industry	0.010
Owner's characteristics, credit and resources		Firm age	-0.003 **	Herfindahl index = .10 to .18	-0.009
Age	-0.002 **	Firm has checking account	0.007	Herfindahl index = .18 or above	0.023
Owner experience	0.001	Firm has savings account	0.013	Located in MSA	0.046 **
Less than high school education	0.039	Firm has line of credit	-0.005	Sales market local only	-0.061 **
Some college	-0.002	Existing capital leases	0.030		
Four-year degree	-0.039 **	Existing mortgage for business	0.048 **		
Advanced degree	-0.024	Existing vehicle loans	0.031 *		
Log of home equity	-0.004 **	Existing equipment loans	0.042		
Owner has negative net worth	-0.032	Existing loans from stockholders	0.074 **		
Bankruptcy in past 7 years	0.225 **	Other existing loans	0.106 **		
Judgement against in past 3 years	0.272 **	Firm used trade credit in past year	0.018		
Log of net worth excluding home	-0.025 **	Log of total sales in prior year	-0.021 **		
		Negative sales in prior year	-0.092 **		
		Log of cost of doing business in prior year	0.012 *		
		Log of total assets	0.005		
		Log of total equity	-0.008		
		Firm bankruptcy in past 7 years	0.201		
		Firm delinquency in business transactions	0.143 **		

Note: * Statistically significant at 90% confidence level.
** Statistically significant at 95% confidence level.

For ease of interpretation, the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using chi-square statistics from the probit coefficients associated with the marginal effects.

"Mining industry" and "Negative total assets" perfectly predicted loan outcome and dropped out of the regression; "Negative total equity" dropped because of collinearity.

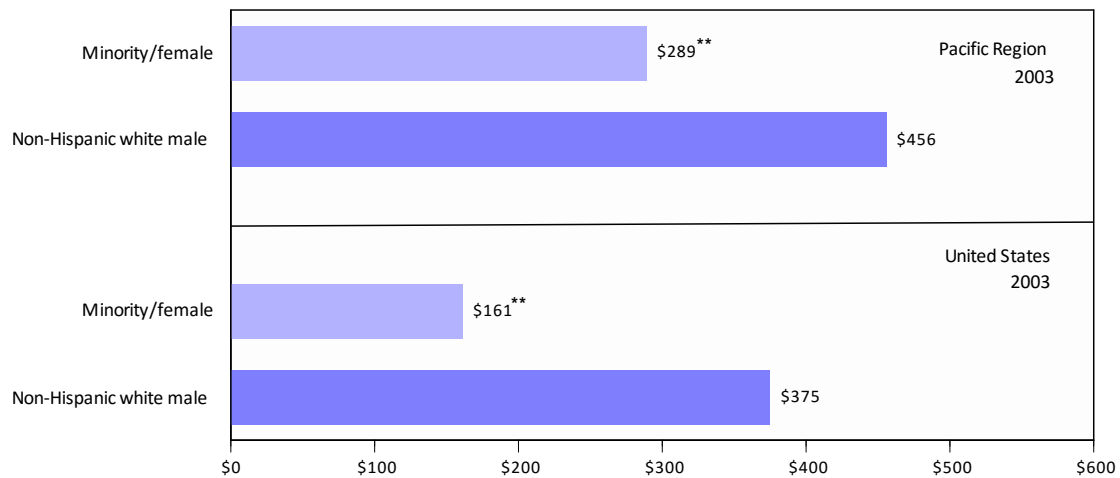
Source: Keen Independent Research analysis of 2003 SSBF data.

Loan values. Keen Independent also considered average loan values for businesses that received loans. Results from the 2003 SSBF for mean loan values issued to different racial/ethnic and gender groups are presented in Figure G-11.

Comparisons of loan amounts between non-Hispanic white male-owned businesses and minority- and women-owned businesses indicated the following:

- Among firms in the Pacific region that obtained loans, minority- and women-owned businesses received loans that averaged about \$289,000. Majority-owned firms received loans that averaged about \$456,000. In sum, minority- and women-owned firms received loans that, on average, were less than one-half the size of loans received by majority-owned firms.
- The disparity in average loan value for minority- and women-owned firms was also evident for the nation, as shown below.

Figure G-11.
Mean value of approved business loans, in thousands, 2003



Note: ** Denotes that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

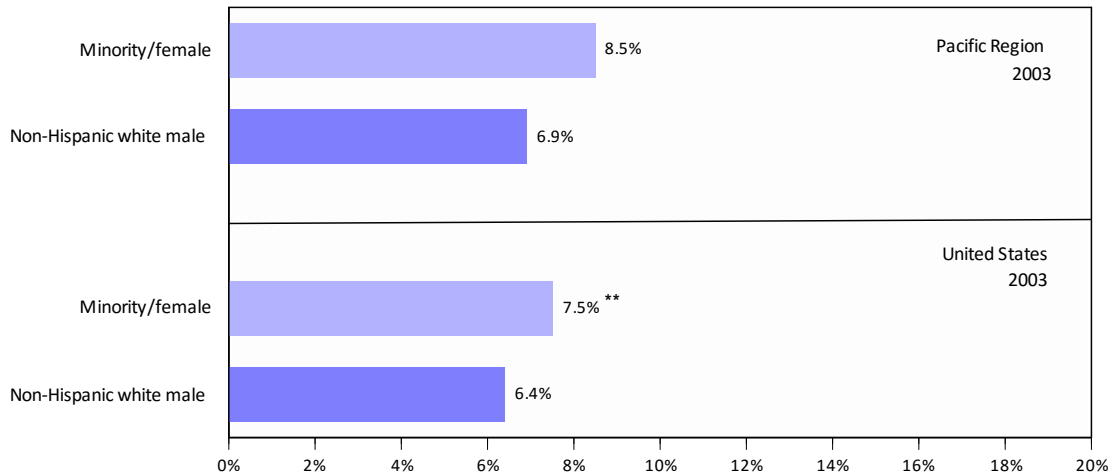
Previous national studies have found that African American-owned businesses are issued loans that are smaller than loans issued to non-Hispanic white-owned businesses with similar characteristics. Examination of construction companies in the United States have also revealed that African American-owned businesses are issued loans that are worth less than loans issued to businesses with otherwise identical characteristics.⁸⁵

Keen Independent conducted further econometric analysis to explore the relationships between loan amounts and the race/ethnicity and gender of business owners while statistically controlling for other factors, but the results were not conclusive.

⁸⁵ Grown, C. (1991). "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

Interest rates. Figure G-12 presents average interest rates on commercial loans received by the race/ethnicity of business owners, based on 2003 SSBF data. In 2003, the average interest rate on loans issued to minority- and women-owned businesses in the United States appeared to be higher (by 1.1 percentage points) than the mean interest rate of loans for non-Hispanic white male-owned businesses. A greater disparity is reflected in the Pacific region data (1.6 percentage points). Due to small sample size, the difference for businesses in the Pacific region was not statistically significant.

Figure G-12.
Mean interest rate for business loans, 2003



Note: ** Denotes that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

Other researchers’ regression analyses of interest rates. Previous studies have investigated differences in interest rates across race/ethnicity and gender while statistically controlling for factors such as individual credit history, business credit history, and Dun and Bradstreet credit scores. Findings from those studies include the following:

- Hispanic American-owned businesses had significantly higher interest rates for lines of credit in places with less credit market competition. However, the study found no evidence that African American- or women-owned businesses received higher rates.⁸⁶
- Among a sample of businesses with no past credit problems, African American-owned businesses had significantly higher interest rates on approved loans than other groups.⁸⁷

Regression model for interest rates in the SSBF. Keen Independent conducted a regression analysis using data from the 2003 SSBF to explore the relationships between interest rates and the race, ethnicity and gender of business owners. The study team developed a linear regression model using the same control variables as the likelihood of denial model along with additional characteristics of

⁸⁶ Cavalluzzo, K. (2002). “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

⁸⁷ Blanchflower, D. G., Levine, P. B., & Zimmerman, D. J. (2003). Discrimination in the Small Business Credit Market. *The Review of Economics and Statistics*, 85(4).

the loan received, such as whether the loan was guaranteed, if collateral was required, the length of the loan, and whether the interest rate was fixed or variable.

The national sample for analysis of interest rates included 1,424 businesses that received a loan in the previous three years and the Pacific region included 225 such businesses.⁸⁸ Again, Pacific region effects were modeled using regional control variables.⁸⁹

Figure G-13 presents the coefficients from the linear regression model. The results indicate that a number of race- and gender-neutral factors have a statistically significant effect on interest rates, including the following factors:

- Business owner having an advanced degree is associated with a lower interest rate;
- Business owner having negative net worth is associated with a higher interest rate;
- Net worth is associated with a lower interest rate;
- High risk credit scores are associated with higher interest rates (by approximately 1 percentage point);
- Total business equity is associated with a higher interest rate;
- Being in the construction industry is associated with a lower interest rate;
- Being in the transportation, communications, and utilities industry is associated with higher interest rates;
- Loans for capital are associated with higher interest rates;
- Vehicle loans and loans for purposes other than equipment, capital lease and business mortgage are associated with lower interest rates;
- Collateral requirements are associated with lower interest rates;
- Longer loans are associated with lower interest rates; and
- Fixed rate loans are associated with higher interest rates than variable rate loans.

After statistically controlling for race- and gender-neutral influences, the study team observed that African American-owned businesses received loans with interest rates approximately 2 percentage points higher than non-Hispanic white-owned businesses. Hispanic American-owned businesses received loans with interest rates approximately 1 percentage point higher than non-Hispanic white-owned businesses. These differences were statistically significant.

Being in the Pacific region was associated with higher interest rates (by about 1.3 percent).

⁸⁸ After excluding a small number of observations where the interest rate was imputed.

⁸⁹ Keen Independent considered an interaction variable to represent businesses that are both minority- and women-owned but the term was not significant.

Figure G-13.
Interest rate (linear regression) in the U.S. in the 2003 SSBF,
Dependent variable: interest rate on most recent approved loan

Variable	Coefficient	Variable	Coefficient	Variable	Coefficient
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Constant	11.720 **	D&B credit score = moderate risk	0.232	Partnership	-0.516
African American	2.204 *	D&B credit score = average risk	0.193	S corporation	-0.135
Asian American	0.211	D&B credit score = significant risk	0.286	C corporation	-0.115
Hispanic American	1.069 **	D&B credit score = high risk	0.992 **	Mining industry	0.162
Native American	-0.499	Total employees	-0.002	Construction industry	-0.563 *
Other minority	-1.066	Percent of business owned by principal	0.000	Manufacturing industry	-0.262
Female	-0.208	Family-owned business	-0.534	Transportation, communications and utilities industry	1.385 **
Pacific region	1.345 **	Firm purchased	-0.003	Finance, insurance and real estate industries	-0.045
Minority in Pacific region	-0.156	Firm inherited	0.069	Engineering industry	0.489
Female in Pacific region	0.422	Firm age	-0.012	Other industry	0.384
Owner's characteristics, credit and resources		Firm has checking account	-0.265	Herfindahl index = .10 to .18	0.578
Age	-0.012	Firm has savings account	-0.024	Herfindahl index = .18 or above	0.885
Owner experience	0.009	Firm has line of credit	-0.026	Located in MSA	0.108
Less than high school education	0.322	Existing capital leases	0.127	Sales market local only	-0.145
Some college	0.275	Existing mortgage for business	0.077	Approved Loan amount	0.000
Four-year degree	-0.304	Existing vehicle loans	0.324	Capital lease application	1.222 *
Advanced degree	-0.583 *	Existing equipment loans	0.568	Business mortgage application	0.505
Log of home equity	0.009	Existing loans from stockholders	0.196	Vehicle loan application	-1.062 **
Owner has negative net worth	2.316 *	Other existing loans	0.364	Equipment loan application	-0.257
Bankruptcy in past 7 years	0.223	Firm used trade credit in past year	0.250	Loan for other purposes	-0.277
Judgement against in past 3 years	-0.214	Log of total sales in prior year	-0.164	Loan guaranteed	-0.326
Log of net worth excluding home	-0.145 **	Negative sales in prior year	-2.264	Collateral required	-0.837 **
		Log of cost of doing business in prior year	-0.135	Length of loan (months)	-0.004 **
		Log of total assets	-0.157	Fixed rate	1.187 **
		Log of total equity	0.196 *		
		Firm bankruptcy in past 7 years	-0.178		
		Firm delinquency in business transactions	-0.188		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

"Owner has negative net worth" and "Negative total assets" dropped out of the regression because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

Small business lending after the Great Recession. The financial landscape has changed substantially since the beginning of the Great Recession. Bank lending fell significantly from the end of 2008 through 2010. Data from the Federal Reserve show that commercial and industrial loans and leases peaked at \$1.6 trillion at the end of 2008 and fell to \$1.2 trillion by the end of 2010, a decline of about 25 percent.⁹⁰ Similar analyses show declines in small commercial and industrial loans and leases (less than \$1 million). The amount of outstanding small loans and leases in the fourth quarter of 2012 was 22 percent below the amount at the second quarter of 2007.⁹¹

Bank tightening of lending standards has been greater for small businesses in recent years. While net tightening (percentage of banks tightening standards minus the percentage loosening standards) was positive for small and large loans in 2008 through 2010, in 2011 and 2012 positive net tightening existed only for small business loans. This tightening of the lending markets may have several effects on small businesses, including fewer startups as well as slower economic and employment growth for those already in existence. Longer term trends in small business financing may exacerbate recent economic disturbances. Data from the Federal Deposit Insurance Corporation (FDIC) show the share of all nonfarm, nonresidential loans of less than \$1 million has been declining since 1995.⁹²

Characteristics of small businesses loans after the Great Recession. Research shows characteristics of small business loans have changed. The average small business loan has more than doubled since 2005, to about \$425,000. Qualitative research suggests this trend toward larger loans may be due to a greater push for profit maximization in the banking industry.⁹³ This may affect some minority business owners, particularly African American business owners. About 80 percent of African Americans that apply for SBA loans seek \$150,000 or less.⁹⁴

Characteristics of small businesses after the Great Recession. Characteristics of small businesses have also changed considerably since 2007. Significantly fewer small businesses reported “good” cash flow in 2013 compared to 2007 (65 and 48 percent, respectively). Small business delinquencies have risen, and consequently, more lending requires collateral. About 90 of small business lending in 2013 required some collateral, up from 84 percent in 2007. During this same period, the decline in housing prices nationwide has weakened owner net equity and made collateral requirements more difficult to meet.⁸⁵

Small business lending by race/ethnicity. In fiscal year 2013, the U.S. Small Business Administration (SBA) administered about \$23 billion in loans. Loans to African American business owners represented \$382 million (or 1.7 percent) of the total, a substantial decline from 2008, when SBA allocated about 8 percent of total loan value to African American business owners. Hispanic American business owners received 4.7 percent of the loan total in 2013, relatively unchanged from 4.5 percent of the loan total in 2009.⁸⁸

⁹⁰ U.S. Board of Governors of the Federal Reserve System. (2014). *H.8 Assets and Liabilities of Commercial Banks in the United States*. Accessed June 15, 2014 from FRASER: <http://fraser.stlouisfed.org/publication/>

⁹¹ Wiersch, A. M., & Shane, S. (2013). Why Small Business Lending Isn't What It Used to Be. *Federal Reserve Bank of Cleveland*.

⁹² *Ibid.*

⁹³ CIT Group, once SBA's top lender, no longer administers SBA loans. Other banks, including Bank of America, have significantly reduced SBA lending.

⁹⁴ Simon, R., & McGinty, T. (2014, March 14). Loan Rebound Misses Black Businesses. *The Wall Street Journal*.

Results from Keen Independent 2015 availability surveys with firms in the Oregon transportation contracting industry. At the close of the 2015 availability surveys conducted as part of the ODOT Disparity Study, the study team asked questions regarding potential barriers or difficulties the firm might have experienced in the Oregon marketplace. The series of questions was introduced with the following statement: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties.

For each potential barrier, the study team examined whether responses differed between minority-, women- and majority-owned firms. Figure G-14 on the following page presents results for questions related to access to capital, bonding and insurance.

Access to lines of credit and loans. The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in Figure G-14, 28 percent of MBEs and 19 percent of WBEs reported difficulties in obtaining lines of credit or loans. Only 10 percent of majority-owned firms reported similar difficulties.

Receiving timely payment. Need for business credit is, in part, linked to whether firms are paid for their work in a timely manner. In the availability interviews, Keen Independent asked, “Has your company experienced any difficulties receiving payment in a timely manner?” Many MBEs, WBEs and majority-owned firms indicated difficulties receiving payment in a timely manner. Figure G-14 shows that about 40 percent of MBEs and WBEs reported difficulties receiving payment in a timely manner compared with 31 percent of majority-owned firms.

C. Bonding and Insurance

Bonding is closely related to access to capital. Some national studies have identified barriers regarding MBE/WBEs and access to surety bonds for public construction projects.⁹⁵

High insurance requirements on public sector projects may also represent a barrier for certain construction and engineering-related firms attempting to do business with government agencies. Keen Independent examined this issue as well.

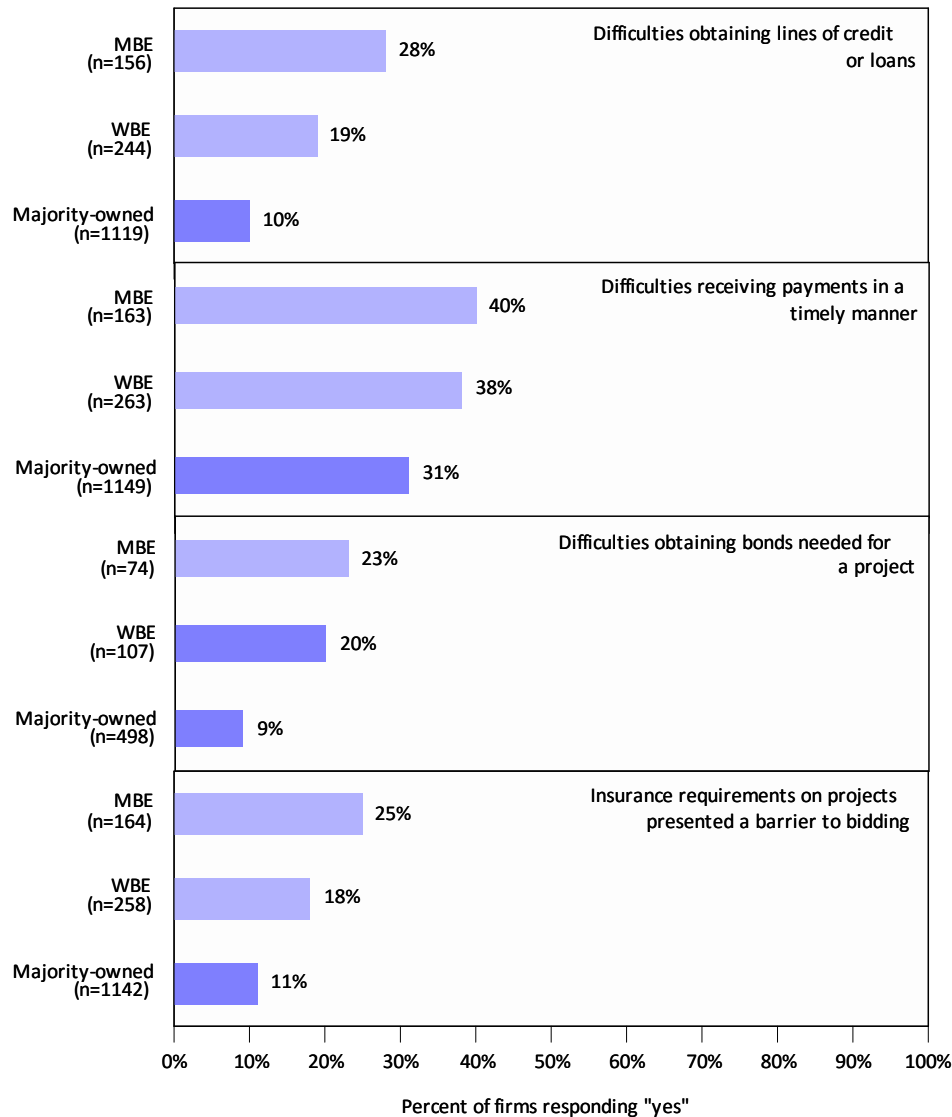
Bonding. To research whether bonding represented a barrier for businesses, Keen Independent asked firms completing availability interviews:

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

⁹⁵ For example, Enchautegui, M. E. et al. (1997). Do Minority-Owned Businesses Get a Fair Share of Government Contracts? *The Urban Institute*, 1–117, p. 56.

Figure G-14 presents these results from the 2015 availability interviews. About one-half of firms had obtained or tried to obtain a bond for a project, this was similar among MBEs, WBEs and majority-owned firms. Among those firms, 23 percent of MBEs and 20 percent of WBEs reported experiencing difficulties obtaining bonds needed for a project. Relatively fewer majority-owned firms (9%) reported difficulties obtaining the bonding needed for a project.

Figure G-14.
Responses to 2015 availability interview questions concerning loans, timely payments, bonding and insurance, MBE, WBE and majority-owned firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Surveys.

Insurance. The study team also examined whether minority- and women-owned firms were more likely than majority-owned firms within the study area to report that “insurance requirements represented a barrier to bidding” (see Figure G-14).

About 25 percent of MBEs and 18 percent of WBEs interviewed indicated that insurance requirements on projects have presented a barrier to bidding. Relatively fewer majority-owned firms (11%) reported that insurance requirements presented a barrier to bidding on projects.

D. Summary

There is evidence that minorities and women face certain disadvantages in accessing capital that is necessary to start, operate and expand businesses. Capital is required to start companies, so barriers to accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start business with less capital. A number of studies have demonstrated that lower startup capital adversely affects prospects for those businesses. Key results included the following:

Home equity is an important source of funds for business startup and growth. There is evidence that minorities do not have the same access to this source of funds as non-minorities.

- Substantially fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Oregon own homes compared with non-Hispanic whites. These differences in homeownership rates were present prior to the Great Recession, and persisted in 2008 through 2012.
- In 2007, high-income African Americans, Hispanic Americans, Native Americans, and Native Hawaiian and other Pacific Islanders applying for home mortgages in Oregon were more likely than high-income non-Hispanic whites to have their applications denied. Disparities were evident for Hispanic Americans and Native Americans in 2013.
- Compared with non-Hispanic whites, subprime loans represented a greater proportion of Oregon conventional home purchase loans and conventional home refinance loans issued in 2007 for African Americans, Hispanic Americans, Native Americans, and Native Hawaiians and other Pacific Islanders. Although subprime rates dropped by 2013, a substantially greater percentage of conventional home purchase loans for Hispanic Americans were subprime.

There is evidence of disparities for minorities and women concerning access to business loans.

- Based on 2003 Survey of Small Business Finances data for the Pacific region, the odds of loan denial for minority- and women-owned small businesses were twice that of non-Hispanic male-owned small businesses. There is evidence that African American small business owners were more likely to have been denied business loan applications than similarly situated non-Hispanic whites (disparity index of 77).

- Among small business owners who reported needing business loans, minority and female business owners in the Pacific region were substantially more likely than non-Hispanic white males to report that they did not apply due to fear of denial. There is evidence that African Americans were more likely to forgo applying for loans due to fear of denial compared with similarly-situated non-minorities.
- The mean value of approved loans for minority- and women-owned businesses in the Pacific region was substantially lower than for non-Hispanic white male-owned firms.
- There is some evidence that minority- and women-owned small businesses in the Pacific region paid higher interest rates on their business loans than non-minority male-owned small businesses (however, difference was not statistically significant). Such a disparity in interest rates would be consistent with national data.
- In the availability interviews conducted as part of this study, minority- and women-owned firms were more likely to report experiencing difficulties in obtaining lines of credit or loans relative to majority-owned firms.
- Minority- and women-owned firms were more likely than majority-owned firms to report difficulties obtaining bonding.
- Minority- and women-owned firms were also more likely to report that insurance requirements on projects represented a barrier to bidding.

APPENDIX H.

Success of Businesses in the Oregon Construction and Engineering Industries

Keen Independent examined the success of minority- and women-owned business enterprises (MBE/WBEs) in the Oregon construction and engineering industries. Keen Independent assessed whether business outcomes for MBEs and WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).¹ Chapter 5 includes a summary of results.

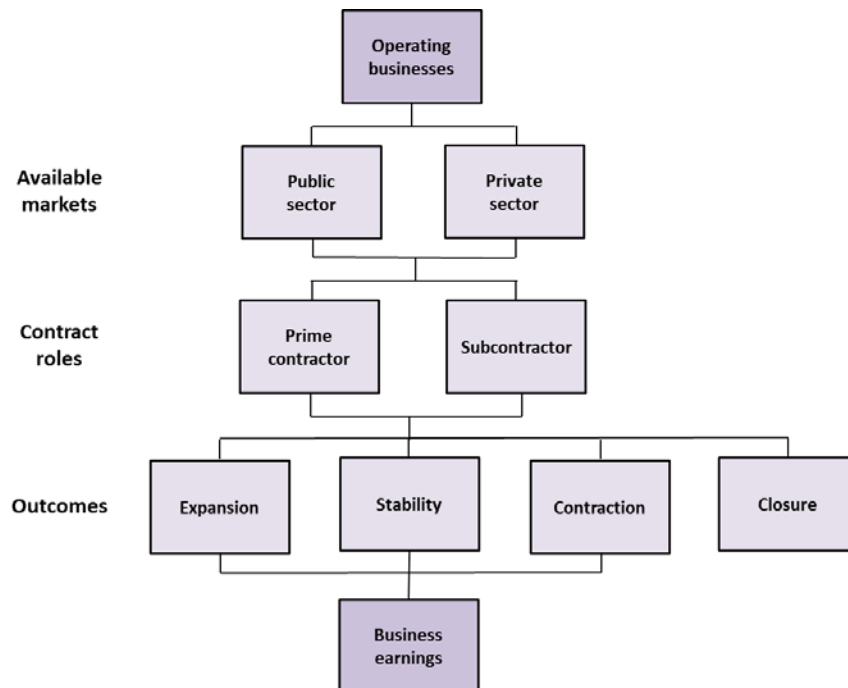
Keen Independent researched outcomes for MBE/WBEs and majority-owned businesses in terms of:

- A. Participation in public and private sector markets, including contractor roles and sizes of contracts bid on and performed;
- B. Business closures, expansions and contractions;
- C. Business receipts and earnings; and
- D. Potential barriers to starting or expanding businesses.

Figure H-1 provides a framework for Keen Independent’s analyses.

Figure H-1.
Business
outcomes

Source:
Keen Independent
Research



¹ Keen Independent uses the terms “MBEs” and “WBEs” to refer to businesses that are owned and controlled by minorities or women (definitions listed in Appendix A), regardless of whether they are certified or meet the revenue and net worth requirements for DBE certification, and regardless of whether they are certified as MBEs or WBEs.

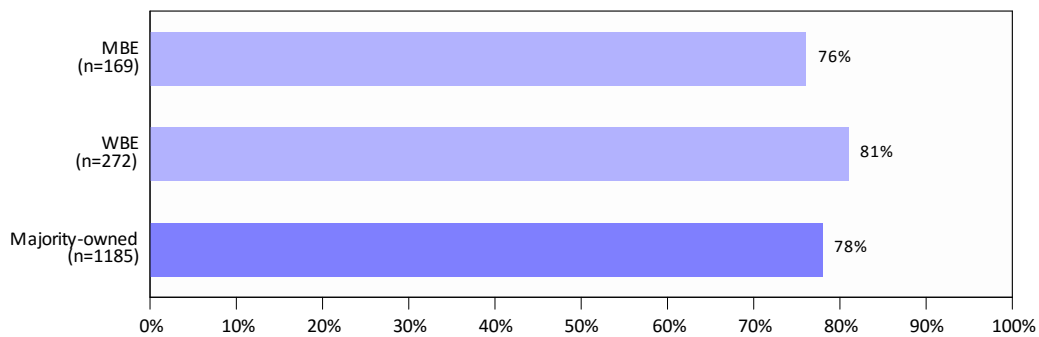
A. Participation in Public and Private Sector Markets

Keen Independent used information collected as part of the availability analysis to examine whether transportation-related construction and engineering businesses bid on public sector and private sector work, and the extent to which firms work as prime contractors and subcontractors.

Bidding on public sector projects. In the availability surveys, firms that reported they performed transportation-related work were asked whether they had bid on or worked on any part of a state or local government project within Oregon in the past five years.² As shown in Figure H-2, most MBEs, WBEs and majority-owned firms (76–81%) reported they had bid on or worked on public sector projects. (In each of the following graphs, the number of firms in each group responding to a particular question in the availability survey is shown in parentheses.)

Figure H-2.

Percent of transportation-related businesses that reported bidding or working on a state or local government project in Oregon in the past five years (any part of a project)



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

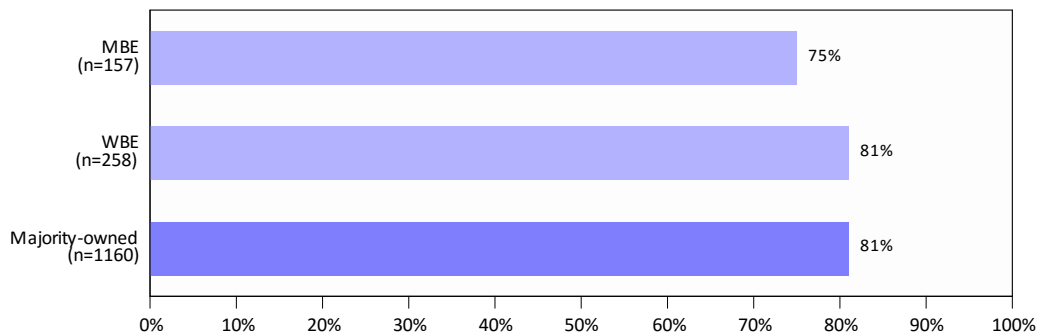
Source: Keen Independent Research from 2015 Availability Surveys.

Bidding on private sector projects. Keen Independent also asked businesses involved in transportation work if they had bid on or worked on private sector work in Oregon in the past five years (any part of a project).³ Again, most MBEs, WBEs and majority-owned firms reported that they had bid on private sector projects.

² Keen Independent deemed a business to have performed or bid on public sector work if it answered “yes” to either of the following questions in availability interviews: (a) “During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in Oregon?”; or (b) “During the past five years, has your company worked on any part of a contract for a state or local government agency in Oregon?”

³ Keen Independent deemed a business to have performed or bid on private sector work if it answered “yes” to either of the following questions in availability interviews: (a) “During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector project in Oregon?”; or (b) “During the past five years, has your company worked on any part of a contract for a private sector project in Oregon?”

Figure H-3.
Percent of transportation-related businesses that reported bidding or working on a private sector project in Oregon in the past five years (any part of a project)



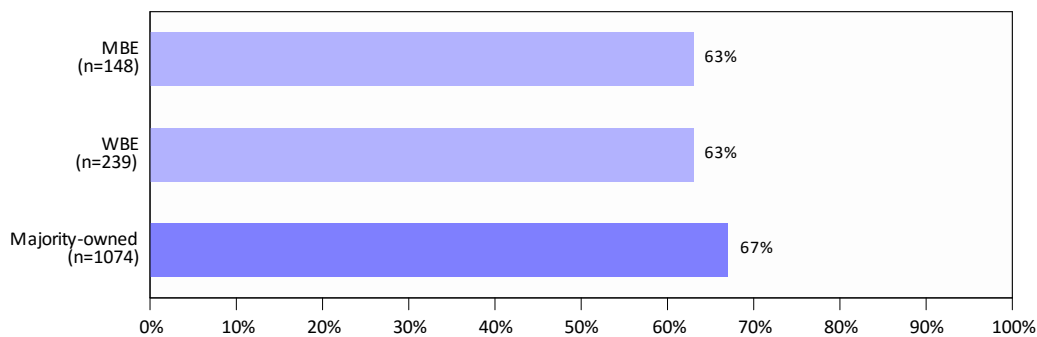
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Surveys.

The above results indicate that most transportation-related firms in Oregon pursue both public and private sector work. As discussed in Chapter 5, the study team also conducted in-depth, personal interviews with businesses and trade associations in Oregon. Interviewees confirmed that companies performing transportation contracts in Oregon can perform both public and private sector work depending on type of work and market opportunities.

Bidding as a prime contractor. The study team also asked firms involved in transportation-related work whether they had bid as a prime contractor or prime consultant within Oregon in the past five years. Two-thirds of majority-owned firms reported bidding as a prime contractor, as presented in Figure H-4. A similar percentage of MBEs (63%) and WBEs (63%) said that they had bid as prime contractors or prime consultants.

Figure H-4.
Percent of businesses that reported bidding or working as a prime contractor or prime consultant on a project in Oregon in the past five years



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Surveys.

Availability survey results also indicate that firms working as prime contractors often also function as subcontractors (and vice versa). In-depth interviews with business owners confirmed that result.

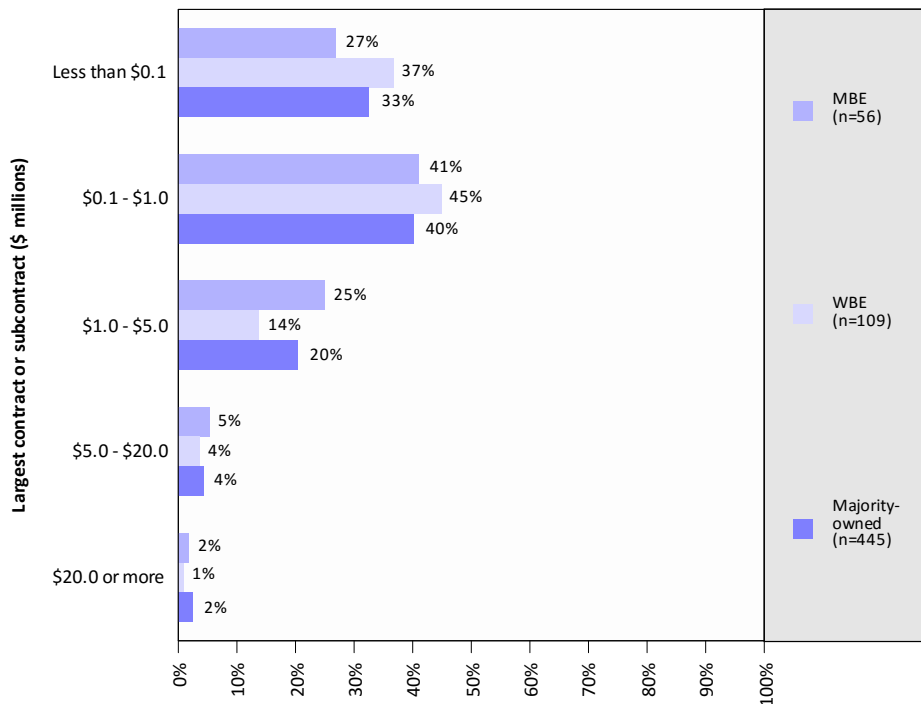
Largest road-, highway- or bridge-related contract in Oregon in the past five years. As part of the availability interviews, the study team asked businesses to identify the largest road-, highway- or bridge-related contract or subcontract they were awarded in Oregon in the past five years.

Construction. Figure H-5 examines transportation construction firms’ responses to the question concerning the largest contract they had been awarded. Most MBE, WBE and majority-owned construction companies either indicated their largest contracts or subcontracts were less than \$100,000 or were from \$100,000 to \$1 million. For example, 27 percent of MBE construction firms reported that their largest contract was less than \$100,000.

There were a few MBEs, WBEs and majority-owned construction firms represented indicating that they had won contracts or subcontracts of \$20 million or more.

Construction firms that received contracts of \$1 million or more accounted for 32 percent of MBEs, and 26 percent of majority-owned firms, but only 19 percent of WBEs. From these data, there was no indication that relatively fewer MBEs were winning large contracts compared with majority-owned construction firms. The data indicate that relatively few WBE construction firms won large contracts.

Figure H-5.
Largest road-, highway- or bridge-related contract or subcontract that businesses received in Oregon in the past five years, construction



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Total may not add to 100 due to rounding.

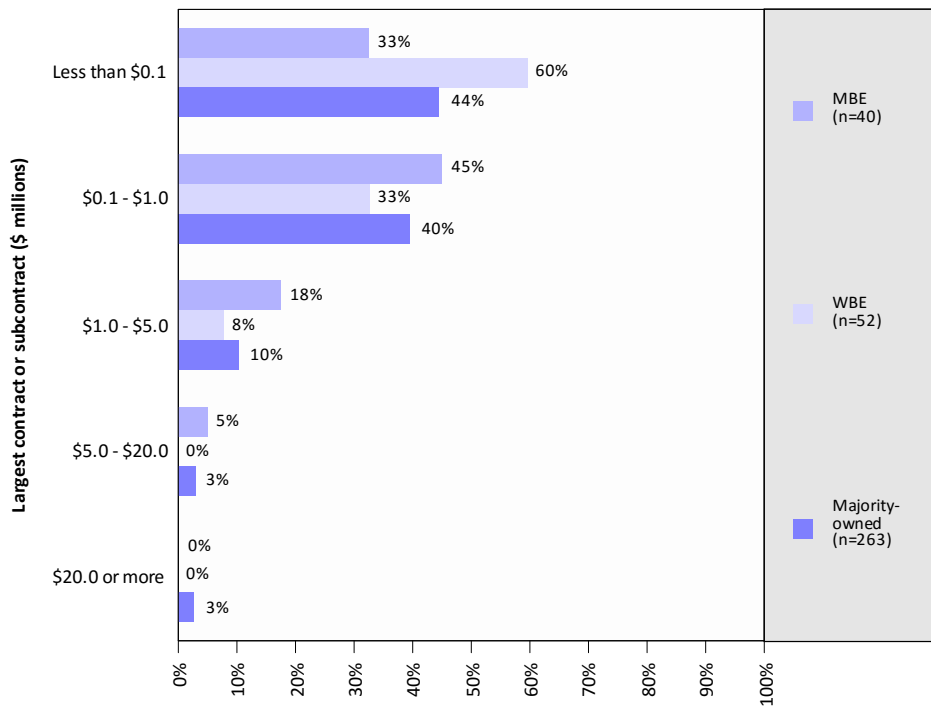
Source: Keen Independent Research from 2015 Availability Surveys.

Engineering. Figure H-6 examines the largest road-, highway- or bridge-related contracts that majority-, minority- and women-owned engineering-related businesses were awarded in Oregon in the past five years based on availability interview responses.

For most engineering businesses, the largest road-, highway- or bridge-related contract or subcontract received was less than \$1 million. About 23 percent of minority-owned engineering-related companies reported that the largest contract they had been awarded in the past five years was worth \$1 million or more compared with 16 percent of majority-owned businesses. Relatively fewer WBE engineering-related businesses (8%) indicated that they had been awarded a contract of \$1 million or more.

Majority-owned firms were the only engineering firms surveyed that reported they had received contracts of \$20 million or more.

Figure H-6.
Largest road-, highway- or bridge-related contract or subcontract that businesses received in Oregon in the past five years, engineering



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Total may not add to 100 due to rounding.

Source: Keen Independent Research from 2015 Availability Surveys.

B. Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.⁴ One approach to account for differing capacities among different types of businesses is to examine relatively small contracts, a technique noted in *Rothe Development Corp. v. U.S. Department of Defense*. In addition to examining size of contracts, Keen Independent directly measured bid capacity in its availability analysis.⁵

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Measurement of bid capacity. The availability analysis produced a database of more than 900 businesses potentially available for ODOT work. “Relative capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the five years preceding when Keen Independent interviewed it.

Subindustries such as paving and general road construction tend to involve relatively large projects. Other subindustries, such as surveying, typically involve smaller projects. Figure H-7 reports the median relative bid capacity among Oregon transportation-related businesses in 26 subindustries. Results categorized companies according to their primary line of business (e.g., results for a firm that primarily performs excavation that also does trucking and hauling are included under excavation, grading and drainage).⁶

⁴ For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

⁵ See Appendix D for details about the availability interview process.

⁶ Only subindustries with a minimum of three respondents in the availability interviews were analyzed.

Figure H-7.
Median relative capacity by subindustry

Subindustry	Median bid capacity
Construction	
Bridge and elevated highway construction	\$2 million up to \$5 million
General road construction and widening	\$1 million up to \$2 million
Asphalt and concrete paving	\$500,000 up to \$1 million
Painting for road or bridge projects	\$500,000 up to \$1 million
Other concrete work	\$500,000 up to \$1 million
Wrecking and demolition	\$500,000 up to \$1 million
Underground utilities	\$500,000 up to \$1 million
Concrete flatwork	\$500,000
Excavation, site prep, grading and drainage	\$100,000 up to \$500,000
Drilling and foundations	\$100,000 up to \$500,000
Electrical work including lighting and signals	\$100,000 up to \$500,000
Temporary traffic control	\$100,000 up to \$500,000
Striping or pavement marking	\$100,000 up to \$500,000
Guardrails, fencing or signs	\$100,000 up to \$500,000
Landscaping including erosion control	\$100,000 up to \$500,000
Pavement surface treatment	\$100,000 up to \$500,000
Concrete pumping	\$100,000 up to \$500,000
Concrete cutting	\$100,000 up to \$500,000
Structural steel work	\$100,000
Trucking and hauling	Less than \$100,000
Engineering-related	
Construction management	\$500,000 up to \$1 million
Engineering	\$100,000 up to \$500,000
Transportation planning	\$100,000 up to \$500,000
Environmental consulting	\$100,000 up to \$500,000
Inspection and testing	\$100,000 up to \$500,000
Surveying and mapping	Less than \$100,000

Source: Keen Independent Research from 2015 Availability Surveys.

Comparison of MBE/WBE and majority-owned bid capacity for transportation construction.

Keen Independent examined whether there were differences in the size of the largest contracts for MBEs, WBEs and majority-owned firms within the same subindustries.

- First, the study team determined for each company whether its largest contract or subcontract (awarded or bid on) was higher than the median for its primary line of business. For example, if the median bid capacity category for a subindustry was \$1–2 million, and a firm’s largest contract was more than \$2 million, it was classified as having “above median bid capacity.”

- Keen Independent then calculated the percentage of MBEs, WBEs and majority-owned firms that had above-median bid capacity for their subindustry. Figure H-8 reports results for construction subindustries and engineering-related subindustries.

For about one-in-three MBE construction businesses, the largest contract bid on or awarded was higher than the median for its subindustry. (This also means that for two-thirds of MBE construction businesses, the largest contract was in the same or lower size category as the median for their primary line of business.)

Relatively more minority-owned construction businesses (45%) than majority-owned companies (36%) reported largest contracts that were above the median for their subindustry.

About 34 percent of WBEs reported largest contracts that were above the median for their subindustry.

Figure H-8.
Proportion of firms with above-median bid capacity by ownership

Source:
Keen Independent Research from 2015
Availability Surveys.

Firm	Construction	Engineering	Construction and engineering
MBE	45 %	38 %	42 %
WBE	34	28	32
Majority-owned	36	32	35

Engineering. Figure H-8 also shows the percentage of engineering businesses that reported relative capacities that exceeded the median for their subindustries.

- For 38 percent of MBE engineering businesses, the largest contract bid on or received was higher than the median size category for their subindustry.
- 28 percent of WBEs had above-median bid capacity.
- 32 percent of majority-owned engineering businesses had above-median bid capacity.

Summary. The right-hand column of Figure H-8 shows the percentage of all construction and engineering-related firms that had above-median bid capacity for their subindustry. Again, after controlling for subindustry, a higher percentage of MBEs (42%) than majority-owned firms (32%) bid on or received contracts that were above the median. There is no evidence that bid capacity for MBEs in the Oregon transportation contracting industry is depressed after controlling for subindustry. There was only a small difference in the bid capacity for WBEs and majority-owned firms.

Summary of markets, contracting roles and bid capacity. Availability interview results show that most firms in the transportation contracting industry pursue both public and private sector work. Most firms also bid as prime contractors and as subcontractors. Compared with majority-owned companies, relatively few WBEs have been awarded contracts or subcontracts of \$1 million or more in size. Relatively more MBEs than majority-owned firms received contracts exceeding \$1 million.

Analysis of bid capacity compared the largest contracts and subcontracts bid on or received for MBEs, WBEs and majority-owned firms in the same subindustries. Relatively more MBEs have bid

on or been awarded contracts that were “large” for a subindustry compared with majority-owned firms (for construction and engineering industries separately and combined). There was no indication that bid capacity for minority-owned firms was lower than for majority-owned companies after controlling for primary line of business for the firm. Differences in results for WBEs compared with majority-owned firms were small for both construction and engineering.

C. Business Closures, Expansions and Contractions

A 2010 Small Business Administration (SBA) report investigated business dynamics for the 2002 through 2006 time period for minority-owned and white-owned businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau’s 1989–2006 Business Information Tracking Series, the SBA reported on business closures, expansions and contractions between 2002 and 2006 across different sectors of the economy.^{7, 8} The SBA also examined differences by gender.⁹

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closure in Oregon. The 2010 SBA report analyzed business closure rates between 2002 and 2006 for minority- and white-owned firms in Oregon. Figure H-9 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for non-Hispanic white-owned businesses.

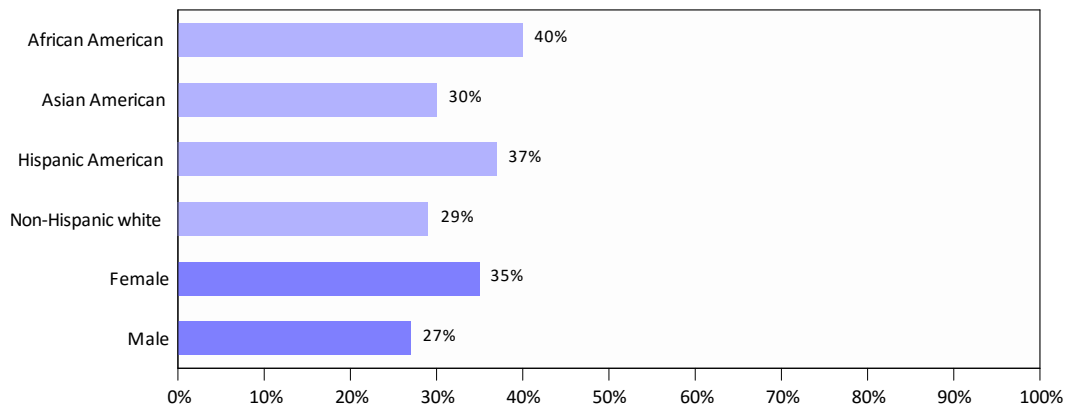
- About 40 percent of African American-owned businesses that were operating in Oregon in 2002 had closed by the end of 2006, a higher rate than for white-owned businesses (29%).
- Hispanic American-owned businesses (37%) also had closure rates higher than white-owned businesses.
- Closure rates for Asian American-owned businesses (30%) were similar to white-owned firms.
- About 35 percent of female-owned firms closed compared with 27 percent of male-owned firms.

⁷ Lowrey, Y. (2010). “Race/Ethnicity and Establishment Dynamics, 2002–2006.” U.S. Small Business Administration Office of Advocacy. Washington D.C.

⁸ Businesses classifiable by race/ethnicity exclude publicly-traded companies. Keen Independent did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

⁹ Lowrey, Y. (2010). “Gender and Establishment Dynamics, 2002–2006.” U.S. Small Business Administration Office of Advocacy. Washington D.C.

Figure H-9.
Rates of business closure in Oregon, 2002 through 2006



Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Here, Oregon refers only to businesses in the state of Oregon, and not those businesses from Clark County, Washington, and Skamania County, Washington.

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

Rates of business closures by industry. Data for the construction and professional services industries were not available by state. The SBA analysis only reported industry-specific results for the nation as a whole. Based on national results, 43 percent of African American-owned construction businesses that were operating in 2002 had closed by 2006; this was higher than the rate for white-owned construction companies. Among professional, scientific and technical services firms, comparatively more African American-owned businesses closed than white-owned firms.

Hispanic American-owned businesses and Asian American-owned construction businesses that were operating in 2002 were also more likely than white-owned companies to have closed by 2006. This was also found in the professional, scientific and technical services industry.

One-third of women-owned construction firms in the United States in 2002 had closed by 2006, a greater percentage than male-owned firms (30%). There was a similar difference nationally for female-owned professional, scientific and technical services firms (33% closure rate for female-owned and 28% closure rate for male-owned firms).

Unsuccessful closures. Not all business closures can be interpreted as "unsuccessful closures." Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent "successful closures." The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.¹⁰ The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, "Which item below describes the status of this business at the time

¹⁰ CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

the decision was made to cease operations?” Only the responses “successful” and “unsuccessful” were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Keen Independent examined CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction; professional, scientific, and technical services; and all industries.^{11, 12} According to CBO data, African American-owned businesses were the most likely to report being “unsuccessful” at the time their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by “other minority groups” (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction industry, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58%). Those trends were similar in the professional services industry with one exception — women-owned businesses (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses are largely due to barriers in access to capital.¹³ Regression analyses have identified initial capitalization as a significant factor in determining firm viability. Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is found to be particularly acute for minority-owned businesses in the construction industry.¹⁴

¹¹ All CBO data should be interpreted with caution, as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, T. J., & Schmitz, J. (1996). Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey. *Journal of Business & Economic Statistics*, 14(2), 231–241. This report did not include CBO data on overall business closure rates because businesses not responding to the survey were found to be much more likely to have closed than ones that did.

¹² This study includes CBO data on firm success because there is no compelling reason to believe that closed businesses responding to the survey would have reported different rates of success/failure than those closed businesses that did not respond to the survey. Headd, B. (2000). “Business Success: Factors leading to surviving and closing successfully.” U.S. Small Business Administration, Office of Advocacy, 12.

¹³ Access to capital is discussed in greater detail in Appendix G.

¹⁴ Bates, T., & Grown, C. (1991). “Commercial Lending Practices and the Development of Black-Owned Construction Companies.” Center for Economic Studies, U.S. Census Bureau.

- Prior work experience in a family member’s business or similar experiences are found to be strong determinants of business viability. Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.¹⁵ Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.¹⁶
- Level of education is found to be a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and non-minority-owned businesses.¹⁷
- Non-minority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.¹⁸
- Possession of greater initial capital and generally higher levels of education among Asian Americans are related to the relatively high rate of survival of Asian American-owned businesses compared to other minority-owned businesses.¹⁹

Expansions and contractions. Comparing rates of expansion and contraction between minority-owned and white-owned businesses is also useful in assessing the success of minority-owned businesses. As with closure data, only some of the data on expansions and contractions that were available for the nation were also available at the state level.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Oregon businesses that expanded and contracted between 2002 and 2006. Figure H-11 presents the percentage of all Oregon businesses that increased their total employment between 2002 and 2006 with a breakdown ownership race/ethnicity and gender.

Results for Oregon from the SBA study indicate that a smaller percentage of Asian American-owned businesses (27%) expanded between 2002 and 2006 compared with non-Hispanic white-owned businesses (31%). Rates for African Americans and Hispanic Americans were equal to those of non-Hispanic whites.²⁰

¹⁵ Fairlie, R., & Robb, A. M. (2005). “Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital.” University of California, Santa Cruz.

¹⁶ Fairlie, R., & Robb, A. M. (2009). “Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey.” University of California, Santa Cruz.

¹⁷ *Ibid.*

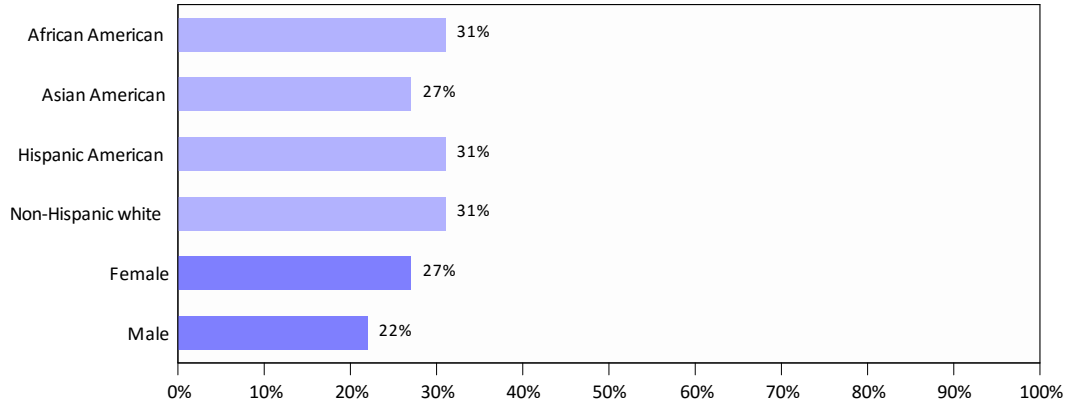
¹⁸ Bates, T. (2002). “Analysis of Young Small Businesses That Have Closed: Delineating Successful from Unsuccessful Closures.” Center for Economic Studies, U.S. Census Bureau.

¹⁹ Bates, T. (1993). “Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses.” Center for Economic Studies, U.S. Census Bureau.

²⁰ Lowrey, Y. (2010). “Race/Ethnicity and Establishment Dynamics, 2002–2006.” U.S. Small Business Administration Office of Advocacy. Washington D.C.

Women-owned firms were more likely to expand over this time period than businesses owned by men, as shown in the bottom of Figure H-10.

Figure H-10.
Percentage of businesses in Oregon that expanded, 2002 through 2006



Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Here, Oregon refers only to businesses in the state of Oregon, and not those businesses from Clark County, Washington, and Skamania County, Washington.

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

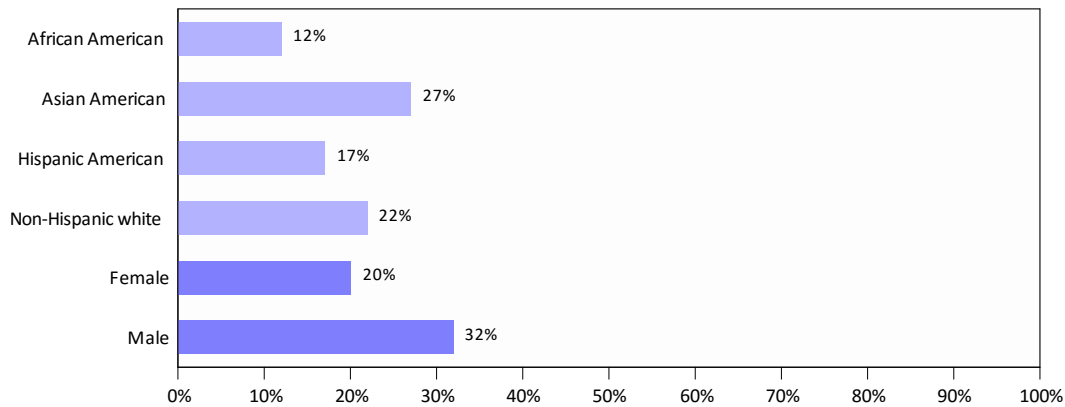
The 2010 SBA study did not report state-level results for individual industries. Nationally, African American-owned construction and professional, scientific, and technical services businesses were less likely than white-owned businesses to have expanded between 2002 and 2006. Hispanic American- and Asian American-owned companies in both construction and professional, scientific, and technical services were slightly more likely than white-owned businesses to have expanded between 2002 and 2006.

Nationally, about the same percentage of female- and male-owned construction firms expanded over this time period (29% and 30%, respectively). For the professional, scientific and technical services industry, however, female-owned firms were less likely to expand than male-owned firms (24% versus 27%).

Contractions. Figure H-11 shows the percentage of businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Oregon. About 22 percent of white-owned firms contracted employment during this period. Rates were lower for African Americans (12%) and Hispanic Americans (17%), and higher for Asian Americans (27%).

Female-owned businesses were less likely to contract than male-owned businesses in Oregon over this time period.

Figure H-11.
Percentage of businesses in Oregon that contracted, 2002 through 2006



Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Here, Oregon refers only to businesses in the state of Oregon, and not those businesses from Clark County, Washington, and Skamania County, Washington.

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

The SBA study did not report state-specific results relating to contractions in individual industries. Based on national data, a slightly smaller percentage of African American-, Hispanic American- and Asian American-owned construction and professional, scientific and technical services businesses contracted between 2002 and 2006 compared to white-owned businesses. A slightly higher percentage of female-owned construction firms and a slightly lower percentage of female-owned professional, scientific and technical services firms contracted compared with male-owned firms.

Summary of business closure, expansion and contraction. The following conclusions can be made based on U.S. Small Business Administration analyses for 2002 to 2006 for Oregon:

- African American-owned businesses were more likely than white-owned businesses to close; African American-owned businesses were also less likely to contract than white-owned businesses.
- Asian American-owned businesses were more likely to contract than white-owned businesses.
- Closure rates for Hispanic American-owned businesses were higher than that of white-owned firms for those years. Contraction rates were lower for Hispanic American business owners.

D. Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. Keen Independent used several different data sources, including:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners;
- Business earnings data for business owners from the 2000 Census and 2007–2012 American Community Survey (ACS); and
- Annual revenue data for Oregon market area transportation construction and engineering businesses that the study team collected as part of 2015 availability surveys.

Business receipts. Keen Independent examined receipts for construction and professional, scientific and technical services businesses in Oregon using data from the 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau. The 2012 SBO reports business receipts separately for “employer” firms (i.e., those with paid employees other than the business owner and family members) and for all businesses.²¹

Figure H-12 presents mean annual receipts in 2012 (in thousands) for construction and professional, scientific and technical services businesses. The first column of results for “all firms” pertains to employer firms and non-employer businesses combined. The second column presents results for professional, scientific and technical services firms in Oregon, including both employers and non-employers. The final two columns provide mean receipts for employer firms. (Note that SBO did not report results for African American- and American Indian-owned construction firms in Oregon.)

Figure H-12.
Mean annual receipts (thousands) for Oregon, 2012

	All firms		Employer firms	
	Construction	Professional, scientific and technical services	Construction	Professional, scientific and technical services
African American	N/A	\$75	N/A	\$710
Asian American	\$411	\$193	\$1,656	\$1,211
Hispanic American	\$229	\$96	\$595	\$608
American Indian and Alaska Native	N/A	\$86	N/A	\$649
Non-Hispanic white	\$514	\$175	\$1,355	\$691
Female	\$308	\$80	\$876	\$427
Male	\$536	\$230	\$1,582	\$834

Notes: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

Here, Oregon refers only to businesses in the state of Oregon, and not those businesses from Clark County, Washington, and Skamania County, Washington.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau’s 2012 Economic Census.

²¹ Includes incorporated and unincorporated businesses, but not publicly-traded or other businesses not classifiable by race/ethnicity and gender.

Construction. In the Oregon construction industry, average 2012 receipts for minority-owned businesses were lower than the average for non-Hispanic white-owned businesses (\$514,000). Results for all businesses (i.e., employer and non-employer businesses combined) indicate that:

- Average receipts of Asian American-owned construction businesses (\$411,000) were about four-fifths of the average of non-Hispanic white-owned construction businesses in Oregon;
- Hispanic-owned construction businesses (\$229,000) had average revenue that was less than one-half of the average for non-Hispanic white-owned businesses;
- Average receipts for women-owned construction businesses in Oregon (\$308,000) were 57 percent of the average for male-owned businesses (\$536,000).

Average receipts were higher for businesses with paid employees (the third and fourth columns of results in Figure H-12). Non-Hispanic white-owned construction employer businesses had average receipts of \$1.4 million. Minority-owned construction firms with paid employees had lower receipts:

- Average receipts of Asian American-owned construction employer businesses (\$1.7 million) were about 22 percent higher than that of non-Hispanic white-owned construction employer businesses in Oregon.
- Hispanic-American owned construction employer businesses (\$0.6 million) exhibited revenues that were roughly 44 percent of the average of non-Hispanic white-owned employer businesses.
- Average receipts for women-owned construction employer businesses (\$0.9 million) were 55 percent of the average of male-owned employer businesses (\$1.6 million).

Professional, scientific, and technical services. In the Oregon professional, scientific, and technical services industry, African American-, Hispanic-, and American Indian and Alaska Native-owned businesses had lower average receipts than non-Hispanic white-owned businesses.

As shown in Figure H-12, results for all businesses (i.e., employer and non-employer businesses combined) in the professional, scientific, and technical services industry indicate that:

- Average receipts of African American-owned businesses (\$75,000) were 43 percent that of non-Hispanic white-owned businesses (\$175,000);
- Average receipts of Asian American-owned businesses (\$193,000) were 10 percent higher than for non-Hispanic white-owned businesses;
- Average receipts of Hispanic American-owned companies (\$96,000) were 55 percent that of non-Hispanic white-owned businesses;
- Average receipts of American Indian and Alaska Native-owned companies (\$86,000) were 49 percent that of non-Hispanic white-owned businesses; and
- Average receipts of women-owned businesses in the Oregon professional, scientific, and technical services industry (\$80,000) were 35 percent that of male-owned businesses (\$230,000).

Examination of businesses with paid employees in professional, scientific, and technical services showed little to no disparity for minority-owned firms compared to non-Hispanic white-owned firms. African American-owned firms (\$710,000) had receipts about 3 percent higher than those of non-Hispanic white owned firms (\$691,000). Asian American-owned firms (\$1,211,000) had receipts 75 percent higher than those of non-Hispanic white owned firms. Hispanic-owned firms (\$608,000) still had receipts lower than those of non-Hispanic white-owned firms, however, the disparity was less than that of all firms (88%). Women-owned businesses (\$427,000) had receipts just 51 percent of those of male-owned businesses (\$834,000).

Business earnings. Keen Independent also examined U.S. Census data regarding earnings of business owners in Oregon. Data sources were the Public Use Microdata Series (PUMS) data from the 2000 U.S. Census of Population and the 2007–2012 American Community Survey (ACS). Keen Independent analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. Results are presented for the Oregon construction industry and the Oregon engineering industry.

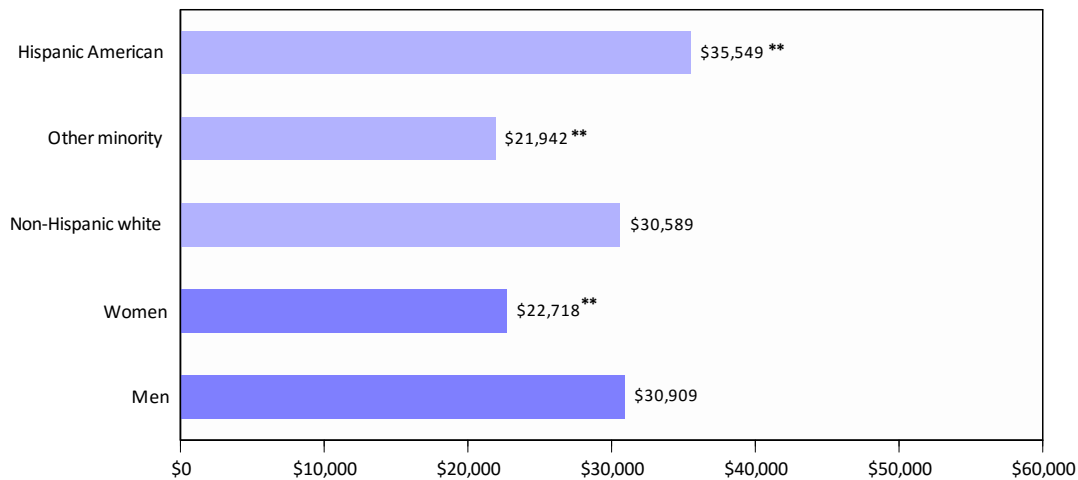
Construction business owner earnings, 1999. The 2000 Census of Population asked business owners about their business earnings in the previous year (1999). Figure H-13 shows average earnings in that year for business owners in the construction industry in Oregon. Due to small sample sizes for individual racial/ethnic groups, Keen Independent examined Hispanic Americans separately but grouped all other minorities into a single “other minority” category.

The top three bars of Figure H-13 present results for Hispanic Americans, other minorities and non-Hispanic whites. Results indicated that:

- On average, Hispanic American construction business owners in Oregon earned more (\$35,549) than non-Hispanic white construction business owners (\$30,589). This difference was statistically significant at the 95 percent confidence level.
- Other minority business owners earned significantly less (\$21,942) than non-Hispanic white business owners, and that difference was also statistically significant at the 95 percent confidence level.

The bottom two bars of Figure H-13 compare business owner earnings for women and men who owned construction businesses in Oregon. With mean earnings of \$22,718, female construction business owners in Oregon earned considerably less than male construction business owners (\$30,909). This difference was statistically significant at the 95 percent confidence level.

Figure H-13.
Mean annual business owner earnings in the Oregon construction industry, 1999



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars. *, ** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

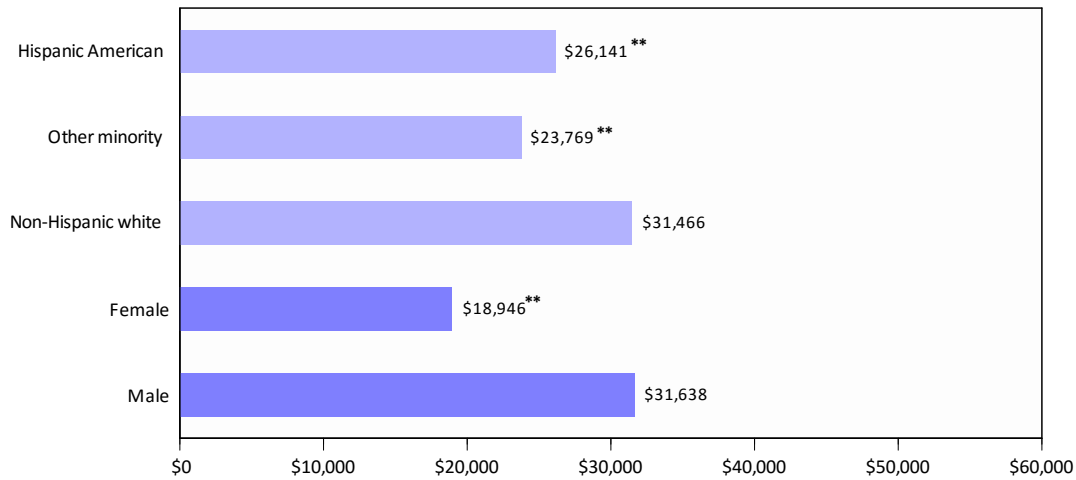
Construction business owner earnings, 2007–2012. The 2007–2012 ACS also reports business owner earnings. Because of the way that the U.S. Census Bureau conducts each year’s ACS, earnings for business owners reported in the 2007 through 2012 sample were for the previous 12 months (2006–2012).²² All dollar amounts are presented in 2012 dollars.

Figure H-14 shows earnings in 2007 through 2012 for business owners in the construction industry in Oregon. Again, due to small sample sizes for non-Hispanic minority groups, these groups were combined.

- On average, Hispanic American construction business owners in Oregon earned less in 2007–2012 (\$26,141) than non-Hispanic white construction business owners (\$31,466), a statistically significant difference at the 95 percent confidence level.
- Other minority-owned construction business owners also earned less (\$23,769) than non-Hispanic white construction business owners. This difference was significant at the 95 percent confidence level.
- Female construction business owners in Oregon earned substantially less, on average (\$18,946), than male construction business owners (\$31,638), a statistically significant difference at the 95 percent confidence level.

²² For example, if a business owner completed the survey on January 1, 2009, the figures for the previous 12 months would reference January 1, 2008 to December 31, 2008. Similarly, a business owner completing the survey December 31, 2011 would reference amounts since January 1, 2011.

Figure H-14.
Mean annual business owner earnings in the Oregon construction industry, 2007–2012



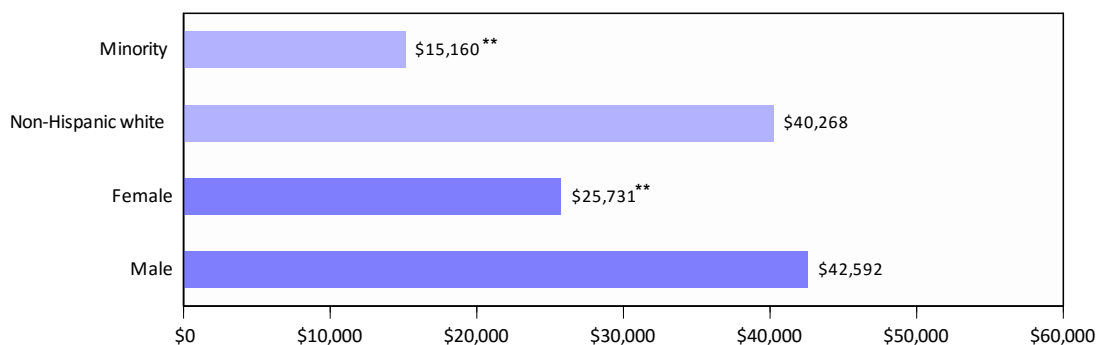
Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars. *,** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2007–2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Engineering business owner earnings, 1999. Figure H-15 presents average earnings in 1999 for business owners in the engineering industry in Oregon based on the 2000 Census. Due to small sample sizes for individual groups, Keen Independent analyzed results for minority business owners combined.

- Minority engineering business owners in Oregon earned considerably less (\$15,160) than non-Hispanic whites in 1999 (\$40,268), a statistically significant difference.
- Female engineering business owners in Oregon also earned substantially less (\$25,731) than male business owners (\$42,592) in 1999 (statistically significant difference).

Figure H-15.
Mean annual business owner earnings in the Oregon engineering industry, 1999



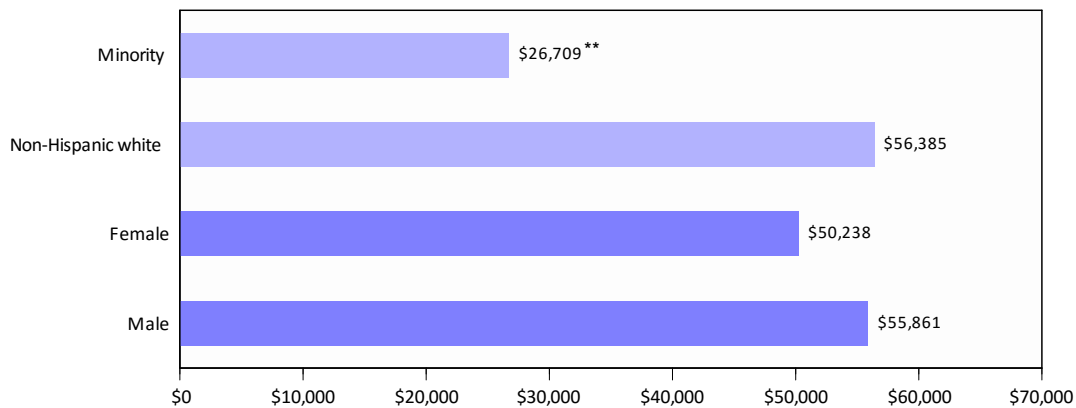
Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars. *,** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Engineering business owner earnings, 2007–2012. As with earnings data for the construction industry, earnings for engineering business owners that were reported in the 2007–2012 ACS data were for the time period between 2007 and 2012. Again, due to small sample sizes, all minority business owners were combined into a single category. Results are for Oregon. Those results are displayed in Figure H-16.

- Minority business owners earned \$26,709, on average, which was less than one-half the earnings of non-Hispanic white business owners (about \$56,385) in Oregon.
- Average earnings for female engineering business owners (about \$50,238) were slightly lower than for male business owners (\$55,861) in Oregon. The difference is not statistically significant.

Figure H-16.
Mean annual business owner earnings in the Oregon engineering industry, 2007–2012



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars. *,** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2007–2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Regression analyses of business earnings. Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status, and educational attainment. Keen Independent performed regression analyses using 2007–2012 ACS data to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral factors.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.²³ The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race, ethnicity and gender of business owners, the

²³ For example, National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation; and National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

model also included variables for characteristics considered likely to affect earnings, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

Keen Independent created two regression models for Oregon, a model for business owner earnings in 2007 through 2012 for the construction industry that included 1,295 observations and a model for business owner earnings in 2007 through 2012 for the engineering industry that included 111 observations.

Construction industry in Oregon, 2007 through 2012. Figure H-17 presents the results of the regression model for 2007 through 2012 business earnings in the Oregon construction industry. The model indicated that several race- and gender-neutral factors predicted earnings of business owners in the Oregon construction industry (and were statistically significant):

- Being older was associated with higher business earnings (with additional age having less of an effect for older individuals);
- Being married was associated with higher business earnings; and
- Not being able to speak English well was associated with lower business earnings;

After accounting for race- and gender neutral factors, results for race/ethnicity and gender were as follows:

- The model suggested that there were negative effects for minorities, but none were statistically significant; and
- Being female was associated with lower business earnings, and that effect was statistically significant.

Figure H-17.
Oregon construction business owner earnings model, 2007–2012

Note:

*,** Denote statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2007–2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.730 **
Age	0.091 **
Age-squared	-0.001 **
Married	0.339 **
Speaks English well	-0.556 **
Disabled	0.107
Less than high school	-0.225
Some college	-0.152
Four-year degree	-0.283
Advanced degree	0.163
Hispanic American	-0.070
Other minority	-0.459
Female	-0.746 **

Engineering industry in Oregon, 2007 through 2012. Figure H-18 presents the results of the regression model of business owner earnings in the Oregon engineering industry in 2007 through 2012. Having an advanced degree was associated with higher business earnings in the engineering industry. No other race- and gender-neutral factors were statistically significant.

After statistically controlling for race- and gender-neutral factors, Keen Independent observed that:

- Effects of race/ethnicity were negative and statistically significant for Hispanic Americans; and
- Being female was associated with lower business earnings in the Oregon engineering industry, but this difference was not statistically significant.

Figure H-18.
Oregon engineering industry business owner earnings model, 2007–2012

Note:

*,** Denote statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2007–2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	5.262 **
Age	0.198 **
Age-squared	-0.002 *
Married	-0.027
Disabled	-0.333
Some college	-0.623
Four-year degree	-0.850
Advanced degree	-0.427
Hispanic American	-1.978 **
Other minority	0.668
Female	-0.416

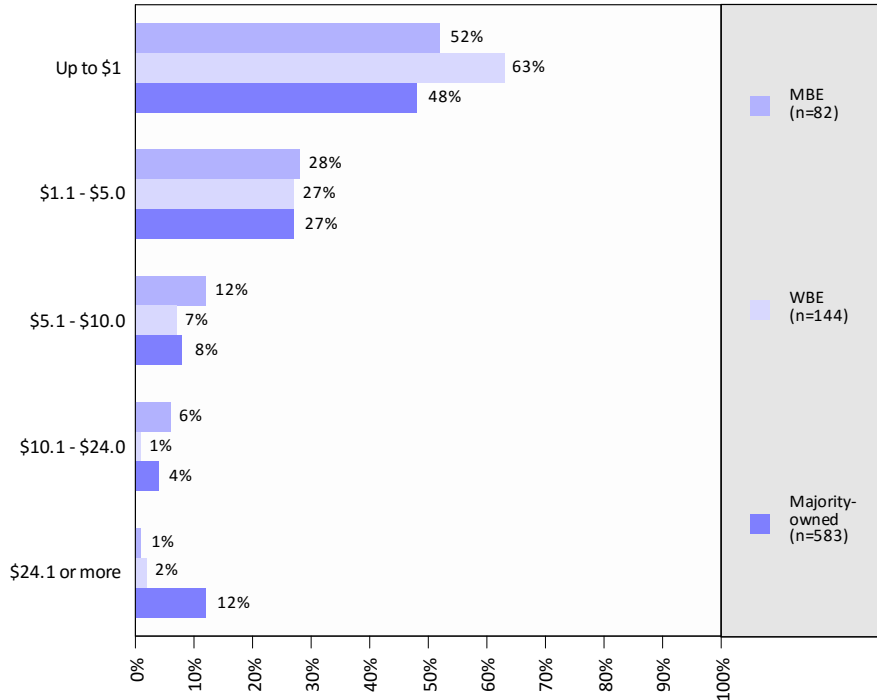
Gross revenue of construction and engineering firms from availability interviews. In the availability telephone interviews that Keen Independent conducted in 2015, the study team asked firm owners and managers to identify the size range of their average annual gross revenue in the previous three years.

Construction. Figure H-19 presents the reported annual revenue for MBEs, WBEs and majority-owned construction businesses.

- A larger percentage of WBEs (63%) than majority-owned businesses (48%) and minority-owned firms (52%) reported average revenue of less than \$1 million per year.
- Only 1 percent of MBEs and 2 percent of WBEs reported average revenue of more than \$24 million. About 12 percent of majority-owned construction firms reported revenue of this level.

As shown in Figure H-19, minority-owned businesses and white women-owned firms in the Oregon transportation construction industry are disproportionately small.

Figure H-19.
Average annual gross revenue of company over previous three years, construction industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

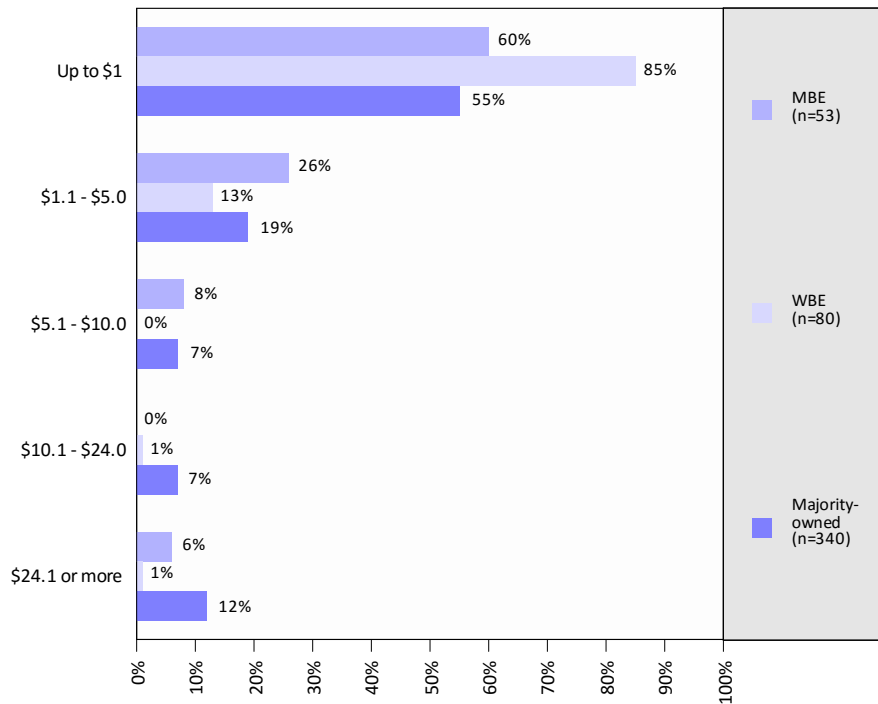
Source: Keen Independent Research from 2015 Availability Surveys.

Engineering. Engineering-related businesses were also asked to report average gross revenue over the previous three years. Figure H-20 presents those results.

- Most WBE engineering-related firms (85%) reported average annual income of no more than \$1 million, compared with 55 percent of majority-owned firms and 60 percent of MBEs.
- Twelve percent of majority-owned engineering-related firms reported average annual revenue of more than \$24 million. A relatively small percentage of MBE and WBE engineering-related firms reported average annual revenue of more than \$24 million (6% and 1%, respectfully).

In sum, among engineering-related firms, minority-owned businesses and white women-owned firms are disproportionately low revenue compared with majority-owned firms.

Figure H-20.
Annual gross revenue of company over previous three years, engineering industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Surveys.

Summary of analysis of business receipts and earnings. Keen Independent examined business earnings data for the Oregon construction and engineering-related industries from the U.S. Census Bureau and the 2015 availability interviews with businesses working in the Oregon transportation contracting industry. The data from different data sets pertained to annual revenue in 1999, 2007–2012 and the three years before 2015. Across time periods and data sources, minority- and women-owned firms had lower revenue than majority-owned firms.

One of the data sets the study team examined included personal characteristics of the business owner. Regression analyses using these data indicated that female construction business owners and Hispanic American engineering firm owners had lower earnings than male and non-minority owners after controlling for other factors.

E. Availability Survey Results Concerning Potential Barriers

As part of the availability interviews conducted with Oregon and Southwest Washington businesses, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the interview process and provides the interview questions. Appendix G presents results for questions concerning access to capital, bonding and insurance.

Results for other interview questions are examined here, including whether the firm had experienced difficulties learning about:

- Bid opportunities with ODOT;
- Bid opportunities with local governments;
- Bid opportunities in the private sector;
- Subcontracting opportunities in Oregon; and
- Networking with prime contractors or customers.

Learning about ODOT bid opportunities. As shown in Figure H-21 on the following page, a greater percentage of minority- and women-owned firms indicated difficulties learning about bid opportunities, including ODOT opportunities, compared with majority-owned businesses. For example, the percentage of minority-owned businesses reporting that they experienced difficulties learning about ODOT bid opportunities (30%) was substantially higher than that for majority-owned firms (18%). About 24 percent of white women-owned firms indicated that they experienced difficulty learning about ODOT bid opportunities.

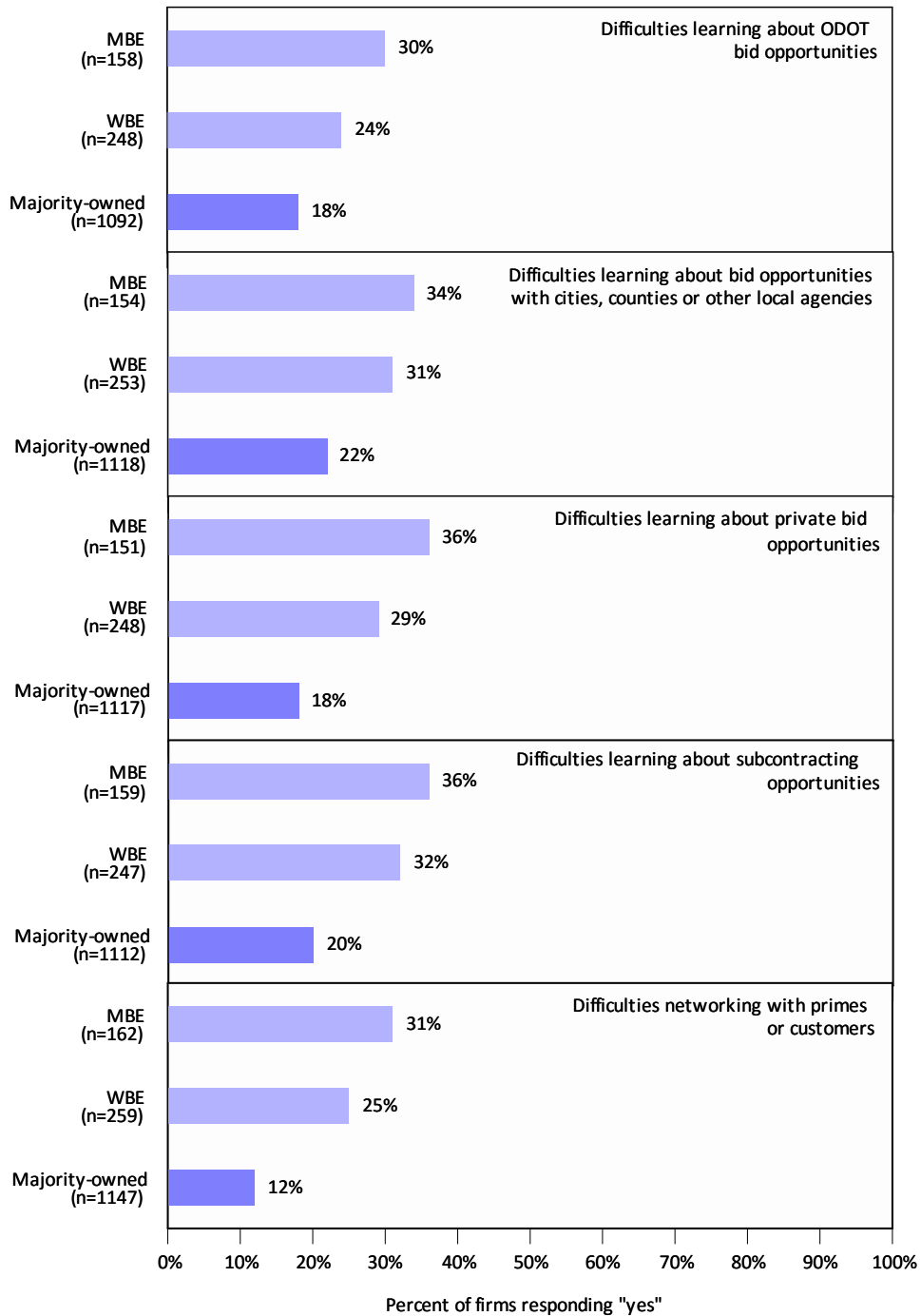
Learning about local agency bid opportunities. Results were similar for questions concerning learning about local government bid opportunities. Relatively more minority- and women-owned firms reported difficulties learning about local agency bid opportunities (34% and 31%, respectively) compared with 22 percent of majority-owned firms.

Learning about private sector bid opportunities. About 36 percent of MBEs and 29 percent of WBEs reported difficulties learning about private sector bid opportunities. Only 18 percent of majority-owned firms reported such difficulties.

Learning about subcontracting opportunities. MBEs and WBEs were also more likely than majority-owned firms to report difficulties learning about subcontracting opportunities. About 36 percent of minority-owned firms and 32 percent of white women-owned firms indicated such difficulties compared with 20 percent of majority-owned firms.

Networking with prime contractors and customers. MBEs (31%) and WBEs (25%) were more than twice as likely as majority-owned firms (12%) to report difficulties networking with prime contractors and customers. The bottom portion of Figure H-21 presents these results.

Figure H-21.
 Responses to 2014 availability interview questions concerning learning about work,
 MBE, WBE and majority-owned firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

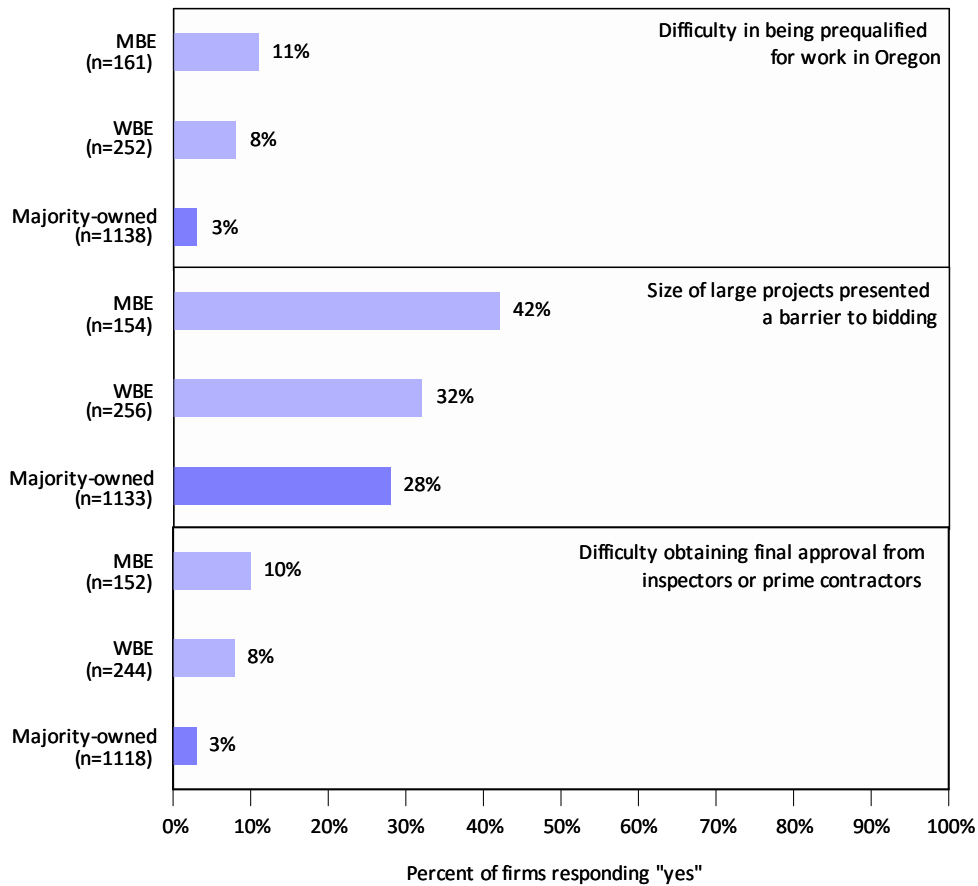
Source: Keen Independent Research from 2015 Availability Surveys.

Prequalification for work. As shown in Figure H-22, few majority-owned firms (3%) reported difficulties being prequalified for work in Oregon. Relatively more MBEs (11%) and WBEs (8%) reported difficulty being prequalified.

Size of projects. Interviewers also asked business owners and managers whether size of projects presented a barrier to bidding. About 28 percent of majority-owned firms reported that size of projects was a barrier. A greater percentage of MBEs (42%) and WBEs (32%) reported that size was a barrier to bidding. Figure H-22 shows these results.

Obtaining final approval on work from inspectors or prime contractors. Although few firms indicated difficulties regarding inspections or approval of work, MBEs and WBEs were more than twice as likely to report these difficulties as majority-owned firms (see Figure H-22).

Figure H-22.
Responses to 2015 availability interview questions concerning size of projects, approval of work, and licensing and prequalification, MBE, WBE and majority-owned firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Surveys.

Summary of analysis of availability interview questions concerning barriers. The availability interviews suggest that relatively more minority- and women-owned firms report difficulties across a broad factor related to operating a business within the Oregon transportation contracting industry.

- Relatively more MBEs and WBEs have difficulty learning about bid opportunities, including those at ODOT and local agencies and in the private sector. MBEs and WBEs are also more likely to indicate difficulty learning about subcontracting opportunities from prime contractors.
- MBEs and WBEs were substantially more likely to report difficulty networking with prime contractors or customers.
- Relatively more minority- and women-owned firms than majority-owned firms reported that size of projects was a barrier to bidding.
- Only a few firms said that they had difficulties obtaining final approval of work from inspectors or prime contractors, however, relatively more MBEs and WBEs reported this as a difficulty.

APPENDIX I.

Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, Keen Independent used data from the following secondary data sources:

- A. Integrated Public Use Microdata Series (IPUMS) from the 2000 Decennial Census and Integrated Public Use Microdata Series (IPUMS) data from the 2008–2012 (five-year) American Community Survey (ACS);
- B. Federal Reserve Board’s 2003 Survey of Small Business Finances (SSBF);
- C. 2012 Survey of Business Owners (SBO) conducted by the U.S. Census Bureau; and
- D. 2007 and 2013 Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its quantitative marketplace analyses.

A. IPUMS Data

The Minnesota Population Center is home to the Integrated Public Use Microdata Series (IPUMS), the largest repository of national and international Census microdata for social and economic research. Researchers may access the IPUMS program and retrieve customized, accurate datasets.¹ The IPUMS-USA data consist of more than 50 samples of the American population. These samples are drawn from both censuses (1850 to 2000) and ACS (2000–2012).

IPUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and state-level samples, and large sample sizes that enable analysis with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups). Because the design of these surveys has changed over time, they have a wide range of record layouts and coding schemes. The IPUMS data files are specifically formulated to standardize the U.S. Census Bureau Public Use Microdata Sample (PUMS) data from year to year. Variables that cannot be compared across years are removed from the dataset. In multiyear files, IPUMS inflates dollar values to the most recent year in the sample. IPUMS also provides some additional geographic and family interrelationship variables. Most importantly, IPUMS provides strata and cluster variables for survey samples prior to 2005, as well as replicate weights for survey samples since 2005 to account for the complexity of the sample design in the measurement of standard errors.

The study team obtained selected Decennial Census and ACS IPUMS data from the University of Minnesota Population Center.

¹ Alexander, J. T., Genadek, K., Goeken, R., Schroeder, M. B., Sobek, M., & Ruggles, S. (2011). Integrated Public Use Microdata Series (IPUMS): Version 5.0 [Machine-readable database]. Minneapolis: University of Minnesota.

Focusing on the construction and engineering industries, Keen Independent used IPUMS data to analyze workers and households in Oregon by examining:

- Demographic characteristics;
- Measures of financial resources;
- Educational attainment; and
- Self-employment (business ownership).

For the analyses contained in this report, the study team used the 2000 Census 5 percent samples and 2008–2012 ACS samples.

2000 Census data. The 2000 U.S. Census Oregon sub-sample contains 187,775 individual observations, weighted to represent 3,770,441 people.²

Categorizing individual race/ethnicity. To define race/ethnicity for the 2000 Census dataset, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual’s race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank-ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified with multiple races was placed in the reported race category with the highest ranking in the study team’s ordering. African American is first, followed by Native

² As noted in Appendix E, in addition to using data from Oregon, Keen Independent also considers Clark and Skamania counties in Washington as part of the Oregon marketplace due to their inclusion in the Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. Discussion of the Oregon marketplace or Oregon construction and engineering industries in this analysis of U.S. Bureau of the Census data includes firms and individuals located in these two Washington counties.

American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as “Korean,” that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as “Korean” in combination with “black,” the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Bhutanese, Burmese, Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Nepalese, Okinawan, Samoan, Tahitian, Taiwanese, Thai, Tongan, and Vietnamese. This category also included other Polynesian, Melanesian, and Micronesian races, as well as individuals who identified as Pacific Islanders.
- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani, and Sri Lankan. Individuals who identified themselves as “Asian,” but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.
- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.
- If an individual identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals who identified as “other race” or “white and other race” were categorized as “other minority.”

For some analyses — those in which sample sizes were small — the study team combined minority groups.

Business ownership. Keen Independent used the Census “labor force status” variable (LABFORCE) and the detailed “class of worker” variable (CLASSWKD) to determine self-employment.³ Individuals were classified into the following categories.

- Self-employed for a non-incorporated business;
- Self-employed for an incorporated business;
- Wage or salary employee for a private firm;
- Wage or salary employee for a non-profit organization;
- Employee of the Federal government;
- Employee of a State government;

³ The labor force consists of the civilian labor force (employed and unemployed) as well as active duty members of the U.S. Armed Forces. Civilians 16 years and older who are not classified in the labor force include students, homemakers, retired workers, seasonal workers interviewed in an off season who were not seeking work, persons doing incidental unpaid family work of less than 15 hours and the institutionalized population. See http://www.census.gov/acs/www/Downloads/data_documentation/SubjectDefinitions/2010_ACSSubjectDefinitions.pdf for more information.

- Employee of a local government; or
- Unpaid family worker.

The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.⁴

Study industries. The marketplace analyses focus on two study industries: construction and engineering-related services. Keen Independent used the IND variable to identify individuals as working in one industry or the other. The variable reports the industry in which a person performed an occupation, and includes several hundred industry and subindustry categories. Figure I-1 identifies the IND codes used to define each study area for the 2000 Census and 2008–2012 ACS analyses.

Figure I-1.
2000 Census and 2008–2012 ACS industry codes used for construction and engineering-related services

Study industry	2000 Census/ 2008–2012 ACS IND codes	Description
Construction	77/770	Construction industry
services	729/7290	Architectural, engineering and related

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

⁴ For the analysis of business ownership, the study team excluded active duty members of the U.S. Armed Forces and all other wage/salary workers.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-2 summarizes the 2000 Census and 2008–2012 ACS OCC codes used in the study team’s analyses.

Figure I-2.
2000 Census and 2008–2012 ACS occupation codes used to examine workers in construction

Census 2000/ 2008–2012 ACS occupational title and code	Job description
Construction managers 22/220	Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers, and constructors who manage, coordinate, and supervise the construction process.
First-line supervisors/managers of construction trades and extraction workers 620/6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, blockmasons and stonemasons 622/6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block, and terra-cotta block, construct or repair walls, partitions, arches, sewers, and other structures. Build stone structures, such as piers, walls, and abutments and lay walks, curbstones, or special types of masonry for vats, tanks, and floors.
Carpenters 623/6230	Construct, erect, install, or repair structures and fixtures made of wood, such as concrete forms, building frameworks including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 624/6240	Apply shock-absorbing, sound-deadening, or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings, and roof decks.

**Figure I-2 (continued).
2000 Census and 2008–2012 ACS occupation codes used to examine workers in construction**

Census 2000 and 2008–2012 ACS occupational title and code	Job description
Cement masons, concrete finishers and terrazzo workers 625/6250	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks, or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways, and cabinet fixtures.
Construction laborers 626/6260	Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades."
Paving, surfacing and tamping equipment operators 630/6300	Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators.
Miscellaneous construction equipment operators, including pile-driver operators 632/6320	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures, such as buildings, bridges, and piers.
Drywall installers, ceiling tile installers and tapers 633/6330	Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.
Electricians 635/6350,6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems. Exclude "Security and Fire Alarm Systems Installers." The 2000 category includes electrician apprentices.

**Figure I-2 (continued).
2000 Census and 2008–2012 ACS occupation codes used to examine workers in construction**

Census 2000 and 2008–2012 ACS occupational title and code	Job description
Glaziers 636/6360	Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings, and tabletops.
Painters, construction and maintenance 642/6420	Paint walls, equipment, buildings, bridges, and other structural surfaces using brushes, rollers, and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.
Pipelayers, plumbers, pipefitters and steamfitters 644/6440	Lay pipe for storm or sanitation sewers, drains, and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe, or seal joints. Excludes “Welders, Cutters, Solderers, and Brazers.” Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.
Plasterers and stucco masons 646/6460	Apply interior or exterior plaster, cement, stucco, or similar materials and set ornamental plaster.
Roofers 651/6510,6515	Cover roofs of structures with shingles, slate, asphalt, aluminum, and wood. Spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures.
Iron and steel workers, including reinforcing iron and rebar workers 653/6530	<i>Iron and steel workers</i> raise, place, and unite iron or steel girders, columns, and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. <i>Reinforcing iron and rebar workers</i> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches, and hand tools. Include rod busters.
Helpers, construction trades 660/6600	All construction trades helpers not listed separately.

**Figure I-2 (continued).
2000 Census and 2008–2012 ACS occupation codes used to examine workers in construction**

Census 2000 and 2008–2012 ACS occupational title and code	Job description
Driver/sales workers and truck drivers 913/9130	<i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock, or materials in liquid, loose, or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude "Couriers and Messengers."
Crane and tower operators 951/9510	Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines, or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."
Dredge, excavating and loading machine operators 952/9520	<i>Dredge operators</i> operate dredge to remove sand, gravel, or other materials from lakes, rivers, or streams; and to excavate and maintain navigable channels in waterways. <i>Excavating and loading machine and dragline operators</i> Operate or tend machinery equipped with scoops, shovels, or buckets, to excavate and load loose materials. <i>Loading machine operators, underground mining,</i> Operate underground loading machine to load coal, ore, or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.

Source: 2000 Census occupational titles and codes, retrieved from <http://usa.ipums.org/usa/volii/00occup.shtml>. 2008–2012, ACS occupational titles and codes, retrieved from <https://usa.ipums.org/usa/volii/c2soccup.shtml>.

Education variables. Keen Independent used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into six categories:

- Less than high school;
- High school diploma or equivalent;
- Some college but no degree;
- Associate's degree;
- Bachelor's degree; and
- Advanced degree.

Definition of workers. The universe for the class of worker, industry, and occupation variables includes workers 16 years of age or older who are “gainfully employed” and those who are unemployed but seeking work. “Gainfully employed” means that the worker reported an occupation as defined by the Census code OCC.

2008–2012 American Community Survey (ACS) data. The study team also examined 2008–2012 ACS data from IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form.⁵ Since 2005, the ACS has expanded to roughly a 1 percent sample of the population, based on a random sample of housing units in every county in the United States (including District of Columbia and Puerto Rico). The 2008–2012 ACS estimates represent the average characteristics over the five-year period.

There were 195,838 observations included in the Oregon sub-sample data; the 2008–2012 ACS dataset represents 3,925,220 people in the Oregon marketplace.

Changes in race/ethnicity categories between 2000 Census and 2008–2012 ACS data. The 2000 Census 5 percent sample and the 2008–2012 ACS IPUMS data use essentially the same categories for the detailed race variable (RACED). However, in some cases, the numerical code assignment is different; the study team accounted for those differences. Categories for the Hispanic variable (HISPAN) remained consistent between the two datasets.

B. Survey of Small Business Finances (SSBF)

The study team used the SSBF to analyze the availability and characteristics of small business loans. The Federal Reserve Board conducted the SSBF every five years, but stopped after 2003.

The SSBF collects financial data from non-governmental for-profit firms with fewer than 500 employees. The survey uses a nationally representative sample, structured to allow for analysis of specific geographic regions, industry sectors, and racial and gender groups. The SSBF is unique as it provides detailed data on both firm and owner financial characteristics. For the purposes of this report, Keen Independent used the survey from 2003, which is available at the Federal Reserve Board website.⁶

Categorizing owner race/ethnicity and gender. In the 2003 SSBF, businesses were able to give responses on owner characteristics for up to three different owners. The data also included a fourth variable, a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables, the study team used the final weighted average for variables on owner characteristics. Definition of race and ethnic groups in the 2003 SSBF are slightly different than the classifications used in the 2000 Census and 2008–2012 ACS.

⁵ U.S. Census Bureau. (2009). *Design and Methodology: American Community Survey*. Retrieved from http://www.census.gov/acs/www/SBasics/desgn_meth.htm

⁶ The Federal Reserve Board. *Survey of Small Business Finances, 2003*. Retrieved from <http://www.federalreserve.gov/pubs>

The SSBF classified race and ethnicity of businesses according to the following five groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian American;
- Native American; and
- Other (unspecified).

A business was considered Hispanic American-owned if more than 50 percent of the business was owned by Hispanic Americans, regardless of race. All businesses that reported 50 percent or less Hispanic American ownership were included in the racial group that owned more than half of the company. No firms reported the race/ethnicity of their owners as “other.”

Similar to race, firms were classified as female-owned if more than 50 percent of the firm was owned by women. Firms owned half by women and half by men were classified as male-owned.

Defining selected industry sectors. In the 2003 SSBF, each business was classified according to Standard Industrial Classification (SIC) code and placed into one of seven industry categories:

- Construction;
- Mining;
- Transportation, communications, and utilities;
- Finance, insurance, and real estate;
- Trade;
- Engineering; or
- Services (excluding engineering).

Region variables. The SSBF divides the United States into nine Census Divisions. Along with Alaska, California, Hawaii, and Washington, Oregon resides in the Pacific Census Division (referred to in marketplace appendices as the Pacific region).

Loan denial variables. In the 2003 survey, firm owners were asked if they have applied for a loan in the last three years and whether loan applications were always approved, always denied, or sometimes approved and sometimes denied. For the purposes of this study, only firms that were always denied were considered when analyzing loan denial.

Data reporting. Due to missing responses to survey questions in SSBF datasets, data were imputed to fill in missing values. The missing values in the 2003 dataset were imputed using a different method than in previous SSBF studies. In the 1998 survey data, the number of observations in the dataset matches the number of firms surveyed. However, the 2003 data includes five implicates, each with imputed values that have been filled in using a randomized regression model.⁷ Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. For the Pacific Region alone, there were 3,690 observations representing 738 businesses. Across the five implicates, all non-missing values are identical, whereas imputed values may differ.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates as well as inaccurate variances and confidence intervals.⁸ Those problems can be corrected through the use of multiple implicates. For summary statistics using 2003 SSBF data, Keen Independent utilized all five implicates and included observations with missing values in the analyses. For the probit regression models presented in Appendix G, the study team used the first implicate and did not include observations with imputed values for the dependent variables.

C. Survey of Business Owners (SBO)

Keen Independent used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO were collected in 2012, but were first released in August of 2015; the full data will be released December 2015. For this report, all variables necessary to complete the analysis were available in the preliminary release.

Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees and total receipts. That information is available by geographic location, industry, gender and race/ethnicity.

The SBO uses the 2012 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction and engineering-related services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Americans,

⁷ For a more detailed explanation of imputation methods, see the “Technical Codebook” for the *2003 Survey of Small Business Finances*.

⁸ Hazelwood, L. N., Mach, T. L., & Wolken, J. D. (2007). *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses*. Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C. Retrieved from <http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf>

Hispanic Americans, Native Americans, or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership.

The study team reported business receipts for the following race/ethnicity and gender groups:

- African Americans;
- Asian Americans;
- Hispanic Americans;
- Native Americans;
- Non-Hispanic whites;
- Men; and
- Women.

D. Home Mortgage Disclosure Act (HMDA) Data

Keen Independent analyzed mortgage lending in Oregon and nationwide using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Financial institutions were required to report HMDA data for 2013 if they had assets of more than \$42 million (\$35 million for 2007), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, were located in a metropolitan statistical area (or originated five or more home purchase loans in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

The study team used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2007 and 2013. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.

Qualitative Information from In-Depth Personal Interviews, Telephone Interviews, Public Meetings and Written Comments

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. More than about 400 business and trade association representatives provided input analyzed for this Appendix. Appendix J includes 13 parts:

- A. Introduction and Background describes the process for gathering and analyzing the information summarized in Appendix J. (Page 2)
- B. Background on the Businesses in Oregon summarizes information about how businesses, organizations and agencies become established and how companies change over time. (Page 5)
- C. Economic Conditions Affecting the Transportation Contracting Industry in Oregon summarizes information about how the recent economic downturn and current economic conditions have affected Oregon’s transportation contracting industry. (Page 19)
- D. Public and Private Sector Transportation Contracting in Oregon summarizes businesses’ experiences working in Oregon’s public and private sectors. (Page 27)
- E. Doing Business as a Prime Contractor or as a Subcontractor presents information about successes and potential barriers to working as a prime contractor or subcontractor in Oregon. (Page 36)
- F. Keys to Business Success and Any Barriers in the Way discusses certain barriers to doing business and keys to success, including access to financing, bonding, and insurance. (Page 46)
- G. Experience Doing Business with Public Agencies Including Oregon Department of Transportation discusses barriers such as access to capital, bonding and insurance that may limit firms’ ability to work with public agencies such as ODOT. Interviewees also discussed other issues related to working for public agencies. (Page 61)
- H. Allegations of Unfair Treatment presents information about any experiences with unfair treatment such as bid shopping, treatment during performance of work, stereotypical attitudes about minorities and women and allegations of a “good ol’ boy” network that adversely affects opportunities for MBE/WBEs in Oregon. (Page 96)
- I. Information Regarding Any Racial-, Ethnic- or Gender-based Discrimination discusses factors that specifically affect industry entry and advancement for minorities and women (or MBE/WBE/DBEs). (Page 102)

- J. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures summarizes information about businesses' knowledge of current and potential business assistance programs and contracting processes, including those offered or potentially offered by ODOT or other public agencies, trade associations and other organizations. (Page 117)
- K. Insights Regarding DBE/MWESB Programs and Other Related Race- and Gender-based Measures summarizes businesses' comments on race- and gender-based measures that ODOT or other public agencies use. (Page 147)
- L. DBE and MWESB Certification presents information about advantages and disadvantages that subcontractors experience because of their certification as a DBE or MBE/WBE/SBE. (Page 166)
- M. Any Other Insights and Recommendations for ODOT summarizes businesses' comments regarding the effectiveness of ODOT contracting processes or programs. (Page 174)

A. Introduction and Background

The Keen Independent study team conducted in-depth personal interviews and telephone, online and fax availability interviews from May 2015 through September 2015. ODOT held four public meetings in February 2015 and also asked for written comments concerning the 2016 Disparity Study. Keen Independent also collected comments through the study website and telephone hotline.

Through in-depth personal interviews, availability interviews, public meetings and public comment process, business owners and managers had the opportunity to discuss their experiences working in the local transportation contracting industry; experiences working with ODOT and other public agencies; perceptions of the Federal DBE Program and other topics important to them.

In-depth personal interviews. The study team conducted in-depth personal interviews and focus groups with 71 Oregon businesses and trade associations. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local transportation contracting industry; the Federal DBE Program; the contracting and procurement policies, practices, and procedures of ODOT; and other topics. Interviews and focus groups were conducted by:

- Keen Independent;
- Donaldson Enterprises, a Washougal, Washington-based Native American female-owned consulting firm;
- Benetti Partners, a Portland-based African American female-owned consulting firm; and
- JLA Public Involvement, a Portland-based female-owned consulting firm.

Interviewees included individuals representing construction-related businesses, engineering firms, other professional services firms and trade associations. The study team identified interview participants primarily from a random sample of businesses that was stratified by business type, location, and the race, ethnicity and gender of business owner. The study team conducted most of the interviews with the owner, president, chief executive officer, or other officer of the business or association. Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both. All of the businesses conduct work in Oregon. All interviewees are identified in Appendix J by random interviewee numbers (i.e., #1, #2, #3, etc.).

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could readily identify interviewees or other individuals or businesses that were mentioned in the interviews. The study team reports whether each interviewee represents a DBE-certified business and also reports the race/ethnicity and gender of the business owner.¹

Availability interviews. The study team also asked firm owners and managers to provide comments at the end of the online or telephone interview. Businesses were asked: Do you have any final comments for ODOT about its construction and professional services contracting?

A total of 275 businesses provided comments. The study team analyzed responses to these questions and provided examples of different types of comments in Appendix J. Availability interview comments are referenced as “AI.”

2015 public meetings. Beginning in December 2014, ODOT solicited comments regarding the 2016 Disparity Study. ODOT made wide-ranging efforts to publicize the Disparity Study and opportunities for public input, including distribution of the information to individuals and organizations throughout the state. For example, ODOT:

- Encouraged the public to provide written comments online, via email or by mail; and
- Invited the public to introduce the study and provide an overview of the 2016 ODOT Disparity Study, outline the study’s purpose, and collect input from the public. Led by the Keen Independent study team, JLA Public Involvement, assisted with these meetings. JLA retained court reporters to record the public comments and question and answer portions of each meeting. ODOT made extensive efforts to notify interested members of the public about the meetings. These efforts included:
 - Statewide press release (January 29, 2015) and reminder release (February 16, 2015).
 - Email to all registered MWESB businesses.

¹ Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.

- Announcement on project website, www.ODOTDBEStudy.org.
 - Newspaper advertising in the following papers approximately a week prior to each meeting: Bend Bulletin, Roseburg News Review, Salem Statesman Journal, Asian Reporter, Portland Tribune, Daily Journal of Commerce, El Latino de Loy, Portland Observer, The Skanner, Northwest Labor Press and Portland Business Journal.
 - Announcements at trade association meetings including NAWIC (January 15, 2015), Capitol Connections (January 27, 2015) and AGC (February 20, 2015).
 - Meetings with an External Stakeholder Group.
- **Public meeting locations and dates.** The study team held each public meeting at 3:00 pm to 5:00 pm. Public meetings included the following Oregon locations:
- Bend, on February 23, 2015;
 - Roseburg, on February 24, 2015;
 - Salem, on February 25, 2015 (also included a conference call option); and
 - Portland, on February 26, 2015.

In attendance were individuals from construction and engineering firms, local agencies, ODOT staff and other groups. The study team reviewed and analyzed comments from these meetings and provided examples in Appendix J (referenced as “PMP”). ODOT representatives making comments at public meetings are referenced as “OPMP.”

In total, 36 members of the public and 43 ODOT representatives attended public meetings in person. Fifteen people attended the Salem public meeting via live webinar.

Meeting format. Tiffany Hamilton from ODOT introduced each public meeting. Keen Independent briefly discussed the study purpose and process through a PowerPoint presentation. Keen Independent also discussed objectives for the meetings, introduced the study team, reviewed the study schedule, explained what a disparity study is and discussed the opportunities for public involvement in the study, including ways to contact the study team.

Keen Independent then opened each meeting for public comments. Suggested topics for discussion included:

- Experiences starting, growing and sustaining a business in the transportation contracting industry in Oregon;
- Access to capital;
- Bonding;
- Informal networks;
- Attempting to work on ODOT and local agency contracts;

- Attempting to work on private sector contracts;
- Prime contract opportunities compared with subcontract opportunities;
- The Federal DBE Program; and
- Specific issues attendees recommend that the Disparity Study examine.

2016 public meetings. Beginning in March 2016, ODOT solicited comments regarding the draft 2016 Disparity Study report and its proposed overall DBE goal. ODOT made wide-ranging efforts to publicize the Disparity Study and opportunities for public input, including distribution of the information to individuals and organizations throughout the state. For example, ODOT:

- Encouraged the public to provide written comments online, via email or by mail.
- Invited the public to an overview of the 2016 ODOT Disparity Study report and outline the study’s purpose and findings. ODOT made extensive efforts to notify interested members of the public about the meetings. These efforts included:
 - Statewide press releases (March 21, 2016).
 - Email to all registered MWESB businesses (March 15, 2016) with reminders on (March 21, 2016) and (April 5, 2016).
 - Email to all project stakeholders (March 21, 2016).
 - Announcement on project website, www.ODOTDBEStudy.org.
 - Newspaper advertising in the following papers approximately a week prior to each meeting: Bend Bulletin, Medford Mail Tribune, Asian Reporter, Portland Tribune, Daily Journal of Commerce, El Latino de Loy, Portland Observer, The Skanner, Northwest Labor Press and Portland Business Journal.
 - Social media announcements (March 29, 2016), (April 2–4, 2016) and April 7, 2016).
 - Announcements at trade association meetings.

Public meeting locations and dates. The study team held each public meeting at 3:00 pm to 5:00 pm. Public meetings included the following Oregon locations:

- La Grande, on April 5, 2016(also included a live on-line call option);
- Bend, on April 6, 2016(also included a live on-line call option);
- Medford, April 7, 2016
- Portland, on April 11, 2016; and
- Eugene, on April 12, 2016.

In attendance were individuals from construction and engineering firms, local agencies, ODOT staff and other groups. The study team reviewed and analyzed comments from these meetings and provided examples in Appendix J (referenced as “PMP”). ODOT representatives making comments at public meetings are referenced as “OPMP.”

In total, 43 members of the public and 11 ODOT representatives attended the 2016 public meetings.

Meeting format. Tiffany Hamilton from ODOT introduced each public meeting. Keen Independent discussed the study report findings and Ms. Hamilton presented the proposed DBE goal. Amy Jermain from ODOT’s Office of Civil Rights Small Business Contracting Program hosted an information booth at each meeting.

ODOT and Keen Independent then opened each meeting for questions and comments.

Written public comments. The study team received four written comment submissions from the spring 2016 public comment period. The study team analyzed these comments as part of Appendix J reporting. We reference written public comments as “WPC.”

Disparity Study hotline. The study team also maintained a Disparity Study hotline phone number for additional input. The study team received and analyzed input from one phone call referenced as other public comment, “OPC.”

B. Background on the Businesses in Oregon

Interviewees reported on business histories. Part B summarizes information related to:

- Business start-up history;
- Work types;
- Sizes of contracts;
- Business location and work territory;
- Business expansion or contraction over time;
- Employment size and staff development; and
- Challenges to starting, sustaining or growing a business, including those that may be race- or gender- based.

Business start-up history. Many interviewees representing construction and engineering businesses in Oregon reported that their companies were started (or purchased) by individuals with prior experience in their respective industries. Some larger firms acquired a number of small businesses during the course of their business history. This pattern demonstrates that any race or gender barriers to entering and advancing within the Oregon construction and engineering industries would affect the relative number of firms started by minorities and women in Oregon.

Most firm owners worked in the industry before starting their businesses. [e.g., #11, #13a, #15, #16, #18a, #24, #25, #26, #27, #28, #30, #33, #37, #41, #42, #44, #48, #54, #55] For instance:

- A female principal of a WBE- and DBE-certified woman-owned transportation planning firm reported that the firm started by several people who broke off from a large engineering-related firm. [#5]
- The African American male representative of an African American-owned DBE-, MBE- and ESB-certified specialty construction firm reported that the firm's owner had previously worked in a related industry before starting his current business. [#6a]
- When asked how the business became established, the white male owner of an ESB-certified general construction firm reported, "We had been in the industry for other people, for other companies, and had experience doing what we [did] ... [so] we decided to start our own company." [#14]
- The white male owner of a specialty contracting firm reported that he worked for another local contractor before establishing his own firm. [#22]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that she established her business after having years of exposure in another construction company. [#36]
- The white male representative of a white woman-owned WBE-certified construction business reported that the owner worked for the firm as an employee before purchasing it. He went on to say that she had previous managerial experience. [#50]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that he has previous experience working in the industry; he worked on large projects with multiple firms. He went on to say that he worked his way up from "digging with a shovel" to managing multi-million-dollar projects. [#51]
- An African American owner of a DBE- and MBE-certified specialty contracting firm reported that he had experience in the industry before he and his partner started the business. [#46]

Some of the business owners had parents or family who had their own companies, sometimes in related fields. For example:

- The African American owner of a now-closed construction firm reported that he started doing construction because his parents worked in the business; it was familiar to him. [#23]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that her family was already involved in the industry. She added that this exposed her to many business practices along with various types of equipment. [#32]

- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that he comes from a legacy of business owners. He went on to say that his business experience can be traced back to when he was in high school. [#33]
- The female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm reported that the owner was exposed to the industry for many years because his family was involved in it. [#56]

Some of the interviewees represented much larger companies, some publically traded or other very large firms. For example:

- The white male president of a majority-owned construction business reported that his firm is a subsidiary of a publically-traded firm that has acquired 50 to 60 smaller firms in Oregon in the past 20 years. [#1]
- The male representative of an international engineering business reported that his firm is an affiliate of a publically-traded international firm. [#12]
- The white male owner of a specialty contracting firm reported that his firm has grown to include subsidiaries, and added that his previous firm helped to establish two of them. He went on to report that his firm also owns a small specialty contracting company. [#22]

Work types. Business owners and representatives discussed the types of work that their firms perform.

Variability in types of work performed. Some interviewees reported that their companies worked in a number of different fields; some based these decisions on profitability. [e.g., #1, #22, #24, #54] For example:

- A Native American owner of a construction firm reported that his firm is able to perform a wide range of work across highway, bridge and other projects. [#26]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that work profitability affects the type of work they perform. [#30]

A few interviewees reported that their companies were specialized and “stuck to that work.” For example, the representative of a white woman-owned specialty construction firm reported, “We stick to what we know ... we don’t go out and build bridges or anything like that.” [#13a]

Including large and small businesses, many business owners and representatives reported changing the services they provide and types of customers they serve to adapt to changes in opportunities or market conditions. [e.g., #6, #7, #8, #11, #16, #18a, #22, #43, #50, #52, #56, #59] Comments from the in-depth interviews include:

- The white female owner of a WBE- and ESB-certified professional services firm stated that she changes the services she provides to accommodate the demand of the marketplace. [#24]
- When asked if there have been changes to the type of work his firm performs, the representative of an international engineering business stated, “Certainly, and mainly due to the economy” He explained that the firm moved from private work to public “when the economy hit” and “the majority of that work went away.” [#12]
- When asked about changes to the types of work his company performs, the African American president of a DBE- and MBE-certified construction business reported, “It has changed dramatically We moved from residential to more commercial and ... federal projects” [#49]
- The male representative of a white woman-owned specialty construction firm reported that the firm changes its line of business based on market conditions. [#13a]
- When asked about the types of work his firm performs, the Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that his firm recently started a new subsidiary. His decision to diversify his firm’s work was based on the fact that he wanted bigger opportunities for himself and his employees. [#37]

There is also cross-over from engineering projects to construction work for some firms (and vice-versa). For example, the white male owner of an ESB-certified engineering firm reported transitioning from engineering to construction site work, such as inspections. [#44]

Some interviewees indicated that the type of work that their businesses perform has not changed. [e.g., #9, #14, #17, #20, #25, #29, #39b]

Sizes of contracts. The study team also asked about the sizes of contracts and subcontracts companies perform.

Most firms conduct a wide range of project sizes. [e.g., #12, #14, #15, #18a, #22, #27, #28, #40a] For instance:

- The white male president of a majority-owned construction business indicated that the firm has the bonding capacity to bid any size project. The firm typically bids projects with budgets anywhere from \$50,000 to \$50 million. [#1]
- A white male principal of an employee-owned transportation and engineering consulting firm stated, “We cover quite a range. Contracts from \$5,000 to a few million dollars.” [#4]

- The African American representative of an African American male-owned DBE-, MBE- and ESB-certified specialty construction firm reported that the firm's largest projects have been about \$3.8 million; their smallest projects have been as low as \$5,000. He commented, "It's a big range." [#6a]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that her firm has the ability to perform "one day jobs" as well as projects that span many months. She added that she has worked on projects with budgets as large as \$1 million. [#25]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that the firm does contracts of all sizes, and stated that they have done projects up to \$7.5 million. [#27]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that they are capable of performing many different types and sizes of contracts. He noted that his firm is capable of doing multiple projects simultaneously due to the firm's flexibility and willingness to work. [#28]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported, "No job is too small, neither too big for us." He further reported taking a wide range of contracts, some with substantial budgets; and said, "We feel confident we could do projects even bigger than that." [#47]
- The African American president of a DBE- and MBE-certified construction business reported that his firm performs projects ranging from \$5,000 to \$5 million. [#49]
- When asked about his firm's ability to perform different sizes of contracts, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that because they are a small business, they typically do smaller jobs. However, he noted that they have the capital and bonding capacity to do large jobs up to \$10 million. [#16]
- The white male representative of a white woman-owned WBE-certified construction business reported that the firm performs jobs ranging from a \$500 repair project to an \$18 million construction job. [#50]
- When asked about the size of contracts that his firm performs, the white male owner of a specialty contracting firm commented, "I will do an outhouse and a main highway." [#20]

Others discussed how their firms respond to project size. [e.g., #13a, #42, #OS3b] Comments from the in-depth interviews include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm commented that her firm relies on small, on-call “mini-compete” projects. Due to small contract size, the firm requires a high volume of assignments to keep staff employed. [#2]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that his firm generally does contracts under \$2 million. He added that his firm would like to do larger contracts, but noted that it is a challenge to prove their ability to do so. [#11]

Business location and work territory. The study team asked about geographic areas companies serve.

Some businesses operate locations inside and outside of Oregon, and some report that they travel statewide for work. [e.g., #18a, #22, #28, #57, #TO3, #TO4] For instance:

- With 13 business locations, the white male president of a majority-owned construction business reported projects with departments of transportation across many states, including Oregon. [#1]
- The white male owner of a specialty contracting firm reported that his firm has branches in multiple states. [#20]
- The white male owner of an ESB-certified engineering firm reported that he has done transportation work in Oregon and California. [#44]
- An African American owner of a DBE- and MBE-certified specialty contracting firm reported working across northern and central Oregon. [#46]

One business leader that had ability to work statewide indicated a preference for bidding jobs based on location. His comment follows:

- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that although he can bid on work anywhere in the state, he preferred certain regions to others when bidding. [#7]

Others reported that they mostly perform local work, or if they were government representatives, indicated that most bidders or proposers come from the local area. Comments from the in-depth interviews include:

- A female engineer from a local government agency reported a relatively local market area for its contractors. She added that it may cross county lines but stays relatively regional. [#LA2]

- A white male project manager from a local government agency reported that most contractors are in the Portland/Hillsboro/Mount Hood area, or alternatively Vancouver, WA. Consultants are quite often based in Salem, Portland or sometimes Eugene. He added that the majority of bridge builders are from Silverton, Oregon. [#LA3]

Business expansion or contraction over time. Periods of business expansion and contraction was a common theme across interviewees.

Many business owners and representatives reported that their firms have expanded or contracted over time, and sometimes seasonally within a year. [e.g., #6a, #8, #20, #22, #29, #30, #34, #41, #47, #52] For example:

- The white male owner of a specialty contracting firm reported that the firm started with annual revenue of \$1 to \$2 million, which increased to \$7 to \$8 million before falling during the economic downturn. He went on to comment that his firm’s revenue has recovered this year, increasing to \$11 million. [#20]
- The white male executive of an African American-owned engineering and consulting firm stated that the company changes its size depending on the contracts they have. [#9]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that the firm’s size fluctuates depending on contract sizes. She added that the firm sometimes teams with larger firms for large contracts. [#10]
- When asked about changes to the size of her firm, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that the firm’s size changes depending on the available work, the season and market conditions. She added that they maintain a core group of 12 employees. [#27]
- A male representative of a white woman-owned specialty contracting firm reported steady growth in the size of the firm. However, he noted, “We did have a shrinkage in 2008 and 2009.” [#39b]
- The female representative of a Hispanic American- owned DBE- and MBE-certified specialty contracting firm stated that the business has expanded in size. She noted that when she began working with the business, it was especially slow during the winter time. Recently however, she said that there is enough work now to carry the business through the winter. [#56]
- The African American male president of a DBE- and MBE-certified construction business reported that the size of his firm fluctuates based on market conditions. [#49]

Only a few interviewees said that the size of their firm was stable, sometimes in spite of wanting to expand. For example:

- The white male owner of an ESB-certified engineering firm noted consistency in his firm's size, although he has recently considered hiring more employees. He stated that he looks forward to his firm's expansion in the future. [#44]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he struggles to sustain the small firm and cannot go beyond seven employees. [#28]

Employment size and staff development. Many business owners and representatives reported increases or decreases in staff, often as a result of work opportunities or availability of qualified workers. Sometimes, changes in staff size are seasonal.

Seasonal fluctuation in staffing. A number of businesses report seasonal drops in staff when work slows because of weather or other seasonal conditions. [e.g., #11, #25, #27] Other firms were not affected by changes in season. [e.g., #35] Comments include:

- The white male president of a large majority-owned construction business indicated that firm drops employees after its summer peak. He added, "The harsh winters that we have, our work will dwindle to very little in December, January and February This winter was abnormal and we were able to work through the winter and keep most of our folks busy." [#1]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that the size of the firm frequently changes. She stated that they hire more staff in the spring and summer due to an increased workload. [#8]
- A white male owner of an ESB-certified general construction firm reported that the size of his firm fluctuates seasonally, and is frequently at its smallest when business is slower in the winter. [#14]
- When asked about changes to the size of his firm, the Native American owner of an MBE- and ESB-certified specialty contracting firm reported that the number of hired employees fluctuate seasonally. [#15]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that her peak employment is during the summer. [#25]
- A white female owner of a specialty construction business reported that their work is weather related and that most customers do not order her type of work in the winter months. [#41]

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that the firm's size fluctuates depending on the available work and the season. He added that because construction is a seasonal industry, things tend to be slower in the winter. [#18a]

He went on to comment that they try not to lay off staff during this time because there is still maintenance of equipment, calibrations and continuing education that can keep them busy. [#18a]

Staff reductions in response to poor economic conditions. Some interviewees said that they had reduced permanent staff because of the economic downturn and poor market conditions. [e.g., #12] For instance:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that his firm had to layoff approximately 30 employees during the economic downturn. He added that while they were one of the few companies without a lot of debt, there was still very little access to capital. He stated, "We were just doing enough to keep our doors open." [#6b]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that his firm grew at a rate of 10 to 15 percent per year. This upward trend ended in the years between 2008 and 2013 when the firm experienced a decline. [#11]
- When asked about the effects of the economic downturn, the male representative of a majority-owned construction firm reported that employees did not get as many hours to work, and noted that there were other employee restrictions to prevent layoffs. [#19]
- When asked about the effects of the economic downturn on his firm, a representative of a white woman-owned specialty contracting firm indicated a drop in staffing. He stated, "We did everything we could to keep everybody busy; but, [the contracts] just weren't there." [#39b]

Some interviewees reported being cautious about adding employees or having difficulty finding qualified employees in the current market. Comments from the in-depth interviews include:

- A woman principal of a WBE- and DBE-certified woman-owned transportation planning firm reported that she tripled staff, but remained cautious when doing so. She went on to add that the firm utilizes interns, and that some have been employed by the firm. [#5]
- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported that the firm expands with the market. [#40b]

- The white male president of a majority-owned construction business commented that finding good talented recruits is a challenge for the firm. He stated, “The baby boomers are retiring faster than the next generation is coming into the industry.” He added that as a result, “... workforce development is one of our biggest challenges going forward.” [#1]
- The white female owner of a WBE- and ESB-certified specialty construction business reported that she faced financial start-up trouble and challenges, including lack of employees. [#35]
- The white female owner of a DBE- and WBE-certified services firm reported that variance in contracts requires hiring and dismissing of employees, “... which is always unfortunate” [#34]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm indicated that the firm is phasing out of construction and ODOT work because of a workforce shortage; she cannot compete with the market anymore. She added that by moving to consulting work, she does not carry the burden of employees. [#36]

Challenges to starting, sustaining or growing a business, including those that may be race- or gender- based. A number of businesses reported challenges when starting, sustaining or growing their businesses.

Interviewees identified a wide range of barriers to initial success. The following comments provide a sense of the variety of responses when asked about barriers to starting and growing a business:

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that there were many unanticipated barriers to starting her firm, and cited payroll, taxes, hiring and rules and regulations as some of the unexpected challenges. [#25]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported that he knows how to do construction; however, management of paperwork, reports and payroll taxes is difficult. The same business owner added that the lowest bidder gets the job, so writing bids was a challenge. [#40a]
- The male representative of a white woman-owned specialty construction firm reported that the firm’s original owner struggled to acquire the materials necessary to run a successful business in his industry. [#13a]
- A public meeting participant representing a DBE- and WBE-certified firm commented that challenges compound for small businesses that are also minority- or women-owned. [#PMP22]

- A Hispanic American male owner of a DBE- and MBE-certified engineering firm reported that obtaining insurance was the biggest challenge his firm faced during start-up. [#17]
- When asked about the challenges the owner faced when starting the business, the white male representative of a majority-owned ESB-certified specialty contracting firm commented, “Like all businesses when you start out there’s always challenges ... at one point we had a problem with an office manager who embezzled money from the company and nearly broke the company, nearly destroyed it.” [#29]
- A public meeting participant representing a construction related firm commented, “... if you look at what the primes are subcontracting out [flagging and trucking], it’s hard for a [construction related] company to increase their capacity or grow their business.” [#PMP31]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported a male employee, who had an ego, had a hard time working for her, because she was a woman; when she fired him, he started his own firm and took her entire workforce with him. [#36]
- When asked if he faced any other challenges other than financing, the Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that his insurance company dropped them with only a two-day notice because they considered his new company too much of a risk, and they did not want “anybody deviating from [their] path.” [#37]

He further commented that in his industry, firms established for generations or union shops do not want competition; they do everything possible to prevent his success. For example, his competitors made calls throughout his area to prevent others from renting to his company. [#37]

- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported visibility in the industry, finding employees and composing bids as challenging. [#40b]
- A white female owner of a specialty construction business reported that she faced many challenges each day related to licensing and finding employees. [#41]
- The white male owner of an ESB-certified engineering firm noted that he was and is spending a fair amount of money on certifications for construction, but learned that if larger businesses were competing for a bid, he was underutilized. [#44]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported capacity to complete work as a challenge for his company, saying, “... even if we got the project, perhaps we were not capable of handling it ... [yet] we certainly could not keep the staff idle.” He also reported that subconsultant assignments were much harder to obtain before becoming certified. [#47]

- When asked about the challenges in starting his business, the African American president of a DBE- and MBE-certified construction business reported that while he had no challenges with credit, bonding or insurance, his skillset was limited at startup. He went on to add that he only had experience working with small equipment. [#49]

Many business owners and representatives considered access to capital to be an ongoing challenge at business start-up. There is indication that this was especially difficult for some minority- and women-owned firms. [e.g., #25, #39a, #41, #58, #PMP24, #PMP33] For instance:

- A white male board member of a contractors association reported that start-up subcontractors often do not understand how “capital intensive” the horizontal public works field is when compared to vertical construction. He went on to comment that sheetrock or drywall firms (vertical construction) require relatively inexpensive equipment, whereas utility subcontractors (horizontal construction) require expensive equipment such as excavators or dump trucks. [#TO4]
- A female procurement manager from a local government agency indicated that access to capital is a major need for companies, but there is not much assistance in the local marketplace. She indicated that OAME has an access to capital program. [#LA7]
- She used paving as an example of access to capital. She would like to have minority-owned paving companies available for subcontract work. Some of the local MBEs have those capabilities but do not currently have the needed equipment, and do not appear to have the money to invest in the equipment. It is difficult to finance it if there is no guaranteed revenue stream for that work. [#LA7]
- A white male owner of an ESB-certified general construction firm reported, “... it’s been challenging just growing ... keeping up with the capital needs to grow a business ... and staffing, too, is challenging.” [#14]
- A female representative of a white woman-owned specialty contracting firm indicated that cash flow was an issue for the growing company. [#39a]
- The male representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented, “I’m sure [we faced challenges] like all businesses face ... with capital and establishing a client base.” [#11]
- A female Native American business owner that contacted the Disparity Study hotline designated for public input commented that in order to receive a business loan (for capital and other needs), she needed to have a well-written business plan, which was difficult for her. [#OPC1]
- When asked about the challenges of starting a small business, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented that the industry requires a lot of capital, and noted that this can be especially challenging for small businesses. He also commented that there are uncontrollable issues like economic conditions. [#16]

- When asked about financial start-up challenges, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported, “It takes quite a bit of money to get going ... to make the payroll and do all that kind of stuff ... buy equipment ... so that was probably one of the bigger challenges.” [#27]

- The white female owner of a DBE-, WBE- and SBE-certified construction business recalled the challenge of getting a loan to pay for liability insurance; a bank loan officer told her, “Send your husband in on Monday, and we’ll get this [loan] finalized.” [#32]

The same business owner added that she contacted other banks that Monday and inquired if they would lend to a women business owner. She continued, “On Tuesday, I moved all my funds from [one bank] to [another bank] ... those were everyday challenges in the beginning.” [#32]

- The Hispanic American owner of a construction business reported that maintaining cash flow during the first three years was his greatest challenge. [#58]
- A white female owner of an ESB-certified specialty contracting firm reported that it was difficult to start a business without a large savings account. When asked if she faced barriers when starting a business as a minority- or woman-owned business, she replied, “It’s kind of hard to say. I mean, we struggled, I don’t know if it had anything to do with being a woman.” However, she also noted that she had a difficult time applying and receiving approval for loans. [#59]
- When asked about any challenges starting his business, a white male partner of a WBE- and SDVO-certified construction firm reported difficulties getting the firm and equipment capitalized. He noted that acquiring equipment for specific jobs was difficult. The same business owner indicated that bonding was, “... sometimes extremely tough.” He recalled a project where he was unable to get the required subs because of bonding issues; he reported that the reason was likely due to being a WBE. [#43]
- An African American owner of a DBE-and MBE-certified specialty contracting firm, when asked about challenges starting the business, reported that money was a challenge, saying “Finding people that would give you money to make your payroll without [abusing] you, that’s the hardest part.” [#46]
- When asked about challenges starting her engineering business, an African American female owner of a DBE- and MWESB-certified engineering firm responded that her biggest challenge was “money.” She explained, “Money is a major problem, because a lot of us are not rich.” Facing a challenge of funds, she commented that she almost gave up. She indicated having added challenges being a “black” woman. [#3]

Others reported challenges in building relationships and gaining access to opportunities during start-up. [e.g., #11, #38] Comments include:

- The male executive of a majority-owned services firm reported start-up challenges with difficulty finding leads, winning contracts and finding work. He noted that these challenges were normal hurdles for all small business. [#45]
- A white male owner of a now-closed ESB-certified engineering firm reported that he started the company and worked on a large project, but had only one client since then. He commented, “We have been singularly unsuccessful breaking into the market.” He added that it is due largely to government agency policies and procurement practices for consulting engineering businesses, which affects both DBEs and ESBs. [#38]
- When asked about the challenges in starting his business, the Native American owner of an MBE- and ESB-certified specialty contracting firm cited a lack of opportunities and available work as the primary issue. He went on to add that receiving timely payment was also an issue for his firm. [#15]
- When asked about the challenges of starting her business, the white female owner of a WBE- and ESB-certified professional services firm indicated that finding clients, setting up policies, and becoming established were difficult. She noted that her age and being a woman also led to some barriers when getting established. [#24]
- When asked if he faced challenges as a minority starting his business, the African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported, “Well, business is business; it depends on how you run it so I won’t say I had any extra challenges ...” He then clarified, “Well, when it comes to getting large contracts then it’s challenging ... but we overcame that too.” He commented that he is the only minority remaining in the ... business. “So as far as challenges go, ‘every day.’” [#7]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that finding sizable and consistent levels of work were challenges at the start of the firm. He went on to indicate that the firm maintained just enough work to “keep the doors open.” [#18a]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm reported that the owner had challenges being a woman-owned business in the construction industry. In addition, the owner faced sexual harassment challenges by clients. [#54]

- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that gaining trust was their new company’s biggest challenge, because their previous employer went out of business. He reported difficulty in gaining trust from contractors so they could work with them and prove themselves. He added, “Trust is a big one when you start a business when there is a major failure from another company ... the biggest struggle was getting your foot in the door ... if something works, [contractors] like to stick with it. So it’s very tough to get in and prove yourself.” [#30]
- When asked about the challenges of being a minority in the business, the African American owner of a now-closed construction firm indicated that establishing relationships was difficult. He commented, “It’s not what you know, but who you know If you’re not part of the group, you’re out.” He also stated that he would take any small amount of work without complaint, “I wasn’t being greedy [for work] I wasn’t ready to ‘rub shoulders’ with the big leaguers Just get me in, and I’ll take the scraps ... and I just couldn’t break through at all.” [#23]
- When asked about the challenges of starting his own business, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he had difficulty teaming with other companies for public work when his business first started. [#28]
- The African American representative of an African American male-owned DBE-, MBE- and ESB-certified specialty construction firm reported that securing contracts and building relationships “are always hard to establish,” especially for small businesses. [#6a]
- An African American male owner of an MBE-certified professional services firm reported that being a minority-owned business was a challenge in itself. He stated that he ran into companies that tell him they are, “Not looking for affirmative action candidates.” He noted that some people would not even shake hands with him citing a chamber of commerce board of director. “Bad things happen, but good things happen. That’s how life has always been.” [#55]

C. Economic Conditions Affecting the Transportation Contracting Industry in Oregon

Economic conditions, good or bad, have a reported effect on contracting businesses in Oregon. In Part C, discussion includes the following:

- Local effects of the economic downturn; and
- Current economic conditions.

Local effects of the economic downturn. Interviewees reported on the local effects of the most recent economic downturn. For many, the Great Recession had lasting negative impacts. [e.g., #6a, #8, #9, #28, #30] Comments from the in-depth interviews include:

- The white female owner of a WBE- and ESB-certified specialty contracting firm stated that from the start of her business in 1998 up to the recession, her business had steady growth. She added that ever since the economic downturn, her company has struggled to get by. [#53]
- When asked about the effects of the economic downturn on his business, the white male owner of an ESB-certified general construction firm reported, “Yes ... lack of work ... lack of profitable work ... funny, staffing was much easier at that time.” [#14]
- When asked about the effects of the economic downturn, the African American male president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported, “... a lot of people were out of work. I lost a lot of money then ... because at that time we were running a credit business and, I’ll say it like this, we have very few credit customers now ... whereas, back then, it [having credit customers] was the thing to do ... it’s a whole lot different today ... economic downturn really affected us.” [#7]
- When asked how the economic downturn affected his firm, the white male representative of a majority-owned ESB-certified specialty contracting firm stated, “It made for some pretty lean times. One of the biggest problems, with that, was actually other companies going broke and not paying us.” He reported, “In [my] industry, 95 percent of the money we end up writing off is other [contracting] companies ... Almost every time we lose money it has to do with working for some other [contracting] company.” [#29]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that the economic downturn affected his business growth. He reported that his firm was unable to grow, expand markets, purchase equipment or hire during the period. He added that his firm had to take on odd, second jobs to survive the downturn of the economy. He went on to report that the economic downturn hindered his firm, and they have been trying ever since to get off the ground. [#33]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported that it was easy for the firm to be competitive during the economic downturn because so many other firms had left the industry. However, he went on to note that the larger firms started bidding small jobs to keep their firms viable, and left no work for small businesses. [#40a]
- A white male partner of a WBE- and SDVO-certified construction firm stated that he was able to keep most of his equipment during the economic downturn. He also noted that during the height of the recession, he was roughly \$1.2 million in debt. [#43]

- The white male executive of a majority-owned equipment firm reported that while his company has faced at least three downturns, the 2008 recession was the worst. He noted that it caused sizeable losses, "... not just the paper kind." [#57]
- To avoid layoffs, a woman principal of a WBE- and DBE-certified woman-owned transportation planning firm reported that they expanded time off and reduced staff hours to control for the economic downturn. She said, "The firm's commitment is to our employees. We do not hire for the upturn and fire for the downturn." The same woman principal reported, "Income was less, but we were able to get through." [#5]

Most interviewees indicated that market conditions in the Great Recession made it difficult to stay in business. [e.g., #3, #36, #44] For instance:

- When asked about the recent economic downturn, the representative of a white woman-owned specialty construction firm stated, "Over here [in her region] it came to a screeching halt ... this is a tourist destination ... the only reason this town exists ... [is] to serve tourism So when the turndown in the real estate market happened ... it was pretty devastating over here ... you couldn't give stuff away." [#13a]
- The representative of an international engineering business stated that in addition to laying off employees, his firm had closed two offices. He stated, "It's more challenging to get work when you are downsized in staff. But, a lot of our competition went clear out of business So we survived barely, by the skin of our teeth, like I said, from 55 employees down to nine" [#12]
- The white male owner of a specialty contracting firm reported that his firm had mass layoffs during the economic downturn, only himself and one secretary maintained the company during that time. [#20]
- The African American owner of a now-closed construction firm reported that the economy was already slowing down by the time his company started to fold. He reported being unsure of how the economic downturn affected him. When asked if the economy hurt his running of a small, minority-owned business, he remarked, "... I speak for me I just couldn't break in." [#23]
- A white female owner of a specialty construction business commented that 2008 to 2009 was, "almost devastating ... very drastic." She went on to report that staff was reduced to one part-time employee. She also said that she and her husband applied for food stamps and sold their house, which they owned for eighteen years. [#41]
- The white male representative of a white woman-owned WBE-certified construction business stated, "[It was] tough to get jobs ... low margins ... so it was really tough." [#50]

- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported, “Oh yes, it [economic downturn] sucked.” He added that his firm lost \$500,000 in receivables during the economic downturn because many other firms filed for bankruptcy. Additionally, he reported owing \$200,000 in payroll taxes for the unpaid jobs the firm completed. He commented, “It was a \$700,000 hole ... in the business.” [#51]
- An African American male owner of an MBE-certified professional services firm stated that his firm nearly failed several times. He recalled being stable and growing one day of the week, then having his employees let go on a job and having his business go south by the next day. He went on to note that he always comes back with the help of other firms and banks. [#54]

Many business owners and managers said they have seen much more competition during the economic downturn. For example:

- The white male president of a majority-owned construction business recalled that there was more competition and business failure. He commented, “There is not enough work to go around; it’s just harder to get work [since the Great Recession].” He added that he saw many of his competitors and customers go out of business. [#1]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that during the economic downturn, larger companies were competing for small projects; business that were customers became competitors. He added that some [larger] engineering firms were bidding projects as low as \$100,000. [#11]
- When asked about the effects of the economic downturn, the Native American male owner of a DBE- and MBE-certified specialty contracting firm reported, “When things are good, a lot of contractors show up ... and when things go bad, things get very competitive ... and the ones that work too cheap, go away” [#16]

The same business owner went on to add that when residential work decreased, many contractors switched to public works jobs. He commented, “A lot of them didn’t know what they were doing.” [#16]

- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that competitive bids went too low to sustain business for long, saying, “Jobs went too cheap ... a lot of jobs we didn’t make money on.” He went on to indicate that the company downsized due to the economic downturn. [#30]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported that in Oregon’s small economy, he had to compete with out-of-state companies during the economic downturn. [#47]

Some business owners described how the downturn in the economy affected the public and private sectors differently. For example:

- The white male president of a majority-owned construction business reported that there was significant drop in the firm's private sector work because of the economic downturn; it changed from about 40 percent of total volume in the past to about 10 percent. [#1]
- A woman principal of a WBE- and DBE-certified woman-owned transportation planning firm commented that the firm had a "healthy" private sector business prior to the economic downturn. However, she reported that the firm lost all of that business due to the economic conditions. She added that the downturn brought fewer and smaller contracts, and that they relied on public sector work to carry them through. [#5]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that the economic downturn led to a large decrease in private sector work. She added that public work increased because the federal and state governments pushed a lot of construction in response to the recession. She also noted that it was because of the economic downturn that her firm started to perform public work. [#10]

Some reported that woman- and minority-owned firms were particularly hard hit during the Great Recession. A number of examples include:

- The African American representative of an African American male-owned DBE-, MBE- and ESB-certified specialty construction firm reported that bidding was a "number one" issue for minority- or women-owned firms during the economic downturn. [#6a]
- When asked about the effects of the economic downturn, the African American female president of a DBE- and MWESB-certified specialty contracting firm stated, "It seems being a minority- and woman-owned business, you sort of get put to the side when the economy is low [and] things aren't prospering. The major contractors who are national, they seem to get more of the work. We have to battle harder." [#8]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that the economic downturn made it difficult for his firm to stay in business. He stated that being a small, minority-owned business during this time was a barrier for his firm because it made it even more difficult to find work with new clients and companies. The same business owner went on to report that his firm was able to recover from the downturn after they secured a particular local government agency project in 2010. [#28]

Some business owners and managers reported that their companies did not see a decline in work during the economic downturn. [e.g., #21, #34 #35, #54, #58] Examples include the following:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm commented, “We held pretty steady, we have a diverse mix of projects.” She explained that work with public agencies helped sustain the firm during the economic downturn. She added that during the Great Recession, her staff worked a lot harder when “work came in the door” even when they could not receive raises. [#2]
- A Native American owner of a construction firm reported that his firm was lucky enough to secure a large project just as the economic downturn hit. He added that this was also part of their start-up period, and that it helped them to realize that they needed to diversify their work. He commented, “... it almost benefited us ... to realize ... we needed to diversify and do those types of ... jobs ... because there wasn’t that same type of work that we would typically go bid on. It wasn’t out there.” [#26]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that she was lucky enough to get a major road contract during the recent economic downturn. She commented that this contract was critical to her firm’s ability to make it through the recession. [#32]
- The male executive of a majority-owned services firm stated that his company experienced an increase in customer volume during the recession, though their revenue remained the same. [#45]
- The African American male president of a DBE- and MBE-certified construction business reported, “During the economic downturn, I felt like I was a little lucky I was working a lot for the federal government, and I also had contracts out in front of me at that time. And, I made some strategic moves, which I was anticipating ... I had purchased all my equipment outright.” The same business owner went on to comment that 2009 and 2010 were ultimately his best years; his gross revenue was \$12 million. [#49]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that her firm was “busier than ever” during the economic downturn. She explained that because the construction industry was not doing well, building owners decided to renovate their buildings themselves, which, in many cases, required her firm’s services. [#25]

Current economic conditions. The study team asked businesses and trade associations about current economic conditions and what that meant for the transportation contracting industry. Some interviewees said that they have not yet seen an upswing in market conditions, or that the recovery has not been what they had hoped it would be. [e.g., #11, #15, #43, #49, #52, #53, #TO3, #TO4] Some reported a drop in public sector work. [e.g., #19, #33] Comments from the in-depth interviews include:

- When asked to describe the overall marketplace for their membership, the white female director of a professional trade association reported that she thinks that the market is very “flat” because there has not been a gas tax increase since 2009. She added that there has not been a boost in federal funding either. The same representative of a trade organization added that the marketplace has not grown since the ODOT bridge program was completed. [#TO1]
- The white male president of a majority-owned construction business stated, “Public funding is as bad as it’s been in a long time.” He added, “What we depend on for 80 to 90 percent of our work ... that ‘pie’ is getting a lot smaller.” [#1]
- When asked about the current economic conditions, the African American female president of a DBE- and MWESB-certified specialty contracting firm stated, “This is one of those times, with the economy, we aren’t getting the business It’s harder to get the contract.” [#8]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that work has not increased as quickly as expected, though it has remained stable. [#10]
- When asked about the current economic conditions, the white male owner of a specialty contracting firm reported that his firm has struggled over the last couple of years. He added that his firm has had to diversify who they work for, and expand to other states. The same business owner went on to comment that they are starting to “get back on track” economically, and noted that an issue with the current economy is that there is a lack of federal highway funding in some of the states where they do business. [#22]
- When asked about the current economic conditions, the African American owner of a DBE-, MBE- and ESB-certified engineering firm stated, “It’s not all that good in Oregon. [There are] not that many projects in the state.” He noted that he has to commute to Seattle several times a month because that is where the current projects are. He went on to comment, “Economically, Oregon is in the dumps.” [#28]

- The white male executive of a majority-owned equipment firm stated that the company has not fully recovered, and said that they have had a substantial lowering of their rental rates. Because equipment is still getting more expensive every year, he reported that margins are considerably smaller than they were in the 1980s. [#57]

The same business owner added that the current economy is selective. He noted that last year was busy, and that his business paralleled drops in the construction industry. He commented, “Their profitability, like ours, is not what it used to be.” He stated that this year is “the year for Seattle” because that is where all the construction dollars are. He went on to report that Portland is doing “okay,” while Oregon as a whole has had limited opportunities. [#57]

- The Hispanic American owner of a construction business stated that although his current firm is profitable, he has worked considerably harder since the recent economic downturn. He indicated that there is not a lot of work for city, county or state public agencies, stating, “ODOT budgets are nothing now, they are nothing compared to what they were even five, six years ago.” [#58]
- The white female owner of a WBE- and ESB-certified specialty construction business reported that she is “nervous” about the current economy because her firm no longer qualifies for minority goals. She commented, “[The recent economic downturn] set me back three or four years.” [#35]

About as many other interviewees commented that they have started to see an upward trend in market conditions. These businesses mostly reported cautious optimism. [e.g., #5, #6, #13a, #14, #24, #26, #27, #29, #31, #34, #39b, #41, #44, #45, #50, #54, #59, #PMP24] Comments include:

- When asked to describe the overall conditions of membership in the marketplace, a white male board member of a contractors association commented that they have been in a “growth mode” ever since the recession. [#TO2]
- When asked how the local marketplace is currently doing, the Hispanic American representative of a minority business association commented, “... everyone is busy right now.” He added that this is not just for private work, and noted that the public sector has benefited from the current economic conditions as well. [#TOFG2b]
- When asked about the current economic conditions, the white male president of a majority-owned construction business commented, “The private sector is being led by the housing starts [in Central Oregon] again, so there’s a market ... one of the fastest in the nation now.” The same interviewee indicated that overall, margins are getting better due to a better balance of available work. He commented that housing is leading the markets more than any other industry. [#1]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm remarked about current economic conditions, “I think it has changed a little bit with Seattle leading the way.” She explained that she must continue to work very hard to bring work into her Portland office. [#2]

- The male representative of an international engineering business reported, “We are now shifting back into ... more municipal [work], and we still have our own federal contract work, but now the private is starting to come back ... and that’s one of the reasons we’re starting to try to grab them.” [#12]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm predicted that his company will have a “good year,” and noted that projects have more “realistic” bidding. He went on to indicate that the economy is slowly returning, and commented that his company is winning bids that were 5 to 10 percent cheaper last year. [#30]
- When asked about the current economic conditions, the white male executive of an African American-owned engineering and consulting firm reported that they have greatly improved in the last year, and noted that the company has experienced growth. [#9]
- When asked about the current economic conditions, the Native American owner of a DBE- and MBE-certified specialty contracting firm stated that his firm was able to bid more than usual this season. He added, “The home development is huge [now].” [#16]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that he has recently paid-off his debts. He went on to note that the firm is currently at their busiest, and that they are booking jobs for the winter and next summer. [#51]
- The Hispanic American female representative of a minority business association indicated that the improved economy could present a unique challenge for ODOT and its contractors. Referring to small businesses, she commented, “If they aren’t treated well, if [there are] too many hoops, too much ‘B.S.,’ they’ll go somewhere else because there are opportunities right now.” [#TOFG2a]

D. Public and Private Sector Transportation Contracting in Oregon

Interviewees reported on experiences with public and private sector work, and any similarities or differences. Part D includes:

- Public and private sector experiences;
- Barriers related to entry or work, and other challenges in public sector; and
- Barriers related to entry or work, and other challenges in private sector.

Public and private sector experiences. Interviewees discussed their experiences in pursuit of public and private sector work.

Many reported that their work is heavily weighted toward the public sector. Many business owners and representatives reported that they perform most often in the public sector, and discussed their experiences and preferences for each sector. [e.g., #9, #10, #13a, #23, #24, #30, #33, #46, #49, #54, #58, #TO4]

Some interviewees explained the predominance of public sector work because that is the type of customer who currently has the money for projects involving their type of work.

- A Native American owner of a construction firm reported that his firm works primarily in the public sector. He commented, “There’s just not a lot of ... private firms that have the capital to go ... build [specified structure]” He added that the firm has completed only three private sector projects since 2009. [#26]
- The white male representative of a white woman-owned WBE-certified construction business reported that this year, the highways and horizontal construction side of the business has had only two private jobs; all new work has been in the public sector. He commented that while the public sector requires more paperwork, it has “guaranteed money,” whereas timely payment in the private sector is not always a guarantee. [#50]

Some interviewees reported that there were advantages and disadvantages of public sector work. For example:

- The white male president of a majority-owned construction business commented, “The firm is heavily dependent on public work. 90 percent of the total revenue comes from public work projects.” He went on to add, “That’s not an ideal situation for making money, because usually the private margins are a lot more profitable.” “The advantage to private work over public work is that there are higher margins and less regulation.” He added, “It just does not require as much administrative work to perform that [private sector] work.” Adding, “Higher administrative work with ODOT eats into your profit.” [#1]
- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that his firm does more public work, and when asked why, said, “Because we know we’re going to get paid.” He added, “From an estimating and work standpoint, public works have the bid price ... [public agencies] pay you for what you do” [#16]
- The white male owner of a specialty contracting firm reported that his firm tends to work most in the public sector on transportation-related contracts. When asked about obtaining this work, he indicated that it’s based heavily on prequalification. He added, “... pretty much you can bond, if you can ... put in a bid, you’re qualified, you’re in.” [#22]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that her firm performs 80 percent public work. She commented that because public sector projects are larger, she has experienced more competition in that sector. She went on to add that it is difficult for her firm to build relationships with private sector owners. [#25]

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that the firm does work primarily in the public sector. She went on to report that public sector work involves more paperwork, and that there are “hoops to jump through.” [#27]

The same female business representative went on to report that her firm is an open shop, which sometimes results in fines when working on some public jobs because they are not a training agent. She added that with public sector projects, “The union thing is just not fair ... we’re penalized because we are an open shop ODOT ... [does not] usually hold our feet to the fire ... but mostly it’s the City of Portland and TriMet.” [#27]

- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm indicated that her firm works in the public sector most often. She went on to add that a challenge to performing public sector work is having the ability to travel; it is hard to expect staff to leave their families and go out of town. [#36]

The same female business owner added that there was a time when there was limited work available to her firm in the Portland Metro Area, and that most work was in Eugene, Eastern Oregon or Washington. She commented, “We had to go for it [out of town work] ... and get it ... but we never made money [due to travel expenses].” [#36]

A few business owners specifically indicated that their certifications were one reason they had more public sector work compared with private sector work. For example:

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm said they perform more public work because the firm is a minority business; much of their work is because of DBE goals programs. When asked about his experiences in the private sector, the same business owner commented that it is more competitive in terms of price. [#18a]
- A Subcontinent Asian American owner of a DBE-, MBE- and ESB-certified professional services firm reported doing 80 to 90 percent public sector work versus private sector. He indicated that because of his certifications, it is easier to obtain work in the public sector. He observed about the private sector, “It’s a protected territory almost, where it is hard to penetrate that market unless you are socially ‘well connected.’” [#47]

Some business owners and representatives reported that their work is heavily weighted toward the private sector. Some interviewees reported that their firms pursue private sector contracts most often, and discussed their experiences and preferences for each sector. [e.g., #17, #41] For example:

- The regional director for a woman-owned engineering-related firm indicated that they do not often pursue public sector work. She commented that that there is often too much “red tape” in the public sector, citing ODOT’s projects as an example. She went on to say that it is easier for her firm to pursue private development projects. [#A110]

- When asked about his firm’s experiences in the public and private sectors, a Hispanic American owner of a DBE- and MBE-certified engineering firm reported that while they are interested in opportunities in both sectors, most of their contacts tend to be in the private sector. [#17]
- The representative of a majority-owned construction firm reported that his firm does both public sector and private sector work, but prefers private sector work because there is “less paperwork, less hassle, less restrictions ... [less] red tape.” [#19]
- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that while his company works in both the public and private sectors, they have been busier with private work. He commented, “... at this time, most of our work is centered on the private sector.” He went on to indicate that work with public agencies is limited, “[The private sector is] where the jobs are [for my type of work]. He added that it is more difficult to collect payment from public agencies, and commented in his experience, “That’s not always the case with private sector work.” [#29]
- The white female owner of a DBE- and WBE-certified services firm reported doing mostly private work. She commented, “The private work, you know that’s really where our market is.” The same business owner commented that public work “... requires a bit more project management and communication, and there’s usually more paperwork ...” She went on to indicate that she pays various fees in the public sector that would otherwise be bundled into the hourly rate. [#34]

She also reported that public work most often involves fixed-period contracts, while private work is typically ongoing. She went on to add that there are frequently shorter payment periods in the private sector. [#34]

- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that his firm primarily performs private sector work., and commented that public sector work is “very bureaucratic,” inflexible and that it requires a lot of paperwork. [#37]

The same business owner added that public sector work causes a lot of animosity among his employees due to the wage disparity; private work generally earns his employees \$25 an hour, while public work is \$40 an hour. He also reported that his firm pursues some public sector work in order to diversify, and that his firm is now working on an ODOT project. [#37]

- A representative of a white woman-owned specialty contracting firm reported that most of their work is in the private sector because of the type of work they perform. He went on to report that in his experience, public contracts require more paperwork than private contracts. [#39b]

- The male executive of a majority-owned services firm reported that he works in both the public and private sectors, and does about 70 percent private and 30 percent public sector work. He went on to comment, “Our biggest hurdle is getting in the door ... and ... [being] on the [public sector] bidders list.” [#45]
- The white female owner of a WBE- and ESB-certified specialty contracting firm reported that her work is primarily in private sector. She noted that she still does some public sector work, but since the passing of her male business partner, it has been difficult to secure large contracts. [#53]
- The female representative of a Hispanic American- owned DBE- and MBE-certified specialty contracting firm reported that her firm does both private and public sector work. She went on to comment that public sector jobs have more restrictions and paperwork, and that when taking prevailing wage into account, public work is more expensive. She added that her firm is currently performing more private sector work. [#56]
- A white female owner of an ESB-certified specialty contracting firm reported that while her firm has worked on small City of Portland jobs, the majority of her work is in private sector. [#59]

Many interviewees indicated that their firms work nearly equally in both sectors. Many business owners and representatives indicated that they work equally in the public and private sectors and that there were advantages to this diversification of work. [e.g., #3, #10, #11, #15, #31, #32, #43, #44, #45, #48, #52, #57, #TO2, #TO3] For instance:

- When asked if her members have a preference for working in one sector over the other, the white female director of a professional trade association reported that she believes that their work in each sector is dependent on what opportunities are available at the time. [#TO1]
- The representative of an international engineering business reported his firm chooses to work close to evenly in both sectors to maintain diversity in case of another economic downturn. He commented, “... [if] one market drops ... [then] that’s all you do ... then you are kind of not prepared and you’ve got to lay off more people” [#12]
- A white male owner of an ESB-certified general construction firm reported that his firm works in both sectors equally, and added that it largely depends on what opportunities are available at the time. [#14]
- The white male owner of a specialty contracting firm reported that his firm performs in both the public and private sectors. He added that there are no differences between sectors in his line of work. [#20]
- The male owner of an ESB-certified engineering-related firm reported that there are only subtle differences between public and private work, and commented that the differences are “nothing significant.” [#21]

Some working equally in both the public and private sectors compared those experiences. A number of comments follow:

- An African American female owner of a DBE- and MWESB-certified engineering firm, “[in private sector] the proposals are not as complicated, and all they [private sector clients] care is that you have done the job before” She added, “Writing public sector proposals are competitive and complex, and it takes time.” She went on to comment that proposal writing is a profession in itself. [#3]
- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm stated, “Each side has its own problems ... but when it comes to dealing with the general [private sector] as long as we do our job, we keep that person as a customer ... that’s the biggest difference.” [#7]
- A white male owner of an ESB-certified general construction firm commented, “The type of work [is usually] very similar to each other, outside of certain structural work ... [which] is always public But when it comes to commercial construction ... whether it’s ... a retail building or a school building ... private versus public ... it’s relatively the same kind of work.” [#14]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm prefers working in the private sector because he likes to finish jobs in the least amount of time, and with the least amount of costs or “troubles.” [#28]
- An African American owner of an MBE-certified professional services firm indicated that the federal government is clear and concise when it comes to project rules and regulations. He added that in the past, state work was “uninformed” concerning DBE certifications, and noted that it is an “evolving process.” He also noted that the State is slower regarding “rules” and making decisions, commenting, “It can be a little difficult ... [but] ODOT is the best it’s ever been.” [#55]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that she prefers private sector work because payment is often more timely than in the public sector. She added that the public sector also requires dealing with more “decision makers.” [#8]
- The white female owner of a WBE- and ESB-certified specialty construction business reported that her firm works in both the public and private sectors. She went on to add that working for WSDOT and ODOT requires a lot of preparation and paperwork. When asked about the private sector, she commented, “I just go and do it,” indicating that it is easier to get into. [#35]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that public sector work involves more paperwork, and that private sector clients negotiate more flexibly and easily. [#51]

One business owner described his transition from mostly private sector work to public sector. The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that when his business first started, he did a lot of residential private work. He commented, “We were going up and up, then all of a sudden we came down.” The same business owner went on to report that his firm currently does public projects and other work for public agencies, stating, “It’s quite a change for us going from private [work] to public.” [#28]

Barriers related to entry or work, and other challenges in the public sector. Many business owners reported various barriers and challenges to working in the public sector. Comments from the in-depth interviews include:

- When asked if there are challenges to public sector work, the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that there are barriers to entry, especially for new businesses. She commented, “It is challenging to find teaming partners, especially as a newer small business on the scene. [There are] other competitors that we have down here that have [a] more extensive history of partnering and teaming with firms in the Portland area.” [#2]
- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm discussed the disadvantages of pursuing public sector work. He stated, “Contracting on its own ... there are a lot of barriers that you have to overcome. I mean there’s sufficient help, having the money [including] the resources to pay for materials and whatever your line of work [is] Those kinds of things happen to everybody” [#7]
- When asked about disadvantages or barriers to working in the public sector, the white male executive of an African American-owned engineering and consulting firm indicated that for minority-owned companies, disadvantages are both “societal and cultural.” He continued, “... people who ... have been typically disadvantaged don’t have the network and the connections I’m sure there are disadvantages to that.” [#9]
- When asked about barriers related to entry or work in the public sector, the representative of a majority-owned engineering-related firm commented, “The main difficulty I see is convincing the prime contractors to sub work to new people or small companies. We represent a greater risk and administrative burden.” [#A19]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that it can be difficult to get smaller work from agents in the public sector (e.g., less than \$50,000 to \$100,000). However, she did note that ODOT has offered a lot of assistance with getting smaller projects. [#10]
- When asked about challenges or barriers in the public sector, the male representative of a white woman-owned specialty construction firm reported, “It depends on the size of the job Sometimes the government agencies ... would much rather deal with one big, massive \$25 million project, which cuts all the small contractors out” [#13a]

- A white male owner of an ESB-certified general construction firm reported that his firm is not always aware of public sector opportunities. Often times, potential opportunities are not posted in places where they are looking, such as their local Builders Exchange, or government websites like ORPIN and the FBO. [#14]
- When asked about any disadvantages or barriers in pursuing public sector work, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that more cities are requiring special prequalification, and commented that “keeping up with that” can be tough. He cited the City of Portland as being one of these cities. [#16]
- The male owner of an ESB-certified engineering-related firm indicated that a lack of networking with primes can be a barrier. He commented, “Having clients that know what’s out there for them is ... very important in what I do, because it’s a niche industry in this part of the world.” [#21]
- A public meeting participant suggested that ODOT make list of projects with hard DBE goals available earlier so primes and subcontractors can network in advance. [#PMP20]
- When asked about the challenges of working in the public sector, the white female owner of a WBE- and ESB-certified professional services firm reported, “Being small, it’s almost like I have to establish two sets of relationships. I have to go find a big firm that I can partner with, and then go to pick the contract” She then noted that the requirements to submit a bid to ODOT are both troublesome and “incredibly time-consuming.” She added that her firm is lacking the staff and available time to work on proposals. [#24]

When asked if being a woman-owned business could be a barrier in public sector, the same female business owner commented, “That would actually be an advantage [that] I am a woman, so they get to check off that box. But then I feel like lots of times they’re only partnering with people so they can check the box. Personally, I find that insulting.” [#24]

- When asked about the challenges in pursuing public sector work, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented that large amounts of paperwork and certified payrolls can be barriers. She went on to comment that the BOLI (Bureau of Labor and Industries) rates that apply to some projects have unclear definitions and “dates.” She added that this makes it difficult for the payroll representatives of small firms. [#25]
- When asked about the disadvantages of pursuing public sector work, a Native American owner of a construction firm indicated that some public agencies make it difficult to do business with them. He commented that while his firm has had good public sector jobs, including some with ODOT, the firm will not work in certain locations due to poor past experiences while working with ODOT Medford and Troutdale offices. [#26]

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that being an open shop contractor is their biggest barrier in the public sector. She went on to add that they do not plan to become a union shop. [#27]
- When asked about potential barriers in pursuing public sector work, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that about 60 percent of ODOT projects is “work in the field,” and that 40 percent is non-paid management and paperwork. Of the latter, he commented, “. . . that’s killing us.” He also reported that ODOT does not inform companies about hidden costs such as reporting or meetings, and noted these can be very time-consuming for small firms. This firm primarily works a subconsultant on public sector assignments. [#28]
- When asked about barriers in pursuing public sector work, the white male representative of a majority-owned ESB-certified specialty contracting firm reported, “Point of contact information, and knowing that the project even exists are the biggest barriers on public sector work.” He went on to add that they get very few contracts through ORPIN. [#29]
- The Hispanic American representative of a minority business association reported that when his organization provides loans to subcontractors, the primes often look for opportunities to withhold payment from the subs. He added that his organization is “in the middle,” and when . . . not reimbursed by prime contractors, they are left without lending money. [#TOFG2b]
- The white male owner of an ESB-certified engineering firm reported that his firm does not receive much public sector work because of the way that ODOT frames their request for proposals (RFPs) — one “big RFP” every five years. [#44]

The same business owner went on to comment, “When you [ODOT] work with a big international firm . . . they have, let’s say, a thousand engineers that work for them, why would they care about using you [a small business]? You’re just taking from their cut.” [#44]

Barriers related to entry or work, and other challenges in private sector. Many business owners reported various barriers and challenges to working in the private sector. Comments from the in-depth interviews include:

- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that there are definite barriers to working in the private sector when the economy is down. However, she went on to note that she knows “many [firms]” in Oregon who are not having the same issues as her firm. [#8]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that one potential disadvantage to private sector work is that they tend to be relatively small in scale. [#10]

- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented that it often takes longer to establish relationships in the private sector. He added that it can also be difficult for small firms to prove themselves capable of doing larger projects; clients often turn to larger firms with known, positive reputations. [#11]
- When asked about challenges in pursuing private sector work, the male representative of an international engineering business reported, “The hardest part is actually firing up for private development. Because their timeframes are shorter, they demand more [than public jobs].” [#12]
- When asked about any disadvantages or barriers in pursuing private sector work, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented that because his firm is a union shop, they have difficulty competing with price in the private market as they pay higher wages than other firms. [#16]
- When asked about any potential barriers or challenges in pursuing private sector work, a Hispanic American male owner of a DBE-, MBE- and ESB-certified engineering firm reiterated, “[Contractors] don’t want the best inspection, they want the easiest inspection.” [#18a]
- The white male owner of a specialty contracting firm reported that clients in the private sector can be “tougher on safety” than public agencies. He added that some work may require certain safety training if the owner has safety concerns. [#22]
- A white male owner of an ESB-certified general construction firm reported that a disadvantage in pursuing private sector work is that sometimes payments can be slow or problematic, whereas in public projects, the payments are more consistent. He added that the average payment turnaround time for public projects is 30 days or less. [#14]
- A Native American owner of a construction firm reported that the possibility of not being paid is the biggest disadvantage to pursuing private sector work. He went on to say that he does research on private clients to determine if they have the assets to pay for a project. [#26]

The same business owner went on to comment, “At least with ODOT, with all their faults ... there’s a process in place ... if there is a disagreement, you can file a claim and go through the claim process” He then added that with private work, a firm would incur attorney fees in attempt to collect. [#26]

- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that in his firm’s experience, payment in the private sector can be difficult because most of their contracts are for startup businesses with the least amount of money to spend. He added, “Financing programs for those individuals would be a help for our business Funds availability for a startup business is a handicap to what we do.” He continued, “New startup businesses are the ones that are most generally buying [specified product], and they are the folks that have the least amount of money to spend.” [#29]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that the biggest barrier in private sector work is price shopping. She commented that while the heavy highway contractors do not price shop in the public sector, they do in the private sector. [#27]

E. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Experience as a prime contractor;
- Experience as a subcontractor; and
- Barriers to prime contract work reported by small businesses, and minority- and women-owned businesses.

Experience as a prime contractor. Business owners and representatives discussed their experiences working as prime contractors, along with their preferences to working as a prime contractor or subcontractor.

Some firms reported that they are a prime contractor for a majority of their work. [e.g., #12, #22, #25, #28, #33, #37, #45, #50, #58, #TO1, #TO2, #TO3] Comments from the in-depth interviews include:

- The white male executive of an African American-owned engineering and consulting firm reported that the company is more often a prime contractor because they have been around longer than most of their competitors. [#9]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that the firm primes about 90 percent of its work. She said that her firm prefers to work as a prime because it is better for overall cash flow, and noted that untimely payments are rarely an issue. [#10]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that as a prime, her firm has the advantage of always being able to control the job. She added that because ODOT has increased the size of their packages to over \$1 million, it can be difficult to have the necessary bonding available for each project. [#32]

- The African American president of a DBE- and MBE-certified construction business reported that most of his firm’s work is done as a prime contractor. He added that as a prime, he knows to communicate with his subcontractors so that they have a clear understanding of their responsibilities. When asked how he finds out about opportunities as a prime, the same business owner reported that he checks federal, state, city and county websites, and cited ODOT, Washington County, Portland, Salem, Eugene and Corps of Engineers specifically. [#49]
- While the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that his firm performs both prime and subcontracting work. He said that having control over the schedule as a prime is advantageous. [#16]
- A white female owner of a specialty construction business reported that she works as both a prime contractor and subcontractor, with no role preference. However, she noted that the benefit that primes have is one less person to answer to, and that they do not have to deal with delayed payments. [#41]

When priming, some businesses conduct the majority of the work in-house. [e.g., #7, #23, #25, #37, #41] Business owners and representatives discussed primes’ decisions to self-perform. One subcontractor reported this as “greedy” on the part of the prime. For instance:

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm indicated that his firm prefers to do the majority of their work in-house when they prime. He added that if they are able to self-perform 100 percent of the work, they will. [#18a]
- The male owner of an ESB-certified engineering-related firm reported that because his business is so specialized, he performs all of the work in-house [#21]
- A public meeting participant reported “greed” as a motivation for primes who self-perform all of their work. He stated, “You can tell small business you need to cultivate a relationship with the primes, but how do you ever compete with someone who says, ‘we’re greedy and we’re going to take it all if we can.’ You just can’t compete with that.” [#PMP12]

In general, businesses reported that they subcontract out work they do not perform in-house, and choose subcontractors based on their knowledge and experiences with those firms. [e.g., #16, #24, #25, #28] For example:

The white male executive of an African American-owned engineering and consulting firm reported that his firm tries to include subs unless the job is particularly small. He added, “We have a contract ... currently, that has 12 subs on it. The subs are committed to more than half of the work on that job. When the city calls and [says], ‘We need this done, we need a person to do that,’ we will get the subs involved [often] before we get our own staff involved, [we] make that commitment to them.” [#9]

The same interviewee went on to say that his firm prefers to work with subs that they can rely on and that they have prior experience with. He added that not all of these subs may be certified, and that some are “small and starting [businesses].” [#9]

- The white male executive of an African American-owned engineering and consulting firm added that as a minority-owned company, the firm is sensitive to the problems of smaller businesses, and that they frequently bring in smaller, “still developing” firms as subs when proposing on large projects for ODOT or the City of Portland. [#9]
- The representative of a white woman-owned specialty construction firm reported that they already have a list of preferred subcontractors that they work with. He added, “You build these relationships with other entities ... so we tend not to be bidding on too many things when [we] don’t have the in-house ... to do [it] ... we don’t have a lot of subs.” [#13a]
- When asked how his firm decides to subcontract out work, a white male owner of an ESB-certified general construction firm reported, “Usually we solicit bids at the time of the prime contract bidding for the portions of work that we don’t have staff to self-perform” He continued, “... we base [bids] off of pricing with the sub or the vendor, and also our experiences with that firm” [#14]
- A Native American owner of a construction firm reported that his firm chooses subs based on the equipment needed for projects. He stated, “It doesn’t make sense for us ... to tie ourselves up with something like that [expensive project-specific equipment].” He added that doing the work “in-house” is oftentimes more cost-effective. On one project, he reported that the firm saved \$800,000 by self-performing. [#26]

The same business owner added that his firm usually uses the same subcontractors for both public and private sector projects. He added that his firm works with those who are more inclined than others to communicate and resolve issues, and stated that they give preference to subcontractors that can “get in and get the work done.” [#26]

- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that they prefer to hire subcontractors that have good business ethics, are reliable, and who “do it right.” He added, “Our first [criterion] is quality I’d like to say that those are our criteria [minority-, women- or veteran-owned], but in reality it’s quality of service.” He went on to say that that compliance with federal wage standards also affects their subcontracting decisions. [#29]

The white female owner of a WBE- and ESB-certified specialty consulting firm reported that they work with subs that have a good reputation, along with those that her firm has previous experience with. She added that they sub out work when a contract requires specialty work beyond their capabilities, or if the job is too large for them to handle on their own. She went on to say that her firm assembles a work description and sends it to subcontractors that may be qualified for the job. [#31]

When asked if they use different subs in the public and private sectors, the same female business owner stated that for public work, she has to make sure that the subs meet the restrictions on insurance, pay and other requirements. [#31]

- The male executive of a majority-owned services firm reported that a project’s size and type determines whether they use subs. He added that he has not experienced any issues with MWESB firms, and that the decision to work with them is dependent upon their capabilities. [#45]
- The African American president of a DBE- and MBE-certified construction business reported that he tries to utilize DBE firms by referencing the Oregon civil rights website to learn about public agencies’ requirements. He went on to say that they try to use minority contractors in their area of expertise so that they can expand their work scope. He also noted that they use the same subcontractors in both the public and private sectors. [#49]
- The white male representative of a white woman-owned WBE-certified construction business reported that the firm subs out specialty work that they do not perform in-house. He added that goals sometimes dictate the firm’s need to subcontract out work to certified firms for jobs like digging and grading. He also noted that the trucking industry is usually where they find certified firms to subcontract to when trying to meet goals, and went on to say that they have worked with many “good” certified firms. She also reported that on a Port of Portland project, they had to sub out some of their in-house work in order to meet goals because they were unable to find certified firms to do their out-of-house work. [#50]

- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm reported that the firm’s practice is to hire local subcontractors first in an effort to support the local community. She went on to say that the owner has a good network of firms to contact, when subcontracting highly specialized work. She also noted that the firm’s owner is sensitive to women-owned businesses since she is in the program, and chooses to hire them whenever they are capable and willing to do the work. [#54]

Some interviewees reported that they subcontract work to meet contract goals. A number of examples follow:

- When asked how his firm decides to subcontract out work, the representative of an international engineering business commented, “There is typically a minority percentage that we try to hit ...” He continued, “For example, on the survey work we will hire a woman-owned company ... and it’s hard to find them ... they all come out of Portland In several cases that I have been involved with, we ... work hard to help train them so they can do the work ... so we try to meet the percentage required by the contracts ... pretty standard stuff, I think.” [#12]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that when they sub out work, it is usually because of minority set-asides on a project. In these cases, his firm subcontracts a portion of the work to other minority firms. He went on to say that he often uses the same subcontractors on both public and private contracts. [#18a]
- The white male owner of a specialty contracting firm reported that after being awarded a job, his firm assesses what they need to complete it. He added that they have experience balancing jobs’ self-performing subcontracting goals, stating, “Sometimes, because we need to make subcontracting goals, we’ll subcontract out work we’d normally self-perform.” [#22]

When asked if his firm has preference working with certain subcontractors, the same business owner commented, “It’s a relationship-based business ... it’s all about relationships.” He added that relationships grow through trust and knowing how each firm works, and noted that there are a few subcontractors that his firm regularly contacts for assistance. [#22]

- A public meeting participant who is a prime contractor reported difficulties in meeting DBE goals that are currently in place because many minority DBE firms are not near his location of work. [#PMP23]

Experience as a subcontractor. Business owners and representatives discussed their experiences working as subcontractors, along with their preferences to working as a prime contractor or subcontractor.

A number of firms worked mostly as a subcontractor or subconsultant to other firms.

[e.g., #6b, #8, #15, #27 #33, #35, #36, #39b, #42, #47, #48, #53, #55, #59] Comments from the in-depth interviews include:

- The representative of a majority-owned construction firm reported that his company used to do more prime contracting work in the past. He indicated that general contractors now give his firm a lot of sub work, commenting, “It’s just the way the market dictated.” [#19]
- When asked why her firm subcontracts most of their work, a white female principal of a DBE- and WBE-certified consulting firm stated the firm lacks the expertise to lead some large projects. She explained that priming requires greater responsibility including keeping subs on schedule and on budget. She concluded, “As a sub, the importance is communication with the prime.” [#5]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that most of his firm’s work is done as subcontractor. He added that by working for prime contractors, his firm is able to get exposure to government agencies for upcoming work. [#11]
- A white male owner of an ESB-certified general construction firm reported that the firm works primarily as a subcontractor because they perform a specialized type of construction, which is usually the subcontracted portion of larger projects. [#14]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm usually acts as a subcontractor to a larger firm, and noted that they work as a prime contractor only a small percentage of the time. He added that this is because the work that his firm performs often falls into the subcontract or subconsultant category. [#18a]
- While his firm performs most often as a prime, the white male executive of an African American-owned engineering and consulting firm reported that the firm’s experience as a subcontractor has been positive. However, he added that because they are not certified in Oregon, they are not often invited to bid as subcontractors. [#9]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that when his firm acts a subcontractor they prefer to work on government projects due to their large size. He also noted that his firm collaborates with other companies on projects that his business is not necessarily experienced to do. [#28]
- The white male owner of a specialty contracting firm reported that his firm solely works as a subcontractor, and that he has no interest in working as a prime because he is “comfortable” where he is. [#20]

Some firms primarily performing as subcontractors would prefer working as a prime contractor. Comments included:

- A representative of a white woman-owned specialty contracting firm indicated that “establishing relationships” is very important, and noted that they often talk with primes to learn about subcontracting bids. He went on to add that they do prefer to work with certain primes, as some are “easier to work with” than others, and noted that they work with the same primes in both the public and private sectors. [#39b]
- The female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm reported that since the firm has been in business for so long, word-of-mouth helps them gain opportunities to work with primes. She noted that she gets bid invitations and has several people employed bidding and estimating, “... at any given time, we are bidding multiple [projects].” [#56]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that the firm does approximately 70 percent subcontract work and 30 percent general contracting work. He went on to report that there is a general lack of prime contracting opportunities in their line of work. He added that even though his firm does not prime often, they prefer it over subcontracting because “the communication level is there to make a project better.” He went on to say that being a subcontractor on larger projects can be difficult due to poor overall communication. [#30]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm said that her firm prefers to work as a prime because working directly with an owner leads to better project communication. She also noted that she prefers prime work because working as a sub under a general contractor oftentimes requires a lot of paperwork and “unnecessary” forms. She went on to indicate that she has had problems regarding communication and change orders when working under general contractors. [#25]

Many firms discussed that they establish and maintain relationships with prime contractors and others to learn about subcontract opportunities. Some use other investigative tools. Examples of comments include:

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she has formed positive relationships with certain primes over the years, and noted meeting many via chamber meetings and NAMCO. [#25]
- The white male executive of an African American-owned engineering and consulting firm stated that the company maintains relationships with primes “so they know we’re here.” He added that as new firms emerge, they make efforts to meet with new managers and provide references to establish a relationship. He also reported that his firm is subscribed to two “bid services” to track potential projects. [#9]

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that her firm finds opportunities with primes by using ORPIN and GCAP (Government Contract Assistance Program), all while taking size of projects into consideration. [#10]
- A white male owner of an ESB-certified general construction firm reported that he learns about prime and subcontract opportunities through the Builders Exchange or an agency's website. [#14]
- When asked how his firm obtains work with primes, the white male owner of a specialty contracting firm reported that when his firm was first starting out, he would make calls to primes, check the Daily Journal of Commerce and "knock on doors." Now that his firm is established, he stated that they rely heavily on email and phone invitations to bid. He added, "We've been fortunate enough to establish relationships with just about every general contractor out there." [#20]
- The owner of an ESB-certified engineering-related firm commented that he often relies on "word of mouth" along with his reputation to find work with primes. He added that he also has an advertisement in a newsletter and on a website. He went on to say that he also attends association meetings for networking opportunities. [#21]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he finds work as a sub by keeping up with the advertising of government agencies such as ORPIN and the Oregon Association of Minority Entrepreneurs (OAME). He also noted that he is prompt in calling primes for work, and that he is proficient in networking. [#28]
- When asked how his firm finds work with primes, the white male representative of a majority-owned ESB-certified specialty contracting firm stated, "Some of it falls in our lap, people contacting us ... but a lot of it is good old fashioned detective work, calling people, and getting the information for [whom] to contact." He added that the firm is also part of "builders exchanges" to find out about possible work opportunities. [#29]
- The white female owner of a WBE- and ESB-certified specialty construction business reported that she obtains subcontracting opportunities by searching websites to see who is bidding upcoming jobs, and by advertising her firm for transportation-related projects. [#35]
- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm stated that working and keeping in touch with prime contractors allows his firm to stay involved with them. He added that he stays in close contact with project managers to keep his company's name in prime's minds during bidding. [#48]

Some firms reported negative experiences as a subcontractor. Examples follow:

- When asked about his experiences working as a subcontractor, the African American president of a DBE- and MBE-certified construction business stated that he has felt “belittled and intimidated,” had unnecessary obstacles put in his way, and has lost money. He added that the belittling and degradation from prime contractors is the result of him not meeting their expectations of knowing the “primes’ processes” of testing, inspection reports and daily reports. He went on to note that he retains receipts and emails proving that he was uninformed of their processes. [#49]
- A white female engineer from a local government agency reported that from her experience, the greatest challenges subcontractors face involve work schedule and timing. She added that on occasion, subcontractors fail to negotiate timing and scheduling with primes, and that in turn, primes provide insufficient time to do the work. She went on to say that if primes are on a tight schedule and miss a required deadline, subcontractors are often blamed. [#LA4]

Barriers to prime contract work reported by small businesses and minority- and women-owned businesses. Business owners described their experience as prime contractors and any barriers they faced.

Small businesses and minority- and women-owned businesses cited many factors making it difficult to work as prime contractors. Some businesses reported having difficulty breaking into the prime contracting arena, especially when conducting work for public agencies. Reasons included establishing relationships with customers, capital, bonding, paperwork and the bidding process. Comments include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that it can be very difficult to establish a client base as a prime contractor. [#10]
- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that having access to an office, staff and supplies can make it difficult for small business to work as primes. He added that paying bills on time and being able to hold a bond are challenges as well. [#16]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm indicated that in his experience, having enough bonding capacity is the biggest barrier to working as a prime contractor. [#30]
- When asked about the challenges of working as a prime contractor, the African American owner of a now-closed construction firm reported that his main issues dealt with [untimely] payment, which may have had to do with a “communication gap” with the owner. [#23]

- When asked about the challenges his firm faces when working as a prime, a Native American owner of a construction firm commented, “The liability involved. Just in general ... being responsible for ... the completion of the work.” [#26]
- An African American female owner of a DBE- and MWESB-certified engineering firm reported that while she would love to prime projects, proposals are too expensive and time-consuming for her firm. She plans, when financially feasible, to hire a proposal writer to be able to prime projects. [#3]
- The Hispanic American owner of a DBE-, MBE-, ESB-and SDVOSB-certified specialty construction firm reported that there are many challenges for small business to work as primes. He cited being able to speak English well, having education past high school, having financial and personal credit, and being able to network as common challenges that small businesses face. [#33]
- A male ODOT staff person reported paperwork as a challenge for small businesses wishing to prime. He reported that the biggest barrier for small businesses working with ODOT is that a lot of paperwork is required, which can be challenging. Small businesses do not have the staff to put someone on paperwork all of the time like big companies do. [#OS3c]

When asked to break down what kind of paperwork is required, this interviewee indicated that there is paperwork for certified payrolls, turning in DBE plans, driving control plans, etc. He also mentioned that there is now a report designed to show how female workers were recruited for projects. [#OS3c]

- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm emphasized that small, minority business owners who start businesses and secure opportunities need to perform well and produce a good product. He added, “It’s an urban myth that you are a minority and checks start flying in the door.”[#51]
- When asked about challenges for small business to work as a prime, the representative of an international engineering business reported that firms need to be able to demonstrate their ability to do a job. It can be difficult for small firms to get the necessary experience. [#12]
- The white female owner of a WBE- and ESB-certified specialty contracting firm stated that being a small business can be challenging due to the expenses of getting a big project as a prime. She reiterated that the 60 to 90 day payment turnaround can also be problematic when trying to maintain cash flow. [#53]
- The white male director of a contractors association reported that in his industry, acquiring the funds to purchase or lease equipment is often the largest barrier. He also noted that in-depth knowledge of the construction process and being able to manage projects is necessary for any firm in the industry. He noted that an inability to follow industry regulations would be a barrier for anyone. [#TO3]

Some interviewees said that a prime contractor role was more difficult to attain for minority- and women-owned businesses. For example:

- The African American female president of a DBE- and MWESB-certified specialty contracting firm commented, "... now that the business is minority- and woman-owned, I think the ones that are minority [while being] 'owned by a man' ... get more preference. It's just the way things are." She went on to report that firms with multiple locations or franchises are at a greater advantage as well. [#8]
- When asked about any challenges or barriers to working as a prime, the white female owner of a specialty construction business commented, "[Construction is] a man's world ... and things are usually handled ... man-to-man So I have pretty thick skin ... you have to around here I don't mind being a verbal punching bag ... just because I am a woman.... They change on a dime as soon as they talk to [the male owner]. I see it time and time again." [#41]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that there are barriers preventing his firm from priming work. He commented, "We have not gotten the opportunities to get in as a prime contractor One [obstacle] is [not] having the bonding capacity; another is being so far behind the curve that we don't have the ability to catch up on the systems necessary to provide the infrastructure to be able to aggressively go after the work." [#6b]

The same business owner went on to add that because his firm is a minority business, he does not have access to the capital necessary to hire full-time employees such as estimators, project managers, supervisors and general managers. [#6b]

F. Keys to Business Success and Any Barriers in the Way

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Discussion focused on:

- Relationship building;
- Employees;
- Equipment and materials;
- Access to pricing and credit for materials;
- Licensing and permits;
- Financing and bonding;
- Insurance;
- Timely payment by the customer or prime; and

- Other keys to business success.

Relationship building. Most business owners identified reputation and relationships as key components to the success of their businesses. [e.g., #2, #3, #5, #8, #10, #11, #12, #13a, #14, #15, #19, #21, #23, #24, #26, #28, #29, #31, #34, #35, #37, #39b, #43, #44, #45, #48, #49, #50, #52, #53, #55, #56, #57, #59, #TO1, #TO2, #TO3, #TO4, #PMP18, #PMP27] Comments include:

- The white male president of a majority-owned construction business indicated that reputation is a key component of his firm’s success. He commented, “... we are perceived as a safe company that provides quality products.” [#1]
- When asked if relationships with customers is a key to his firm’s success, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “[Relationships are] always a big one ... you want people to call you back.” [#16]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that his firm has relationships with customers who want the job done right, and added that he has a long working history with many of his clients because of this. [#18a]
- The white male owner of a specialty contracting firm reiterated that his firm has built positive relationships with primes, and noted that this took years of effort. He added, “Reputation is huge Quality work, that’s all I have to go on.” [#20]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm said having a reputation for completing projects on time and on budget are important to a firm’s future success. [#25]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that trust and dependability are key factors to success in business. He added that having confidence in the work, expertise and the ability to offer valid recommendations are also key factors to success. [#33]
- The white male executive of an African American-owned engineering and consulting firm stated, “Our clients’ trust in our people. They have to feel comfortable that we will not do anything that isn’t in their best interest or in their clients’ best interest There don’t need to be any surprises.” [#9]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm reported that key factors in the firm’s success are their longevity in the industry, their wide range of experience, their good creditability and their reputation. [#54]

One interviewee indicated that relationship building can be difficult, especially in the private sector. The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm indicated that established networks that operate from a “privileged perspective” can make relationship building difficult in the private sector. He went on to say that this hinders opportunities for his firm to build relationships and secure work. [#6b]

Employees. Many business owners and managers discussed the importance of quality employees and barriers they face if they do not have sufficient qualified staff. [e.g., #6b, #8, #9, #10, #13a, #14, #16, #19, #24, #25, #26, #28, #30, #33, #35, #41, #44, #45, #48, #51, #53, #56, #57, #58, #59, #TO1, #TO2, #TO3, #TO4] Comments from the in-depth interviews include:

A number of interviewees indicated that high-quality workers are a key to business success. Employees are a key factor in business success for many. However for some, hiring employees can be a struggle. Comments from the in-depth interviews include:

- A white female principal of a DBE- and WBE-certified consulting firm indicated that a key to their success is that they have experienced very little turnover with long-term, key employees. She added that due to those long relationships, the firm sees employees as family. [#5]
- The white male owner of a specialty contracting firm reported, “There are always issues with employees Anything to do with the ‘people side’ is the toughest side of the business, because you’re only as good as the people that work for you. If you don’t have good employees, you’re not going to last.” [#22]
- When asked if his employees have been a key to his firm’s success, a white male partner of a WBE- and SDVO-certified construction firm stated, “Definitely They’re like a piece of good equipment; if you don’t take care of them, they’ll break.” [#43]
- The representative of an international engineering business reported that the firm strives for their employees to have good communication skills, and that finding employees is a challenge, even today for the firm. He went on to report that his firm is probably the largest in the area, and that they still face challenges recruiting good employees due to the lack of a solid base of potential employees. [#12]
- The white male representative of a white woman-owned WBE-certified construction business reported that it is a challenge not having enough trained staff to hire. He added that the labor force is competitive now, and that the firm is an open shop. He went on to say, “[We] could do more work if we had more [people]” [#50]
- The white male owner of a specialty contracting firm reported that the firm is struggling now because there are not enough quality workers to hire. He added that this prevents the firm from taking on additional work that they would otherwise pursue. [#20]

Some firms reported investing heavily in recruiting, staff development and employee benefits. Examples of comments include:

- The white male president of a majority-owned construction business reported that the firm has a diverse work group with an “awesome HR department.” He added that the firm invests considerable funding into training of staff. As for recruiting, the same interviewee added that the firm’s booths are always busy at job fairs, and that their hiring model starts with “integrity.” [#1]
- When asked about his firm’s employees, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented, “They take pride in their work and they are good at it We have a really good retention rate and we compensate our employees more than the industry average and we retain the good ones ... out of 30 employees ... half of them have been here 10 years or more.” [#18a]
- Because his employees frequently travel, the white male owner of a specialty contracting firm reported that his firm sometimes allows employees to go home for a week, or allows their spouse or family visit. He added that he wants his employees to feel rewarded for working for the firm, not burdened. [#22]
- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that his firm pays their employees well in order to attract the best possible candidates. He went on to comment that they have low employee turnover, with most leaving for retirement. [#29]
- A representative of a white woman-owned specialty contracting firm reported that the firm offers employees “a well-rounded benefit program,” and that they want their employees “to be happy.” [#39b]

The same business representative went on to say that the firm’s “in-house” climate is important to their success, and commented, “... we try to behave as a family for the most part.” He went on to report that they promote employees within the company and create a “comforting environment” where they can talk to anyone at any time. [#39b]

Some interviewees from small minority- and female-owned businesses said that hiring and retaining quality staff was more difficult for small businesses. For example:

- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented, “Being a small business, attracting good employees is always a challenge Employees are looking for long-term prospects and good benefits, and compared to a large business, sometimes that can be a challenge.” [#11]
- A representative of a white woman-owned specialty contracting firm reported that it can be difficult for emerging businesses to find trained employees. He added, “It takes four years to create a new [specialty contractor]. Well, right now, there aren’t [any out there].” [#39b]

Equipment and materials. Business owners and managers discussed equipment and materials needs along with access to pricing and credit for materials.

A number of businesses reported the importance of having the right equipment and materials for operating their businesses, and keeping it operational. [e.g., #11, #12, #14, #18a, #21, #22, #23, #24, #26, #30, #35, #43, #44, #49, #52, #53, #56, #57, #58, #TO2, #TO3, #TO4] For instance:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female stated, “We do have equipment ... like computers, software ... tool kits” She added that all of this equipment is required for her firm to be successful. [#10]
- The male representative of a white woman-owned specialty construction firm reported that if a firm has considerable funding, they can rent construction equipment, though they cannot be as competitive in the long run. He added that the only reason to rent equipment is to be covered in case it breaks down. He went on to note the importance of having a good mechanic to maintain any owned equipment. [#13a]
- When asked about the importance of equipment, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that the newest technology is an important factor to his firm’s success. He added that a firm must invest heavily in technology to stay competitive. [#16]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm stated that access to necessary equipment is a key to his firm’s success. He added that having the right equipment and being able to operate it properly can greatly influence the odds of securing a contract. [#33]
- The African American president of a DBE- and MBE-certified construction business reported that his firm owns all their own equipment, and that this makes them more competitive.[#49]

However, some business owners pointed to expensive equipment, or not having the equipment needed, as barriers. Some indicated that their cash reserves are too low to purchase equipment outright, and some reported limited access to financing. Comments from the in-depth interviews include:

- When asked about pricing and credit regarding materials, the white female owner of a WBE- and ESB-certified professional services firm stated that she does not have access to either. [#24]
- The male executive of a majority-owned services firm reported that his company is short-handed when it comes to equipment. He went on to comment that it is very expensive keeping their trucks working, and noted that it is often more cost-efficient to rent rather than purchase equipment. [#45]

- A white female owner of an ESB-certified specialty contracting firm reported that obtaining a loan for equipment can be difficult. She added that to secure jobs, she keeps prices low for customers, though doing so keeps profits low. She went on to say that it is difficult for her firm to be able to afford equipment. [#59]
- When asked about the issue of equipment, the representative of a majority-owned construction firm commented, “It’s a barrier of small business [in general].” [#19]
- To keep ahead of the competition, the white male president of a majority-owned construction business reported that they have heavy investment in raw materials. He then indicated that his competitors do not have the raw materials that his firm has. [#1]

Access to pricing and credit for materials. Some business owners and representatives reported the importance of access to fair pricing and credit for materials. [e.g., #1, #8, #18a, #19, #25, #26, #33, #34, #44, #59, #TO3, #TO4] Examples of comments include:

- A representative of a white woman-owned specialty contracting firm reported that his firm has paid vendors on time for many years. He went on to note that because of the consistent timely payment, the vendors are “very willing” to extend credit. [#39b]
- When asked about the importance of access to pricing and credit for materials, the white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm indicated that it is important to their firm’s success. He went on to say that adding more products onto ODOT’s qualified product list would make material prices more competitive, stating, “We’re limited ... there’s two suppliers. If it was broader, it’d be more competitive, just like the bidding process.” [#30]
- When asked about pricing and credit for materials, a white male owner of an ESB-certified general construction firm indicated that his firm has no problems with pricing. He commented, “... we have good relationships with all of our vendors ... we usually get good pricing.” [#14]
- When asked if pricing and credit regard materials has ever been an issue for his firm, the African American president of a DBE- and MBE-certified construction business commented that he was lucky enough to have his suppliers work with him when he had a late payment because a prime had not yet paid him. He added that this “hard time” happened a few years ago, and that he only lost one supplier because of it. [#49]
- The white female owner of a WBE- and ESB-certified specialty construction firm stated, “I’ve never had credit, I’ve never had a bank loan. No one would ever give me a bank loan.” She went on to say, “I’ve never had credit, ever Without my husband’s signature.” [#35]
- On the topic of access to pricing and credit (for materials and other expenses), a white female owner of an ESB-certified specialty contracting firm stated that personal credit is likely to be the biggest barrier to success for minority- and woman-owned businesses, or small businesses. [#59]

Licensing and permits. Some business owners and representatives reported barriers to obtaining necessary licensing and permits. For others, licensing and permits were not a challenge. [e.g., #1, #10, #12, #13b, #15, #22, #27, #28, #31, #39b, #TO2,] Examples include:

- When asked about licensing and permits, a white male owner of an ESB-certified general construction firm commented, “No problems [with licensing] ... the only license we have is our general contracting license. We don’t deal with permits that often, especially as a sub ... usually that’s all taken care of by the prime.” [#14]
- When asked about his firm’s experience with licensing and permits, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that his firm has never had an issue with either, though he did note that some jobs have been “held up” due to not having permits. [#16]
- On the topic of licensing and permits, the white female owner of a WBE- and ESB-certified professional services firm commented that the procedures and time required to obtain licensing and permits can be as troublesome as the prequalification process. [#24]
- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm reported that while he has been meaning to get more licensing, keeping his business afloat requires a lot of time and energy. He noted that if he were to switch gears to acquire additional licensing, other aspects of the company may suffer. [#48]

Financing and bonding. Access to capital and bonding are interrelated. Many interviewees discussed the importance of both. As with other issues, interviewees’ perceptions of financing and bonding as a barrier depended on their experiences.

Many business owners reported that obtaining financing and bonding was important in establishing and growing their businesses. For example:

- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that they have collaborated with an insurance company from Tacoma to secure the firm’s bonding and insurance needs. He went on to say that the company provided training on bonding and insurance, which was very helpful for his firm. [#33]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that prior to the economic downturn, bonding was not necessary for subcontractors; afterward, it was required. He went on to say that he nearly lost an awarded project because the required bonding was higher than his bonding capacity. [#51]

The same business owner reported that after working with his bonding company to raise his capacity, bonding is no longer a challenge. He went on to comment that securing credit lines was nearly impossible after the economic downturn, and noted that a non-profit helped him secure a credit line during that time. [#51]

- Another public meeting participant commented, “Bonding is another issue. It’s very, very difficult, and it’s an arduous process.” Getting bonding is a necessary step in growing a business. [#PMP17]
- A public meeting participant commented that it is difficult for anyone to get a loan without collateral; and just having a business idea is not sufficient to secure financing. [#PMP38]

Many interviewees said that obtaining financing and bonding was and continues to be a barrier for businesses. Interviewees reported difficulty finding new financing, or having recently lost lines of credit that they had secured in the past. [e.g., #11, #30, #35, #56, #LA1, #LA8, #TO4, #PMP33] Comments include:

- A public meeting participant stated that access to capital is difficult for women- and minority-owned businesses. [#PMP17]
- Another public meeting participant commented that all small businesses are at a disadvantage when it comes to access to capital. She said, “There’s no access to capital period. It just isn’t there.” She added, however, “Being in debt is detrimental to a business . . . if payment was more prompt, I would never have needed any funding at all.” [#PMP15]
- A public meeting participant commented that access to capital is problematic. He said, “We have to borrow, get loans, lines of credit and everything else in order to do business. You are only creating subcontractors; you’re not turning subcontractors into general contractors. And how are we to grow?” [#PMP6]
- A public meeting participant remarked that there are challenges with access to capital. This same participant said, “They [banks] want the big deals because at the current low interest rates there is not enough return to make [lending] make sense.” [#PMP19]
- One public meeting participant commented regarding applying for business loans, “It’s not worth the time and paperwork.” [#PMP18]
- When asked if there is opportunity to waive bonding (a barrier reported by some small businesses), an African American program manager for a local agency indicated that she has tried but to date has not been successful. [#LA6]

Many interviewees and public meeting participants reported on specific issues stemming from difficulties with bonding. Securing bonding was a primary concern, for many.

- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported that bonding limits and obtaining bonding is a barrier to pursuing public sector work. He went on to say that obtaining higher bonding limits is a slow process for small businesses. [#40a]

- The Hispanic American female representative of a business assistance organization stated that bonding agents set bond amounts based on their “feel,” and noted that this creates disparity. [#TOFG1d]

The same female representative went on to say, “If you walk in and you just happen to be the ‘right look’ for that bonding agent, [they decide], ‘You know what, we’ll give you the 1:40 so now you can bond that \$4 [million] or \$10 million project.’” She continued that if an agent doesn’t like your “look,” he will give you the “1:10” regardless of how many assets you bring to the table. [#TOFG1d]

- An African American female program manager for a local agency reported that it is difficult for DBEs to participate in airside construction contracts because of the \$10 million in bonding required for such projects. She has not found good resources to assist M/W/ESB/DBEs with bonding. [#LA6]
- The African American owner of a now-closed construction firm commented that bonding was expensive with its high interest rates, and reported that he could no longer afford his bond and licensing when his jobs became harder to get. He went on to report that he initially had to borrow money from his family in order to afford his bond. [#23]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that bonding rates tend to be very high at start-up for small businesses, and noted that the “personal guarantee” is a challenge for newer firms. [#27]
- A female representative of a construction firm commented that her firm could never bid jobs as a prime because they could not get bonding or the experience required for bonding. She asked if the DBE Program could assist DBEs with bonding opportunities. She suggested a point system where point accumulation could count towards experience. [#PMP13]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that bonding capacity is a challenge in public sector work, and that she could only work on projects where the general contractor would carry the bond. She added as a subcontractor, the general contractor usually carries the bond anyway. [#36]
- A public meeting participant reported that he has problems with bonding because he is with the tribe and it has sovereignty. He added, “Bonding agencies don’t like to lend to people that they can’t go after.” He added that the tribe is working on a tariff that would help in securing bonding. He also commented that on a project that ran through a reservation, he was able to “coattail” on the prime for bonding. [#PMP18]

Some business representatives reported issues connecting bonding to access to capital, including personal wealth. For example:

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that she is unhappy that the firm must personally guarantee bonds. She added that if a problem arises on a project, losing the business and personal funds is a substantial risk for the owner. [#27]
- When asked about his firm's ability to perform different types and sizes of contracts, a Native American owner of a construction firm reported that large projects of \$20 to \$30 million are hindered by a lack of capital; the aggregate bonding capacity of the firm limits is limited to \$13 million. [#26]

A number of other business owners and representatives reported that obtaining financing and bonding was not a barrier at the current time. Firms reporting few barriers typically had established relationships with lenders, their own resources, business longevity or could rely on others' bonding. [e.g., #1, #3, #6b, #8, #9, #12, #13a, #15, #28, #29, #30, #44, #45, #49, #53, #54, #58, #TO2, #TOFG1b] For example:

- A white male board member of a contractors association reported, "Anecdotally, people feel that there is discrimination [in bonding]." He went on to note that through his work as an attorney, he does not think that there is discrimination when it comes to bonding. [#TO4]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services and consulting firm reported that she had initial access to a line of credit, and therefore did not need additional financing assistance. [#2]
- When asked about her firm's ability to pay bills, a white female principal of a DBE- and WBE-certified consulting firm indicated that the business is in a "good place," and commented, "The business is cash driven, and luckily, we have not had to take out loans." [#5]
- When asked about bonding requirements and obtaining bonds, a white male owner of an ESB-certified general construction firm reported that he has no issues with bonding, and noted that bonding capacity is dependent on a firm's financial health. He added, "Our [bonding] experience has been good with our current agent." [#14]
- On the topic of bonding requirements and obtaining bonds, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that his experiences with bonds have been typically good. He went on to note that he is aware of his firm's capacity, and takes that into consideration. [#16]
- The representative of a majority-owned construction firm stated that financing and bonding have not been issues for his firm. He added that Oregon should assist small and emerging minority businesses with bonding to take some of the liability off of the general contractors. [#19]

- The white male owner of a specialty contracting firm reported that financing and bonding has been especially important because it allowed his firm to bid larger jobs. He went on to say that during the economic downturn, bonding was a bigger issue for everybody due to the large amount of firms that were unable to complete work. [#20]
- When asked about bonding requirements, the white male owner of a specialty contracting firm indicated that they bond very few of their subcontracts. He went on to say that with a large enough subcontract, or someone they have not worked with previously, his firm may ask for a bond. [#22]
- A public meeting participant indicated that their firm does not get bonding, they “ride” on the prime’s bond. [#PMP19]

Insurance. The study team asked business owners and managers whether insurance requirements or obtaining insurance presented barriers to business success. Many interviewees identified challenges obtaining insurance or meeting certain requirements. [e.g., #13, #23, #28, #31, #59]

Some business owners commented about not having the required insurance or those requirements (both type and levels) being unnecessary or unreasonable. Sometimes this shut a firm out from contract opportunities. Comments include:

- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that his firm had an experience with a local agency that wanted his firm to have a very specific type of insurance that was not necessary for the type of work to be performed. He commented, “... they want you to buy this insurance which is not required for any of our work, but you can’t sign the contract until you have it ... so we basically did not sign [the] contract because of that.” [#11]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that on occasion, the firm has faced insurance requirements that they could not fulfill, causing delays in contract set-up. She went on to comment, “... usually, insurance is OK.” [#2]
- A Hispanic American owner of a DBE- and MBE-certified engineering firm reported that though his firm was awarded contracts, they were unable to do the work because they did not have the proper insurance. [#17]

When asked why obtaining insurance has been an issue, the same business owner commented, “Engineers can carry regular business insurance, but there’s also ‘errors and omissions’ insurance, I think they call it professional liability [insurance] ... “ He continued, “In 2010 ... we could not find an insurance carrier who would provide professional liability insurance to a firm of our [small] size ...” [#17]

Some interviewees reported that the cost of insurance needed to meet requirements was a barrier for small companies. For example:

- A white female principal of a DBE- and WBE-certified consulting firm stated that the cost of obtaining insurance can be a definite challenge for small businesses. [#5]
- The representative of a white woman-owned specialty construction firm reported that insurance is a part of business overhead, and that they shop around. He went on to say that no insurance company has given them a “sweetheart” deal. [#13a]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that obtaining insurance is expensive, and noted that certain parts of Oregon have increased their professional liability requirements due to a recent multi-million dollar building needing to be evaluated for safety issues. He added that this is a burden to his firm’s success because the cost of insurance in his industry has doubled to approximately \$300,000 per year. [#18a]
- The white female owner of a DBE- and WBE-certified services firm reported that having the proper insurance is critical to business success. She went on to say that insurance is the firm’s second greatest expense, only behind employee pay. [#34]
- An African American owner of a DBE- and MBE-certified specialty contracting firm reported that insurance is extremely expensive for his company, and that they pay approximately \$2,600 a month. He went on to say that during “slower times,” it can be very difficult to pay. [#46]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm indicated that while he managed to obtain business insurance, he considers it “too expensive.” [#28]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported difficulty, on occasion, with professional liability insurance requirements. He also reported waivers (for professional liability insurance) granted each time they needed them. In addition, the same business owner had difficulty committing to on-call jobs where the insurance costs exceeded the earnings (particularly when the firm is underutilized). [#47]

Some reported that although they carried insurance, they may not have the level of insurance required to conduct work on a public agency projects, or did not have access to the required coverage. For example:

- The white female owner of a WBE- and ESB-certified professional services firm stated that while she has insurance, having enough to work with larger firms can still be an obstacle. [#24]

- When asked about insurance requirements, the owner of an ESB-certified engineering-related firm reported that some private sector clients have requested higher limits, although he reported still being able to work within his current limits. [#21]

Some interviewees reported no instances in which insurance requirements or obtaining insurance were barriers. [e.g., #1, #8, #10, #13b, #14, #15, #16, #20, #21, #22, #30, #39b, #52, #54, #TO4] Some of these business owners still commented on the high cost of insurance. For example, a white male partner of a WBE- and SDVO-certified construction firm noted that while the cost of insurance has gone up tremendously, his firm has not had problems acquiring it. [#43]

Timely payment by the customer or prime. Full and timely payment by customers or prime contractors is critical to business success. Some reported non-payment and slow payment by the customer or prime contractor. [e.g., #PMP20, #PMP37]

Companies had mixed experiences with timely payment from public agencies. For example:

- The male representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that payment is an issue for small firms. He commented, “[Untimely payments are] not something a small firm can bear.” However, he indicated that untimely payments have not been an issue for the firm when working with public agencies. [#11]
- On the topic of timely payments by agencies or primes, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented that, in her experience, if a firm “goes by the rules” and submits the invoices and required documents on time, then payments are timely. [#25]
- An African American owner of an MBE-certified professional services firm reported that he has had issues with both public and private payment. He stated that some payments will be anywhere from 90 days to six months out. [#55]
- A white female project administrator from a local government agency reported that the County pays on a 30 day cycle. She noted, however, that depending on circumstances, it can sometimes take more than 60 days before a sub is paid. She went on to say that she has heard that the County’s payment schedule is difficult for some small firms. [#LA1]

The same female administrator went on to note that the City of Portland has changed its payment schedule to every two weeks. However, she indicated that a two-week payment schedule requires added administration, and noted that the County already spends ten days per month preparing payments. [#LA1]

Some firm owners had favorable comments regarding payment from ODOT and some did not. Comments include:

- The representative of a Hispanic American-owned construction company stated, “[ODOT has] always done us well. They pay faster than I can bill them.” [#AI1]
- The white female owner of a WBE- and ESB-certified specialty contracting firm reported that ODOT is very prompt, and sometimes even early, with their payments. [#53]
- A female public meeting participant representing a certified engineering consulting firm commented, “... as ODOT looks to ensure prompt payment to subcontractors, I would advocate that ODOT promptly pays the primes.” [#PMP34]
- Regarding payment by ODOT, the representative of a majority-owned professional services firm stated, “Although it’s in the contract, and I understand that when going in, they do take longer to pay than other agencies.” [#AI3]
- A female public meeting participant, representing a DBE-, MBE- and WBE-certified architecture and engineering services firm, provided written comments and suggestions relating to limited access to capital for DBEs and untimely payments by ODOT. She commented, “... there are immediate actions that ODOT could take to provide DBEs access to capital and increase their DBE participation ...ODOT can pay their invoices on the A&E side quicker” [#WPC10]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm commented, “[Untimely payments] can be the ‘kiss of death’ for most minority contractors. On the topic of ODOT’s retention being paid six months later, this business owner stated, “That’s the ‘kiss of death’ for us.” [#6b]

Some interviewees identified prime contractors as the source of payment delays. For example:

- The male representative of a woman-owned supply firm commented, “We’ve had troubles [untimely payments] with some primes, agencies not so much” [#52]
- An African American owner of a DBE- and MBE-certified specialty contracting firm reported, “Weekly invoices are important to a new company, starting out.” He went on to say that not finding prime contractors who are willing to pay weekly invoices is detrimental to small firms. [#46]

- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that he has experienced delays when working with prime contractors, and noted that can be costly. He commented, “We’ve been out \$150,000 on a bid item, and [the response is], ‘We’ll get you on the next one.’” [#30]

The same business representative added, “I think the state does their due diligence [concerning timely payment].” He went on to say that payment depends upon primes; and that subcontractors have no power or control over when they get paid. [#30]

Other keys to business success. Some business owners and representatives reported other keys to their business success.

A number of business owners brought up fiscal responsibility, cost accounting and “back office” capabilities. Comments include:

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that knowledge of construction, proper training and fiscal responsibility have contributed most to the firm’s success. [#27]
- The representative of an international engineering business reported that meeting deadlines and staying within budget are essential for any business to be successful. [#12]
- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that a key to long-term business success is fiscal responsibility, and noted that it is important to know your costs and not go under or overprice. [#29]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that in her industry, hiring a good accounting firm that understands construction accounting and a good attorney who understands construction law is very important. She also noted that the business owner must have some understanding of both accounting and law as it pertains to construction. [#32]
- The white male representative of a white woman-owned WBE-certified construction business commented that “cost accounting” has been a big factor to the firm’s success. [#50]
- The Hispanic American female representative of a minority business association indicated that small business “back office” capacities are needed for success. She added without these skills, small businesses have limited growth potential. She went on to comment, “Don’t bid on [the] stuff, if you can’t do the paperwork or if you can’t somehow get it done.” [#TOGF2a]
- The Hispanic American representative of a minority business association reported that to be successful, especially in the local marketplace, a firm has to have good knowledge of the bidding process and have a successful “back office.” He added that some small businesses do not have “back office” knowledge, or financial “know-how.” [#TOFG2b]

Some business owners identified excellent communications as a key to business success. For example:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm commented that it is important to be “innovative” when it comes to communicating with primes and other customers. [#2]
- The African American owner of a now-closed construction firm reported that listening, getting over any communication gaps, and working to your highest standard are also important to business success. [#23]

Some firms named other factors that affect success. Interviewees identified a variety of other keys to success, including the following:

- The white male president of a majority-owned construction business indicated that the firm’s geographic diversity contributes greatly to their success. [#1]
- The white male owner of a specialty contracting firm reported that it is important to “follow through” to contract completion, even if it means a need for overtime. He added that this level of commitment is passed down to his employees. [#22]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she has received help from non-profit organizations, and commented that this was a key factor to her firm’s success. She added that her acquired knowledge from these relationships has helped her firm grow from a “pop and mom” shop to a company. [#25]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that being a small and flexible firm has helped them become successful. He also noted that his affordable fees have helped as well. He added that “getting your foot in the door” with a project is crucial to future successes. [#28]
- On the topic of what makes a successful company, a Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm commented, “I think you really need to know, ‘What is your core strength?’” [#47]
- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that ongoing training with the latest technology is a key factor to business success. He added that in his industry, if you are not advancing, “you are falling back.” [#37]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that the biggest factor in his firm’s success was the realization that just because he was good at his job, it did not mean he was good at running a business; he knew he needed to learn a new skill set. [#51]

G. Experience Doing Business with Public Agencies Including Oregon Department of Transportation

In addition to barriers such as access to capital, bonding and insurance that may limit firms' ability to work with public agencies such as ODOT, interviewees discussed other issues related to working for public agencies. (Some appeared to be barriers and some were not.) Topics included:

- Doing business with public agencies in general;
- Doing business with ODOT;
- Opportunities to market the firm;
- Public sector insurance requirements;
- Prevailing wage and other wage-related requirements;
- Prequalification;
- Non-price factors public agencies or others use to make contract awards;
- Unnecessarily restrictive contract specifications;
- Bid process;
- Untimely payments; and
- Other experience with ODOT or other public agencies regarding any barriers;

Doing business with public agencies in general. The study team asked business owners and representatives about their experiences working with public agencies in general.

Some businesses expressed frustration about working with public agencies. Comments included problems with paperwork, excessive requirements, inconsistent treatment, difficulties with payments and other disadvantages for small and new businesses. Some of these topics are discussed further elsewhere. Examples of responses to the general question about working with public agencies included the following:

- The white male owner of a specialty contracting firm commented that there is more bureaucracy when working with public agencies, and cited additional paperwork, types of forms, and certified payroll as examples. He added that this can be a challenge for small businesses, as they likely do not have the time or resources necessary to complete the paperwork. He went on to note that ODOT and other agencies have many rules and regulations. [#22]
- A white female owner of a specialty construction business reported that business management on public sector projects, including paperwork and documentation, is extremely stressful. She went on to say that ODOT and other agencies share this barrier. [#41]

- A white male owner of an ESB-certified general construction firm stated that the experience with public sector agencies has been good on some projects and not so good on others. He added that he considers a “good” work experience to be one in which expectations and specifications are standardized. [#14]
- A white male owner of a now-closed ESB-certified engineering firm reported that RFPs often include unrealistic requirements, and added that insurance requirements by public agencies are out of kilter with the project workscope. He went on to say that there are clauses in small projects that a bidder would expect to see only in large projects. [#38]

According to the same business owner, some RFPs are geared to established firms that already have a history of doing the work. He reported that small and new businesses are penalized by public agencies that evaluate awards based on the amount of work completed in a particular area, not the collective experience of the team. [#38]

The same business owner went on to say that public agency payments need to be expedient. He added that his issues with late payments typically result from an agency’s late payment to the prime. In addition, he commented that invoices sit on desks awaiting signatures, and that 60 to 90 days oftentimes pass before issuing a check. [#38]

- A white male partner of a WBE- and SDVO-certified construction firm reported that oftentimes staff at public agencies is not educated concerning the type of work a company is doing. He explained that staff with a public agency may not know how to resolve an issue due to lack of know-how. [#43]
- The male executive of a majority-owned services firm noted that public agencies are not always looking for the best price, are more likely to use the five dominant leaders in his field, which can be a barrier for his small firm. [#45]
- When asked what it is like to work with a public agency, an African American owner of a DBE-and MBE-certified specialty contracting firm commented, “Every day is different.” He went on to say that on some contracts he talks with different people that give him different answers to the same question. He added, “Some days it’s like spreading butter on bread, other days it’s like trying to dig up a pile that’s full of rocks.” When dealing with inconsistencies in instructions among agency representatives, he stated, “If you stick around . . . sooner or later you’ll find the guy that’ll to tell you the right thing.” [#46]
- A public meeting participant indicated that their manufacturing and engineering services firm registered in various state procurement systems for the past four years. “We invariably find that the contracts are too large or already let to others before we have an opportunity to bid. It seems there should be a fairer way for small women-owned businesses such as ours to participate in these state contracts and procurement events.” [#WPC3]

- When asked about his experience working with public agencies in general, the African American president of a DBE- and MBE-certified construction business reported that working with them as a prime presents a challenge because of “change of the guard.” He went on to say that when knowledgeable public employees retire, new employees tend to work strictly “by the book,” which does not always have the answers. [#49]

The same business owner went on to comment that paperwork has increased and trustworthiness has decreased in the public sector. He added that his experience working with public agencies has been “fair to good.” [#49]

When asked to compare public agencies with ODOT, the same interviewee reported that he has not had the opportunity to work on large ODOT projects. He went on to comment that ODOT has not “truly” attempted to incorporate small business into their projects, and noted that they rely on primes to bring in the small businesses. [#49]

- When asked about her firm’s experiences working with public agencies in general, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male stated that as a subcontractor, the firm does not work directly with public agencies. She added that the firm has not experienced any problems aside from an issue with an open shop trainee and bonding. [#27]

When asked to recap the trainee issue, the same female business representative commented that the union is the only training approval agent, and that they would never approve an open shop contractor as a union training agent. She went on to report that the firm tried to use Northwest College of Construction for craft training, but noted that it was too expensive and time-consuming. She added that ODOT “requires the same things,” but are “a lot more lenient.” [#27]

- A female public meeting participant representing an engineering consulting firm commented that it is problematic for small firms when ODOT keeps work that should be performed by DBEs in-house because, “...they [ODOT] finally got around to figuring out their workload...they weren’t busy enough and needed work to do.”[#PMP34]
- When asked about his firm’s experiences doing business with public agencies in general, the white male owner of a specialty contracting firm reported that in the private sector, he is the go-to person for both design and challenges in the [specified] industry. He added that in the public sector, this is not his role because “they [public agencies] know it all.” He gave the example that he tried to introduce a new, less expensive method of installation to a public agency, but they were not interested. He commented, “Some of these agencies have been doing it for so long that they don’t want to change.” [#20]

A few interviewees did not report difficulty working with some public agencies. For example:

- The white female owner of a WBE- and ESB-certified specialty consulting firm commented that she is used to working with public agencies, and that she knows them well enough to understand their processes. [#31]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm commented that public agency work is both complex and interesting. He went on to say that CORs (federal contracting officers) provide assistance before, and oversight on, a project. He added that he has had success with the Department of Veterans Affairs, hospitals and cemeteries. [#33]
- The white female owner of a DBE- and WBE-certified services firm indicated that she enjoys working with public agencies, and that they are, "... willing to pay you fairly for that work, there's typically an established schedule for the work, they're good at communicating what they need." [#34]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm reported that her firm was "buffered" from working directly with public agencies because she works primarily as a subcontractor. [#36]

Many firms discussed their experiences doing business with ODOT. Business owners and representatives had mixed experiences working with ODOT. Some compared ODOT with other agencies.

Many of the interviewees related negative perceptions of working with ODOT based on a variety of past experiences. Reasons for difficulty with ODOT varied from general comments about excessive paperwork and "red tape" to overly restrictive policies to difficulties with specific ODOT offices or inspectors. Comments from the in-depth interviews include:

- The regional director for a woman-owned engineering-related firm stated, "... we don't typically pursue ODOT contracts because it's kind of a hassle. [There's] so much red tape. So, it's [easier] to work on private development projects." [#AI10]
- When asked about his experiences working with ODOT or other public agencies, the representative of a majority-owned construction firm commented that there is more "paperwork" when dealing with public agencies. He went on to say that working with ODOT in multiple offices makes for drastic differences in the types of attitudes that you encounter. He added that some agencies are easier to work with than ODOT due to less paperwork, more consistency, and less restrictions. [#19]
- When asked about his experiences working with public agencies in general, the African American owner of a DBE-, MBE- and ESB-certified engineering firm commented that ODOT has very outdated procedures that are remnants from the "pre-digital age." He elaborated that there is a lot of redundancy, excessive paperwork and hidden costs when working with them. He also reported that ODOT projects are weighed heavily on the management side, which in turn is costly for both small businesses and large primes.

He commented, “It really [raises] project costs.” He reiterated that 40 percent of ODOT jobs are management and paperwork, and that only 60 percent of work is in the field, which is expensive. “If you bid on an ODOT project,” he commented, “you are guaranteed to lose money” He went on to note that TriMet is more “updated,” and that they conform better to modern standards. [#28]

- At a public meeting, an ODOT staff person commented on ODOT processes, “We’ve got a lot of paperwork required, especially if you’re going to be a prime. There are so many hoops and things you’ve got to jump through, and forms to fill out, and processes.” [#OPMP3]
- A public meeting participant commented that there are ODOT expectations of perfection placed on primes, for example; primes are responsible for correct payrolls for their subcontractors. [#PMP38]
- In reference to a firm who could not access the ODOT computer system, an ODOT staff person and public meeting participant said, “There was something wrong with the system. Here the deadline is approaching so I had to physically go in and send him all the information.” He added that the business could have missed an opportunity had he not been in the office to send the needed information to him. [#OPMP11]
- When asked about working with ODOT, the representative of an international engineering business reported that his firm’s last experience with ODOT was about ten years ago, and that any work with them has been through the Portland office. He added, “ODOT is very stringent in their process. They won’t vary from how a project is done ... it has to be in their format, their specific process [even if better alternatives are available].” [#12]
- When asked about his firm’s experience working with ODOT or other public agencies in general, a Native American owner of a construction firm reported, “Because we’re dealing with different personalities on different projects, when you’re dealing with somebody like ODOT ... everybody reads that book [Oregon Standard Specifications for Construction] a little differently ... and so that ... can be a challenge Everybody has their own little take on what the specifications, in the contract reads” [#26]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that ODOT projects are more complicated than ever; they require more management on the part of firms. She went on to say that ODOT recently made it difficult for her to hire a women-owned subcontractor who she had worked with in the past; the subcontractor had to recertify because she started a new business under a new name. She commented, “I couldn’t get her on a job that I needed her on ... without her certification, because she isn’t eligible for a public works bond yet.” She continued, “I can’t use any sub on a job unless I have the subcontractor’s approval by ODOT It just makes it more difficult Let’s give these people [subcontractors] a helping hand if they’re already qualified.” [#32]

- The white female owner of a WBE- and ESB-certified specialty consulting firm stated that it has been difficult being a small, woman-owned business, especially because she does all of the work on her own. She reported, “A lot of companies like ODOT want someone to do the whole project. They want them to build a bridge and do the environmental work [As] somebody who specializes in [specific type of work], I rarely [build anything].” She went on to say that it is difficult to find opportunities to perform her specialized type of work. [#31]

The same female business owner indicated that many ODOT project scopes require cross-discipline capabilities with the ability to perform a project’s entire work scope. [#31]

The white female owner of a DBE- and WBE-certified specialty contracting business reported that she is used to working with public agencies, as she has been doing it for some time. She added that when she first began working with public agencies, it was difficult and rarely cost effective. [#42]

The same female business owner went on to say, “Over the last three years, we have preferred to work with counties and cities over ODOT.” She further reported that ODOT’s goals exclude personnel from “African Nations,” which is problematic as they provide dependable work; because of the exclusion, her firm prefers to work with counties and cities. [#42]

- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm reported that public agencies are fairly “cut and dry,” and that he does not encounter many problems with them. However, he stated that there is a big difference between ODOT and other public agencies. He commented, “There’s always an [ODOT] inspector breathing down someone’s neck or, you know, walking around ... talking to employees ... having a conversation. It goes other places it shouldn’t go Personal conversations, things like that ... things that shouldn’t be on a job site.” [#48]

The same business owner went on to say that in these instances, inspectors’ conversations with his employees extend past normal pleasantries while they are on the job, and noted that it creates a stressful environment. He also reported that inspectors will sometimes ask his employees to do additional tasks outside their area of responsibility. [#48]

- The Hispanic American female representative of a minority business association reported that member firms have backed away from ODOT because they “are not the ‘right’ minority.” She added, “ODOT has been very, very troublesome. People are, as you know, angry, upset [and] distraught.” She noted that other agencies (e.g., TriMet, Multnomah County and Port of Portland) are “great to work with.” When asked what distinguishes these agencies, she reported that they encourage firms, unbundle contracts and refer individuals to her organization when problems arise. She also noted that these agencies conduct outreach and offer clear instructions to contractors, including expectations and goals. [#TOFG2a]

- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported, “It’s very different from agency to agency. Working for [a city in Washington], you could not work with more reasonable people ... you can sit down and look at issues [Meanwhile], you’re typical working with WSDOT and ODOT ... they’re a lot more spec driven ... this is what the book says ... this is what you’re doing I call it the ‘robot mentality’ because there are a lot of situations you come up to [that] maybe we should use our minds and come up with a solution instead of just looking at the book” [#16]
- When asked about his firm’s experiences working with public agencies, the owner of an ESB-certified engineering-related firm reported that because his firm is so specialized, it is necessary that they be “on-call,” and stay “on the lookout” for public agency opportunities. [#21]

The same business owner went on to say that ODOT and the City of Portland sometimes call his firm in the early stages of projects. He commented, “Knowing some people is easier, not to get the jobs, but to get contact and start the conversation.” [#21]

- The white female owner of a WBE- and ESB-certified specialty construction firm reported that public agencies, including ODOT, require excessive paperwork; she must stop and do the paperwork, or hire someone else to do it for her. She added that she already has an employee dedicated to doing the payroll. [#35]
- The white male representative of a white woman-owned WBE-certified construction business shared a negative experience with an ODOT division. His firm was a prime, and the ODOT division had poor communication and was slow in paying for change order requests. He added that the firm will not bid any future projects with this particular branch of ODOT. [#50]
- A female ODOT Region 1 staff member reported that in her experience, DBEs sometimes say that it is too hard to break into business with ODOT. She added that after a while, “they just give up.” [#OS2a]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that he has not worked with ODOT. He said that he is unlucky with ODOT, and cannot guess why. While he has submitted bids in the past, nothing “materializes.” [#33]
- When asked about doing business with ODOT, the representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that they [ODOT] should give subcontractors better exposure to primes. He added that if more subcontractors knew about upcoming projects, they would have enough time to submit proposals on time. [#11]

- When asked about doing business with ODOT and public agencies in general, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that his experience has been positive as long as budgets are approved and everything is accounted for. When asked about ODOT specifically, he commented that his engineering staff has been very successful working with them. [#18a]

The same business owner also commented that while his firm would like to perform inspections for ODOT, both ODOT and the Army Corps of Engineers decided that they do not want to take on certain costs. Instead, they save money by making the contractor pay. [#18a]

- When asked about her experiences working with ODOT and public agencies in general, the white female owner of a WBE- and ESB-certified professional services firm reported that working with public agencies is a pleasant experience most of the time. She added that when working with ODOT specifically, it can be a challenge because they can have unreasonable expectations for work and time requirements. [#24]
- When asked about her firm’s experiences working public agencies, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that experiences vary from agency to agency, especially with regard to requirements and paperwork. When her firm worked as a subcontractor on an ODOT building renovation project, the communication and required paperwork were “horrible.” She went on to report that working with ODOT directly is a much better experience, and noted that her firm has clear knowledge of ODOT’s requirements and expectations when working as a prime. [#25]
- The white male owner of an ESB-certified engineering firm reported that learning about ODOT contracting opportunities is an issue for his firm. He went on to say that while RFPs are largely disseminated, they never go to subcontractors. He added that RFPs are relatively unknown to small, woman- or minority-owned businesses, and suggested that this information go out through ORPIN for public bidding. [#44]
- The white male director of a contractors association reported that ODOT is the biggest (specified industry) customer in Oregon, and commented that the memberships’ overall experience with ODOT has been “fine,” not “fantastic or bad.” He added, “ODOT probably has critiques of contractors, [and] contractors have critiques of ODOT.” He went on to say that ODOT’s “commercial useful function” requirement for subcontractors to work on a project is not particularly clear among ODOT or the contractors. He added that ODOT could better in clarifying the rules regarding the minimum percentage requirements for using DBEs. [#TO3]
- When asked about his experiences with ODOT specifically, a white male board member of a contractors association reported that the association has a subcommittee for every public agency, including Clarke County, ODOT and Portland. He went on to say that these subcommittees are avenues for membership to express their experiences with each agency. [#TO4]

- The African American male owner of a DBE-, MBE- and ESB-certified specialty construction firm stated, “[ODOT and the City of Portland] are doing a better job of trying to put [contracting] opportunities out there.” He added that TriMet monitors their prime contractors while reaching out to subcontractors for input. He went on to say that while the City of Portland and ODOT are moving in this direction, they are not quite there yet. [#6b]
- One ODOT public meeting participant commented on “getting to know ODOT.” This staff person reported that “getting to know ODOT” is difficult. However, he added that ODOT is responsive when they get calls from contractors. [#OPMP13]

There were a few comments from interviewees indicating that ODOT was easy to work with. For example:

- The white male executive of a majority-owned equipment firm stated that he has worked with ODOT before and has not experienced any issues. He noted that when he has salespeople specializing in government contracts on board, he tends to receive more business. [#57]
- The white male representative of a majority-owned ESB-certified specialty contracting firm described most of their work with public agencies as “a good experience.” He went on to note that most of the people they work with, including ODOT staff, are professional and communicative. However, he also reported that certain permit approval by ODOT is a “tedious” process. [#29]
- The white male executive of an African American-owned engineering and consulting firm stated, “Most all public employees, managers, supervisors, people that are the first line of contact for us, are welcoming and they are well versed in the business of contracting for additional help.” He added, “The big [agencies] like ODOT ... everything is very public, very transparent. The RFPs go out, we respond. There are rules.” [#9]
- When asked about his experiences working with ODOT or other public agencies in general, the Native American owner of an MBE- and ESB-certified specialty contracting firm commented, “It’s nice, actually It’s good communication.” He went on to say that he has had similar experiences with ODOT. [#15]
- A Subcontinent Asian American owner of a DBE-, MBE- and ESB-certified professional services firm reported, “Working with a public agency is no different than working with a private entity because ... they’re all humans” He commented that ODOT provides more opportunities to minorities and small businesses than other public agencies. [#47]

Opportunities to market the firm to public sector agencies. Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves. Others indicated that marketing is not necessary for their firms. [e.g., #2, #6b, #9, #13a, #14, #18a, #26, #31, #39b, #40b]

Some reported ways they market their firms or secure work with public agencies. For example:

- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that his firm went to TriMet, the post office and SBA to market itself as minority business. He went on to comment that it “worked very well.” [#7]
- The white male president of a majority-owned construction business reported that outreach to ODOT is a major way of marketing his firm, and added that the firm is engaged in [industry] associations and subcommittees. [#1]
- When asked about opportunities to market the firm, the African American female president of a DBE- and MWESB-certified specialty contracting firm reported that they are registered with Oregon as a minority business, and that prime contractors often need to fulfill minority business requirements on public sector jobs. [#8]
- The representative of an international engineering business reported that his firm always markets the products they produce. He added that he attends city council meetings, planning commission meetings, and county commission meetings. [#12]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that, in addition to her experience with ODOT’s outreach events, she is an active member of OAME (Oregon Association of Minority Entrepreneurs) because many firms working in the public sector use it as a resource. [#10]
- When asked how her firm approaches marketing, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that a lot of her marketing is “free,” and cited word-of-mouth and attendance at networking events as examples. [#25]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm commented, “... it’s [marketing] always a good opportunity [to market the firm].” He went on to report that there are a lot of subs and public agencies involved in marketing his firm, and noted that this is an opportunity for them to see his work firsthand. [#28]
- When asked how he markets the firm, the Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm commented that his firm relies on word-of-mouth and recommendations from others. He went on to say that his firm attaches a time-lapse video of their projects to every email they send. The same business owner also reported that they received a job just over \$1 million as a result of their video marketing strategy. He went on to say that a representative from the Federal Aviation Administration (FAA) who saw the video told him that there is work for them once they secure their SBA 8(a) certification. [#51]

Some business owners and representatives reported limited opportunity to market their firms specifically to secure work with public sector agencies such as ODOT. Examples of comments include:

- The Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “I guess we could market our firm to the bigger general [contractors] I don’t see the value in marketing to ODOT or other public agencies, because everything we bid is a low-based deal ... unless we’re on one of the special projects ... proposal-based projects ... [but] I don’t think ODOT has a lot of that.” [#16]
- When asked about marketing opportunities, the representative of a majority-owned construction firm commented that there are very few marketing opportunities on the public side, and added, “Most public work ... is low bid.” [#19]
- A white male partner of a WBE- and SDVO-certified construction firm stated that he does not think ODOT offers opportunities to market the firm. He reported that there are companies that offer to get him jobs and market the firm, but they will take a large cut of the money. He recalled an airport project, which he knew the firm was not qualified to do, but received an offer to get qualified. He stated, “It would have taken falsification of records to do so [qualify].” [#43]
- The white male owner of an ESB-certified engineering firm commented, “I guess ODOT really doesn’t care if you’re a small company so, you know, you could try to ‘talk to them.’” He added that a company could try talking to a public agency for work, although the effort would be “futile.” [#44]
- The white male owner of a specialty contracting firm commented that he does not see many opportunities to market his firm to public sector agencies. He commented, “... because I am white and a male ... there are a lot of invites for women in construction ... no one ever says, ‘[I need] white and male [contractors].’” [#20]
- The Native American owner of an MBE- and ESB-certified specialty contracting firm reported that he is actively working on marketing. He commented, “For me, it’s just a process of elimination and finding opportunities I’ve been having advertising problems bad ... how to advertise my business ... where should I go ... what should I do? Anything I’ve tried ... I’ve spent \$5,000 in advertising to come up with nothing, I mean nothing, so I don’t know if I’m the lone sucker out there That’s where I’m having my biggest problem, advertising.” [#15]
- The white male owner of a specialty contracting firm indicated that his firm does not market often because they work primarily in the public sector. He commented, “[The firm] is known, so we don’t really have to market ourselves.” He did note, however, that they promote themselves when they do alternative contracting work. [#22]

- When asked about marketing, the white male representative of a majority-owned ESB-certified specialty contracting firm commented, "... the only time we're going to get an opportunity [to market the company for public sector work] is [when] ... they need somebody to come and [do a] repair ..." [#29]

Businesses owners and representatives discussed how they go about finding opportunities to prime for ODOT, public agencies and others. Comments include:

- The white male executive of an African American-owned engineering and consulting firm reported that as a small firm, their ability to track upcoming work is very limited. In most cases, they wait until the job becomes public. He went on to note that his firm finds out about opportunities on the ODOT website or other online sources. He added that his firm also attends ODOT and other large agencies' job fairs to stay informed. [#9]
- When asked how his firm learns about ODOT opportunities, the representative of a white woman-owned specialty construction firm stated that ODOT's six-year project projections are helpful in identifying relevant projects on the horizon. He said, "There's a wealth of information from ODOT if you can find it." [#13a]
- When asked how his firm learns about prime contract opportunities, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that he is signed up with various plan centers, and that he gets emails every day regarding opportunities. [#16]
- A Hispanic American owner of a DBE- and MBE-certified engineering firm reported that he learns about local contract opportunities through the newspaper, and added that he uses websites for "big agency" postings of RFPs. He commented, "I know where to look for that kind of thing." [#17]
- When asked how his firm learns about prime contracting opportunities, the white male owner of a specialty contracting firm reported that his firm takes advantage of city and agency websites, trade journals, and ad services. He went on to note that it is also important to consistently review "request for bid" postings to identify jobs compatible with your firm. [#22]
- The white female owner of a WBE- and ESB-certified professional services firm reported that the majority of opportunities presented to her are irrelevant to the company because they are outside her scope of consulting. She also indicated ORPIN is not too easy to work with, and noted that opening documents from ORPIN can be "more hassle than it's worth." [#24]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she learns about prime and subcontracting opportunities through advertisements, community meetings and ORPIN. She added that her firm works primarily with schools and universities, and noted that these public entities are very different than ODOT. [#25]

- When asked how his firm learns about prime and subcontract opportunities, a Native American owner of a construction firm stated that they read The Daily Journal of Commerce, and frequently utilize GCAP. [#26]
- When asked how he learns about opportunities to work as a prime, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that frequent collaboration with subs offers his firm new information and contacts in their industry. [#28]
- The executive of a majority-owned services firm reported that learning about contracting opportunities can be difficult. He indicated that the firm learned about and secured the majority of its ODOT work through established relationships with project managers who use the firm as a blanket “PO.” [#45]
- The white female owner of a WBE- and ESB-certified specialty consulting firm reported that her firm is on certain state lists for prime bidding opportunities. However, she went on to say there doesn’t seem to be a standard way for agencies to announce bids; it can vary between agencies. [#31]
- When asked how his firm finds out about opportunities to bid as a prime, a representative of a white woman owned specialty contracting firm stated, “We’ve been on some of the boards ... that have the bidding stuff, but we don’t generally go to that. [We are] likely to go directly to the prime, so it’s a limited amount of subcontractors bidding on a project.” [#39b]
- The white female owner of a WBE- and ESB-certified specialty contracting firm reported that she has worked on small projects with ODOT, and that she has had good experiences with them. She went on to say that her previous business partner had a good relationship with ODOT, and commented, “They [ODOT] just call us when they want something” [#53]

Some prime contractors reported how they identify subcontractors to work with them.

A number of interviewees reported that they often work with the same subcontractors on repeat assignments. [e.g., #2, #14] However, some reported that availability of subcontractors is limited. Comments include:

- The white male president of a majority-owned construction business reported that when priming a project, they reach out most often to subcontractors they know. He went on to say that his firm receives calls from subs wanting to work with them on certain projects. [#1]

When bidding projects with DBE goals, the same business owner indicated that they have been receiving less direct outreach from DBEs seeking subcontracting opportunities than in the past. [#1]

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that her firm's policy is to team up with other minority firms to increase the overall minority percentage in the workforce. [#10]

The same female representative went on to say that while her firm often works with subs they have worked with in the past, it is still important to know what their qualifications and capabilities are. She also reported that her firm often works with the same subs in the public and private sector when working as a prime. [#10]

- When asked if his firm has a preference for working with certain subcontractors, the representative of an international engineering business commented that their options are limited on survey projects because Oregon only has two subcontractors available to work. On other projects, he reported that the firm subcontracts out to whoever is "best qualified to do the job." [#12]

The same representative went on to say, "On all the federal and state contracts ... we try to use what we can to meet the minimum standards for the work for minorities" He continued, "We need a bigger pool [of minorities]." [#12]

Business owners and representatives reported networking, relationships and electronic communications as ways to find opportunities for subcontract work for public agencies and others. Comments from the in-depth interviews include:

- When asked how her firm learns about subcontracting opportunities, the white female owner of a WBE- and ESB-certified specialty consulting firm reported that networking with prime contracting firms is crucial. [#31]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that the firm does a lot of professional networking through associations, and that they stay in touch with primes they have had good experiences with in the past. [#2]
- The male representative of an international engineering business reported that primes oftentimes contact them in order to initiate repeat business. He added, "... we work on providing good service, [and] good relationships It helps business in the long run." [#12]
- When asked how his firm obtains work with a prime, the Native American owner of an MBE- and ESB-certified specialty contracting firm commented, "They get a hold of me." [#15]
- The male representative of a woman-owned supply firm stated that his business finds primes for service via inner-industry word-of-mouth, which he calls "business to business interaction." For supply, he stated that clients find his business through labels on materials, or interested vendors lists from the federal government. [#52]

- When asked how his firm learns about subcontracting opportunities, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported that he finds out which primes are interested in bidding a project, then deals directly with them instead of going through ODOT. [#16]
- When asked how her firm learns about subcontracting opportunities, the white female representative of DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that they usually hear about heavy highway projects from primes, while on the commercial side, the firm’s estimator tracks ORPIN and eBIDS. [#27]
- When asked how his firm obtains subcontract work, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that the firm identifies work opportunities through ORPIN, the Portland Daily Journal of Commerce and ODOT’s website. He added that most primes have knowledge of his business because it is on a registered vendors list. [#18a]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that she gets notifications via email regarding available work. For example, she said that she receives information about walkthroughs and meetings regarding potential subcontracting assignments. [#8]
- When asked how his firm learns about subcontracting opportunities, the white male representative of a majority-owned ESB-certified specialty contracting firm reported that his firm has difficulty finding bids for ODOT projects. He went on to say that when looking for public prime contract opportunities, “ORPIN is the only thing we’ve found to try and use. And that hasn’t been particularly productive for us.” [#29]
- A female ODOT Region 1 staff person indicated that she knows of one prime contractor that has a network to target MWESB and construction firms; another prime co-sponsors the network. The same female staff person went on to say that ODOT has pre-bid meetings where they encourage DBEs to attend so that they can use the experience as an opportunity to interface and network with primes in a number of different fields. She also noted that the Office of Civil Rights conducts a monthly breakfast group where it invites owners of projects to talk to DBEs and small businesses. [#OS2a]

Subcontractors reported on whether or not they have preferences for working with certain prime contractors. A number reported no preference, while others reported that they prefer to work with some primes over others. Examples of comments include:

- The representative of an international engineering business reported that when his firm works as a subcontractor, they prefer to work with primes that have established relationships with agencies. [#12]

- A white male owner of an ESB-certified general construction firm reported that his firm has definite preferences for certain primes. He commented, “Some are easier to work with than others ... some pay better than others ... in a more timely way Sometimes their supervision staff is easier to work with ... personalities or expectations Some have realistic schedules ... some have unreasonable schedules.” [#14]
- When asked if his firm has a preference to work with certain primes, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “Definitely I have a special relationship with [a firm] ... because of the type of work ... how it fits ...” He continued, “They tend to give a lot of latitude to solve problems and make decisions. Other contractors ... have their thumb on you the whole time ... they ... want to get the most out of you that they can.” [#16]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm said that his firm does not have preference for any primes, though they do have ones that they had poor experiences with in the past. He noted that these primes do not let them do their job, and gave the example of some primes not wanting his employees near a certain work process, even though it is required that they observe and inspect the process. He went on to say that once his firm is on a team, it is usually a successful venture, and noted that his firm is used by the same primes on public and private sector projects. [#18a]
- When asked if his firm prefers to work with certain primes, the African American owner of a DBE-, MBE- and ESB-certified engineering firm indicated that his firm takes what they can get, stating, “No, we don’t have a choice.” [#28]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm commented that her firm has no preference to work with specific primes. She added, “As long as they’re open to working with minority and women businesses, I’ve had no problems.” [#8]

Some business owners and representatives discussed challenges when working as a subcontractor on public sector work. Examples of comments include:

- When asked about the challenges of being a subcontractor, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported, “Being a sub is always challenging You’ve got to closely watch out ... typically the general [contractor] is in charge of the whole thing ... [if the prime] misses something ... they’re going to try to get you [the sub] to cover that You’ve got to really pay attention to what you’re doing ... your cost ... notification requirements You’ve got to pay attention.” [#16]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that price shopping in the private sector and penalties in the public sector are challenges. She added that it is difficult to bid jobs knowing that they must add money for the potential penalties, and noted that sometimes they do not bid jobs because its penalties are prohibitive. [#27]

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that one barrier to obtaining subcontract work is a lack of experience with the prime; this often prevents small firms from securing work. He went on to say that “getting his foot in the door” has always been a challenge. [#28]
- Regarding being a successful subcontractor, a white female owner of a DBE-, MBE- and ESB-certified general construction business remarked, “Get in and get out as quick as possible.”[#40b]
- A male ODOT Region 1 staff person reported that the main 16 firms that do work in Portland are not DBEs; they are multidiscipline. He commented that, primarily, they want to hire expertise simply because of issues of liability. He said, “Breaking into that field is really difficult.” He went on to say that single discipline DBEs would “not be able to imagine” the questions that a local prime consultant would ask them if they wanted to break into the field. He stated, “They’re going to say, ‘Dream on. What projects have you worked on? What’s your track record?’” [#OS2e]
- A public meeting participant commented that subs are contacted sometimes only a day or two before a bid must be presented. The time constraints inhibit opportunities for small businesses. [#PMP14]
- The white male owner of a specialty contracting firm reported that while he does not have this problem now, obtaining bonds can be a definite challenge when working as a subcontractor on public sector projects. [#20]

Public sector insurance requirements. Some interviewees considered the cost and availability of insurance required on public sector contracts to be a barrier for their firms, especially if they are small or new companies. [e.g., #13, #23, #35, #28, #31, #59] Comments include:

- When asked about insurance as a barrier for his firm, the representative of a majority-owned consulting firm commented, “I think [ODOT’s] professional liability insurance requirements and process is convoluted. We have to pick up insurance that is not really needed.” [#AI16]
- The white female owner of a WBE- and ESB-certified professional services firm stated that public agencies require too much from subcontractors, and that insurance is “intolerably expensive.” She went on to note that the requirement is often \$2 million for subcontractors, and that this is excessive for a small business. [#24]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that insurance requirements often go “over and beyond” the actual scope of work. She commented that she needs insurance to cover tasks outside of her workscope. She went on to say that this sometimes requires coverage of up to \$5 million. She added that even though she has been in business for over ten years, her firm cannot afford the same rate of insurance as other, more established firms. [#25]

- When asked about insurance requirements, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that on heavy highway projects, a \$5 million “umbrella policy” is usually required. She then noted that the firm only has about \$3 million in umbrella insurance now, and added that their coverage is only acceptable due to their long standing relationships with primes. She went on to say that the high expense of umbrella policies can be a barrier for small businesses. [#27]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm commented that insurance is “a nightmare.” He explained that even if subs do a small task that is low-risk or limiting in scope, they are still required to fulfill “massive” insurance requirements. He went on to say that agencies often come up with several damaging scenarios to cover themselves, and noted that this can quickly make insurance too costly. [#28]
- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm stated that insurance can be unnecessarily restrictive and expensive, and reported that some projects require that he have specific insurance. He went on to say that small businesses in the DBE Program should not have insurance as a requirement. [#48]
- An African American female owner of a DBE- and MWESB-certified engineering firm indicated that at start-up, the cost of insurance was a barrier for her business. She went on to report that she had a few small contracts with ODOT, and that they lowered the insurance requirement for her firm. She added that the cost of insurance is not a barrier for them, as they can now afford to purchase a \$1 million policy. [#3]
- Although her firm faced challenges regarding the cost of professional and general liability insurance, a white female principal of a DBE- and WBE-certified consulting firm commented, “ODOT has been amazingly stable in their [insurance] requirements over the years.” [#5]
- A white female owner of a specialty construction business stated that she sends her insurance agent copies of contracts, and asks them to provide the required insurance. She indicated that securing insurance is not necessarily a barrier for her firm, and commented that it is [just] an additional step in “the process.” [#41]
- The white male representative of a majority-owned ESB-certified specialty contracting firm reported that most public sector clients accept the firm’s insurance but that a small percentage of his private sector projects require greater coverage, particularly when it comes to workers compensation. He added that this can be a challenge for the firm, saying, “... I can’t write it for just one job.” [#29]

Prevailing wage and other wage-related requirements. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts. Some companies reported difficulty with these requirements and others did not.

A number of business owners and representatives indicated that prevailing wage requirements present a barrier to working on public contracts. [e.g., #6b, #19, #26] Comments include:

- The white female owner of a WBE- and ESB-certified professional services firm reported that wage requirements are frustrating for her firm as well as her primes. She went on to say that her prices need to be increased because of them. She commented, “That’s challenging because lots of times, the numbers don’t pencil out.” [#24]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that in rural Oregon especially, the zone pay factor in prevailing wage packages can be a challenge for small businesses; paying the competitive wage makes it difficult to compete with larger firms that are able to afford heavier equipment. [#32]
- The white female owner of a DBE- and WBE-certified services firm reported that prevailing wage attracts higher quality employees; however, she noted that the process for paperwork and bidding is both complicated and financially risky. She went on to say, “We had to turn it down because we had missed a one page document ... we didn’t want to risk losing our whole company to try and deal with that.”[#34]
- When asked about prevailing wage, project labor agreement (PLA) or union requirements, the white female owner of a WBE- and ESB-certified specialty construction firm noted that she struggles to find labor workers or truck drivers who speak English, have a phone and a valid driver’s license. [#35]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business commented that small contractors face going out of business because of PLA requirements. He went on to say that Oregon PLA almost put his firm out of business due to many factors. [#40a]
- A white female owner of a DBE-, MBE- and ESB-certified general construction business recalled an incident where their firm stayed on the job despite not being able to manage the PLA requirements. She went on to say that they met with the union representative along with TriMet, and negotiated a way to stay on the job. [#40b]

The same business owner went on to mention that the PLA factors that were troublesome were wage costs, wage differentials, restrictions to union staff and paying benefits in cash. [#40b]

- A white female owner of a specialty construction business reported that when it comes to public agencies, including ODOT, prevailing wage requirements involve excessive paperwork and documentation. [#41]

- The female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm stated that there is no certified training program in Oregon for her industry unless the firm is union, which is a big issue for her non-union company. She commented, “We are an open shop, and we are kind of left out there hanging because we can’t go to the Northwest College of Construction They don’t have the workers we need.” She went on to say that she has spoken to the college about it, and that the college has tried to make a training program for them in the past, though it has never come to fruition due to a lack of space and funds. [#56]

Some firms said that complying with prevailing wage requirements was not a barrier when working on public projects. [e.g., #14, #16, #20, #28, #43, #48, #59, #TO2] For instance:

- The male representative of an international engineering business reported that prevailing wage requirements have not been an issue in Oregon, though it has caused problems in Washington. [#12]
- The white male owner of a specialty contracting firm reported that he has no issues with prevailing wage requirements, and noted that it gives a living wage to well-deserving workers. He added, “It also helps to level the playing field, to keep the people that would get jobs based on the fact that they’re willing to pay their workers less ... out of that marketplace. [And] I’m all for that.” [#22]
- An African American owner of a DBE-and MBE-certified specialty contracting firm commented that his employees like prevailing wage, and that he gets better employees because of it. [#46]
- The Hispanic American owner of a DBE-, MBE-, ESB-and SDVOSB-certified specialty construction firm reported that rates are “perfect,” and that he would not change anything. He went on to say that prevailing wages are a “blessing” for many Hispanic American workers. [#33]

Prequalification. Public agencies, including ODOT, sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

Some interviewees from construction firms reported that prequalification was difficult, cumbersome, confusing or invasive. [e.g., #12, #24, #33, #37] Comments include:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm indicated that prequalification requirements can be tedious. He commented that some jobs, especially as primes, require that a firm have past experience doing a job at least three to five times. He went on to say that in hindsight, he would have preferred to subcontract parts of many past jobs; he chose not to for fear of not meeting future prequalification requirements. [#6b]

- The white female owner of a specialty construction firm commented that when a work history is required, it could be a barrier to start-up businesses. She went on to say that if a firm doesn't have at least three years of experience, they must provide three letters of reference to ODOT. [#13b]
- When asked about prequalification requirements, the white male owner of a specialty contracting firm stated, "Once you get qualified with a state or public agency, you should stay qualified ... on every public job, there is a new project manager who hasn't heard of you You'd think there is a small database saying, 'This guy's all right,' but theirs isn't." He went on to say that while the inspectors in the field know him, the project managers do not. [#20]
- When asked about prequalification, the white male owner of a specialty contracting firm reported that a strong benefit is that prequalification can help eliminate underperforming or litigious business practices. [#22]

The same business owner went on to say that prequalification can also be a barrier for entry into the public marketplace, and noted that small businesses who want to gain the experience needed for prequalification often find "breaking into" the private sector equally as challenging. [#22]

- When asked about prequalification requirements, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he had a negative experience with a company that required his firm to have previous experience with them. [#28]
- A white female owner of a specialty construction business commented that the firm was interested in a bid with the Oregon Water Resource Department. After the firm inquired about an opportunity to bid, they realized that there was a "prequalification pool" of preferred firms that disqualified them from bidding. The same female business owner went on to report that on one state project, the required paperwork took 20 hours to complete, while the actual technical work took only two hours to complete. She added that her firm has learned to incorporate potential office work into the project cost when submitting public sector bids. [#41]
- The female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm reported that her firm has been able to meet prequalification requirements for several large companies and projects; however, she noted that the process is both tedious and time-consuming. [#56]
- A female engineer from a local government agency reported that the prequalification process can be a barrier if a consultant does not know "how to work" with ODOT. She went on to say that the County uses ODOT's prequalification process, and that a contractor without ODOT approval would need to submit prequalification information to the County. [#LA2]

- A white male board member of a contractors association reported that prequalification requirements have been a recent issue for members. He said, “[Prequalification requirements] can be a challenge in the public works area because of ... a ‘catch-22’ of prequalification that’s related too tightly to performance of a particular type of work” He went on to say that a firm may not have done a particular type of job recently enough to satisfy prequalification requirements, and even if they hire an employee with the required experience, public agencies do not consider that employee’s experience to be representative of the firm as a whole. [#TO4]

The same representative added that prequalification requirements are significant barriers for small, certified firms that want to break into public sector contracting; this is because prequalification requirements do not exist in the private sector, which is where small businesses most often begin. [#TO4]

Others reported few difficulties regarding prequalification. [e.g., #8, #26, #31, #40a, #40b, #TO1, #TO2]. Examples include:

- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that because she does a lot of public agency work, she already has the documentation needed for prequalification. She went on to note that her preparedness makes the process smoother overall. [#32]
- When asked if prequalification requirements have ever been an issue, a representative of a white woman-owned specialty contracting firm recalled one instance where the requirements were more complicated than usual. He went on to note that they still met those requirements, saying, “... it really hasn’t been that big of a deal.” [#39b]

Some representatives of engineering and other consulting firms were critical of the prequalification processes in the public sector, and indicated a need for transparency. Some specifically mentioned barriers posed by ODOT’s process. Comments include:

- A white female principal of a DBE- and WBE-certified consulting firm commented, “It is hard for us to know if they [ODOT staff] are actually using those lists to advertise jobs. It would be nice to know how they choose from those prequalified lists.” [#5]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that it can be difficult to prove your firm has done specific types of work, especially if the work was completed years ago. He added that ODOT’s prequalification requirements are a challenge to meet, and that they tend to write contracts “with larger businesses in mind.” [#11]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that while his firm is ODOT-accredited, many of the associations that audit and accredit them have expensive charges. He said that ODOT’s audit is not particularly expensive; it only requires a small application fee. He noted that the Army Corps of Engineers and [an association] have the most expensive audits. [#18a]

- On the topic of prequalification, the African American male owner of a DBE-, MBE- and ESB-certified engineering firm reiterated that if a business has not worked with ODOT previously, then they will have trouble securing work with them. [#28]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that the prequalification process involves a lot of paperwork, and that it is “a pain in the rear.” He went on to say that it can be frustrating when you have to go through multiple prequalification processes for cities, states and federal levels. [#30]
- A Subcontinent Asian American owner of a DBE-, MBE- and ESB-certified professional services firm commented that prequalification requirements are impossible to work with in certain scenarios. He commented, “The requirements are so humongous, it takes like several hours to go through those. And, in reality, what do they do? They ... generate nothing, in fact.” [#47]

A few interviewees indicated that prime contractors require subcontractors to prequalify. For example:

- The white male owner of a specialty contracting firm reported that many primes require subcontractors to prequalify. Although his firm does not require subcontractors to provide financials, he noted that many primes make that a requirement. He went on to say that his specialty contracting firm limits prequalification requirements to bonding agency names, insurance and different bonding rates, if applicable. [#48]

Non-price factors public agencies or others use to make contract awards. Public agencies select firms for some construction-related contracts and most professional services contracts based on qualifications and other non-price factors. Comments regarding this practice include:

Small and minority- and women-owned businesses made negative comments about having professional services contract selections not consider price. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm reported, “Small firms ... do better in the private sector because of the price.” She went on to explain that the government qualification-based services are disadvantageous for all small businesses because in those cases, price does not matter. She went on to say that working at low cost is a strength for many small businesses. [#3]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm indicated that awarding contracts based on non-price factors is about “who you know.” [#2]
- When asked about non-price factors, a white female principal of a DBE- and WBE-certified consulting firm reported that ODOT sometimes requires that a firm have at least two or three years of relevant experience. [#5]

- However, one interviewee discussed how consultants generally prefer non-price based selection. The white female director of a professional trade association reported that Qualifications-Based Selection (QBS) is how engineers prefer to be hired, “in lieu of low-bid.” She added that they have worked for many years to develop a “law” so that engineers can be paid via this method, and noted that it has helped their members when working in the public sector. [#TO1]

Many construction-related businesses had positive comments about non-price factors in contractor selection. [e.g., #1, #7, #20] Comments include:

- The African American owner a DBE-, MBE- and ESB-certified specialty construction firm reported that non-price factors are “extremely important” to his firm. He went on to say that non-price and non-low bid specifics help to “level the playing field” for everyone [#6b]
- When asked about non-price factors, a white male owner of an ESB-certified general construction firm reported, “[Non-price factors are] one thing I wish ODOT would do more of ... and I know some other agencies, like some federal agencies ... are able to do the ‘best value’ award process ... and we have gotten projects in the past that we weren’t low-bid But, I don’t believe ODOT does that ... or has the ability to [do that] Maybe state laws are different ... we’ve acquired contracts both ways.” [#14]
- When asked if more non-price factors should be taken into account when awarding contracts, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “It would be cool if they did [have more] ... if they had more qualification-based stuff.” [#16]
- When asked about non-price factors, the white male owner of a specialty contracting firm commented, “I think that ODOT, in general, has done a pretty good balance of recognizing the jobs they need special consideration on, other than just price. And I don’t see that they abuse that.” [#22]
- The white female owner of a DBE- and WBE-certified services firm reported that non-price factors can be useful in promoting small firms. She went on to say that non-price factors often provide more value to the client while encouraging higher wages for workers. [#34]
- On the topic of non-price factors, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she has had experience with a “scoring system” to award bids. She gave the example that a firm might receive five to ten points for safety, MWESB certification or references towards the bid, and noted that price would factor in at about 70 percent. She went on to note that the low-bid factor is a challenge for many contractors. [#25]
- The Hispanic American female representative of a minority business association commented that contract awards should not be based solely on low-bid, and said that those contracts tend to draw from the “bottom of the barrel.” [#TOFG2a]

However, some firms noted that non-price factors may exclude them from bidding on a contract. For example:

- A white female owner of an ESB-certified specialty contracting firm reported that some jobs require recent experience, typically in the last five years. She went on to say that an employer is more likely to hire a company with the five years rather than her firm's two years of experience, and noted that being a new business is a disadvantage. [#59]
- The African American president of a DBE- and MBE-certified construction business reported that experience requirements can be unnecessarily restrictive. He stated that both the City of Portland and ODOT require years of experience to perform certain work, and that this can prohibit contractors from growing their businesses. [#49]

Size of contracts. There were relatively few comments that large contract sizes were a barrier to firms on public sector contracts. Most of the discussion of this issue pertained to bonding requirements or other effects of large contract sizes such as prequalification.

Examples of those reporting large contract sizes for public sector agencies were a barrier included the following.

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that some projects are far too large for her firm as well as other small businesses. She added that while “the scope” is sometimes good, the time limits cause those jobs to be “out of reach.” [#25]

The same female business owner added that some projects are packaged with four-week completions, and noted that her firm cannot work within that timeframe. She went on to comment that she had seen a four week timeline become eight weeks for another firm. She added that if she had known it would be an eight week project, she would have submitted a bid. [#25]

- When asked if the sizes of contracts has been an issue for the firm, a male representative of a white woman-owned specialty contracting firm reported that their contracts have become larger over time. He went on to say that they had to train employees to perform more work as the company grew, and noted that they would not bid jobs that they “weren’t able to take care of.” [#39b]

Unnecessarily restrictive contract specifications. The study team asked business owners and representatives if any contract specifications restricted opportunities for obtaining work. Reported incidents spanned both public and private sectors.

Many business owners and managers indicated that some specifications are overly restrictive and present barriers. It appears that some businesses choose not to bid due to what business owners and managers perceive to be overly restrictive contract requirements. [e.g., #24, #TO1]

Comments from the in-depth interviews include:

- When discussing prequalification requirements, the white male representative of a majority-owned ESB-certified specialty contracting firm reported of an incident, or “exception” where ORPIN put up a contract in which the company bidding had to be the distributor of a specific type of product. He explained, “[This] effectively eliminated everybody from bidding on the project except [for] one company.” He went on to report that he found “three or four” more contracts on ORPIN that had the same types of pre-qualifiers. [#29]
- When asked about unnecessarily restrictive contract specifications, the white female owner of a specialty construction firm reported that in her industry, some contracts hold the contractor responsible for any risks associated on the jobsite’s subsurface. She noted that it should be the agency’s responsibility to investigate the jobsite, and added that this is a common barrier for small contractors. [#13b]
- When asked about unnecessarily restrictive contract specifications, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that there are many unnecessarily restrictive contract specifications and contract clauses in both the public and private sector. He cited “pay-if-paid” clauses, “indemnity” clauses and “highest standard of care” as examples of these. [#18a]

The same business owner went on to say that the firm has conservative in-house legal counsel, and noted that about 20 percent of opportunities are lost due to contract terms. [#18a].

- The white female owner of a DBE-, WBE- and SBE-certified construction business referenced a new contract specification that she and other business owners find restrictive. She reported, “I think it caught most people by surprise. They put in the job specs that it is the contractor’s responsibility to ... get their utilities moved in a job. Utilities like gas, electrical, water, sewer ... whatever is out there [and] in your way. It used to be ODOT that forced those agencies to do the moving.” She went on to say, “... and the primes don’t have any authority It’s a stupid rule.” [#32]
- On the topic of unnecessarily restrictive contract specifications, the white male owner of a specialty contracting firm reported that he has noticed contracts written with specifications that are out of date, or written to an old standard and practice. For example, he described a parking lot project at an airport that included concrete pathways for the buses. The specifications called for a particular machine, which he did not have. Because of this, he “spec’d out” the project with another machine while bidding \$200,000 lower. Still, without the required machine, his firm did not get the job. [#20]

- When asked about unnecessarily restrictive contract specifications, a Native American owner of a construction firm reported that the industry has complained about the fact that if a contractor not paid has given notice, than an increased interest rate is required (9%). He added that the increased interest rate only applies when prime contractors owe subcontractors, not when ODOT owes the prime contractors. [#26]
- When asked about unnecessarily restrictive contract specifications, the white male representative of a majority-owned ESB-certified specialty contracting firm commented, “[My] only issues or concerns would be [with the] payment timeframes” [#29]
- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm commented that large firms work with agencies to add irrelevant specifications to contracts. [#37]
- A representative of a white woman-owned specialty contracting firm reported that they have had difficulty meeting contract requirements, particularly for Portland contracts. He commented, “You will have so many [required] minorities, you will have so many [required] women” He went on to note that it is difficult to find enough people to fulfill those requirements. [#39b]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that unnecessarily restrictive contract specifications are common, especially in the private sector. He mentioned an experience where a general contractor wanted project accountability from both the firm and him personally. He also mentioned another case where his firm was expected to continue working a job in the absence of payments, and with an uncertainty of even receiving payment. [#51]
- An African American owner of an MBE-certified professional services firm reported that construction-related jobs “sneak in” extra specifications not indicated in contracts that his firm feels obligated to do, otherwise he risks getting into trouble or losing the job. He also noted that sometimes bonding and insurance are unnecessarily high and “out of line.” [#55]
- A Subcontinent Asian American owner of a DBE-, MBE- and ESB-certified professional services firm reported having difficulty with the nomenclature of certain contract specifications, and that this makes it difficult for his company to report and find correct values; he cited audited rates and negotiated billing rates as examples. [#47]

Some businesses reported that contract specifications were not much of an issue for their firms. [e.g., #8, #12, #14, #15, #16, #25, #31, #48, #TO2] Comments include:

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that when her firm bids on ODOT contracts, they know exactly what they are bidding. She went on to say that insurance is the only restrictive issue for the firm. [#27]

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that aside from his firm's issues with insurance, he has no other problems regarding contract specifications. [#28]
- Although unnecessary contract specifications have not been a barrier for his firm, the white male representative of a white woman-owned WBE-certified construction business reported that there is still a learning curve to understanding the requirements of each public agency due to each agency having its own paperwork, template of specifications and project organization. [#50]

Bid process. A number of business owners and representatives found the bid process to be challenging. [e.g., #24, #30, #39b, #44]

Some negative comments pertained to the time provided to submit a bid or proposal, language used in the bidding documents and RFP, and other concerns. For example:

- A public meeting participant remarked that he was aware of an RFP for a small business contracting, but the time required to get the contract is not worth it. [#PMP12]
- When asked about the bidding process, the African American male owner of a DBE-, MBE- and ESB-certified specialty construction firm indicated that his firm is not given enough time to submit RFPs. He commented, "We could utilize and benefit from an extended bidding time They say this is due next week or two weeks ... [it's] just too short of a time for us." [#6b]
- When asked about the bidding process, the white male representative of a majority-owned ESB-certified specialty contracting firm stated that using "non-industry terminology" paired with specific product specifications can make the process "cumbersome." [#29]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm indicated that government contracts should rely more on relationships, because the current process feels "cold, bland and unfriendly." He added that some aspects of the bidding process are a guessing game because of the lack of transparency in requirements (i.e., preferred vendors, estimated budget expectations on bids). [#33]
- The white male director of a contractors association commented primes face challenges when bidding a project with a team of DBEs. They experience uncertainty over whether or not ODOT would consider the DBE to be performing a commercially useful function, uncertainty about the DBE's availability and uncertainty about the DBE's ability to submit timely proposals. [#TO3]

Some of the complaints about the bidding process related to establishing rates for work or labor. For example:

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reiterated that better identifying the BOLI (Bureau of Labor and Industries) rates with specific dates would greatly improve the bidding process. She added that more reasonable due dates would improve the process as well. [#25]
- When asked about the bid process, the owner of an ESB-certified engineering-related firm reported that he has had some difficulty with primes not paying his fees. He commented, “They have told me to lump my MOBE [mobilization] fees in a different way ... [to] include my MOBE fees into the hourly ... rate, because they wouldn’t pay [for them]” [#21]
- When asked about the bid process, the African American female president of a DBE- and MWESB-certified specialty contracting firm commented, “Well, the bidding process is always complicated, and we have to take into consideration everything ... our supplies, equipment, and our employee wages and benefits ... all in that one rate per hour so that then we just bid by the hour. It has profit, overhead, everything in it. So that fully loaded rate is important because that’s how you ... make money. If you haven’t got that right, [then] you’re in trouble.” [#8]
- When asked about the bidding process, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that audited overhead rates are challenging for small businesses, and noted that ODOT uses those rates unless they use negotiated billing rates, which compares many small engineering firms’ rates to determine a rate. [#18a]

The same business owner added that ODOT occasionally has contracts that require engineering firms to have audited overhead rates. He went on to note that 20 percent of the federal and state opportunities that his firm does not bid on are because of the audited overhead rate requirement. [#18a]

- The white male owner of a specialty contracting firm commented that agencies like to use “bid forms” even though the forms often provide contractors with units that are incorrect, to the firm’s benefit. He went on to say that they bid to the agencies’ units that are known to be incorrect. [#20]

A few interviewees complimented ODOT on its bid processes. Others did not find it challenging [e.g., #28, #TO2] For example:

- When asked about the bidding process, the white male owner of a specialty contracting firm commented that ODOT’s system has improved over the years. He added that ODOT offers quick responses, and that they “handle questions well” He continued, “[They] issue the proper addendums. They give people a timely notice so they can make the changes ... from my perspective, anyway, the bidding process works pretty well.” [#22]

One interviewee commented about the difficulty his firm has, as a subcontractor, helping to meet contract goals:

- When asked about the bidding process, the representative of a majority-owned construction firm reported that although his firm is not minority-owned, they still receive pressure from general contractors to get minority percentages in their subcontractor quotes. He went on to say that while they have never been able to get full minority percentages, they can hire minority truckers to get close. [#19]

Untimely payments. Many businesses and ODOT staff discussed whether untimely payment is a barrier to doing work with some public agencies or primes. Some interviewee indicated difficulties and offered suggestions for improvement, sometimes specifically for ODOT. Some companies reported that slow payment was not an issue on public sector contracts.

Some reported that untimely payments were a challenge on public sector contracts.

[e.g., #31, #34, #41, #42, #PMP34] General comments from the in-depth interviews include:

- When asked about timely payment from agencies or primes, the African American female president of a DBE- and MWESB-certified specialty contracting firm reported that payment by government agencies is slower than the private sector. She commented, “We usually require 30 days ... but in the government and public sector work it’s up to 90 days before you can get paid.” [#8]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported that the City of Portland is the best when it comes to timely payment because they pay every other week; other public agencies (e.g., ODOT) pay 30 to 60 days later. He went on to say that long waits for payments and retainage are challenging for small contractors. [#40a]
- The white male executive of a majority-owned equipment firm reported that public entities have been paying slowly over the past two years. He went on to say that untimely payments are more common when dealing with public entities. He stated, “It used to be that we never saw a public entity go beyond 60 days, and now it’s becoming more and more often that I see cities and counties going out sometimes 90 days and beyond 90 days I don’t know what the reason is.” [#57]
- The Hispanic American owner of a construction business stated that timely payment is problematic, and that there are no repercussions if agencies pay late. He went on to say that this has not been a huge issue for his firm because he has the cash reserves to accommodate late payments. He also noted that toleration of untimely payment surprises him. [#58]

There were many comments about slow payment of subcontractors, sometimes attributable to prime contractors. Discussion included:

- An African American female owner of a DBE- and MWESB-certified engineering firm indicated that untimely payments are a problem for her firm; she would prefer that public agencies directly pay subcontractors. She went on to say that late payments are a challenge for DBEs, as they do not have much capital to begin with. [#3]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that receiving payment has taken up to 180 days for some primes, and added that this sometimes occurs even if the prime received funds from the public agency on time. [#10]
- When asked about timely payments, a Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm commented, “It’s really a wild game.” He went on to say, “In the public sector you don’t get paid until they [primes] get paid It has happened to us a few times in [the] past where, worst examples were that we were not getting paid for almost close to 90 or 100 days.” [#47]
- One public meeting participant indicated that late payments were a factor in her business failing. She said that late payments ruined her credit. Though her business closed in 2012 she is still receiving late payments, years later. She commented that her firm waited months to get a check that was \$50,000 short from the contractor because ODOT made a mistake on the amount. [#PMP15]

She said, “... I appreciate that there is a prompt payment rule.” She also commented that there is no accountability from ODOT when it comes to prompt payments from a prime to a sub. She added that she knows of several businesses that have closed due to late payments. She commented, “They’ve [business owners] lost more than just their business. They are losing homes. It’s ruining their lives because they are not able to meet the financial obligations that the payrolls and business brings on them.” [#PMP15]

- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that some companies fail to pay the last \$4,000 or \$5,000 to subcontractors because they know it would not be worth it for the subcontractors to hire an attorney to fight it. [#32]
- A female ODOT staff person said that posting what payments are made to primes online might help subs know when primes have been paid by ODOT. She reported that ODOT Civil Rights staff will help address payment issues raised by subcontractors. They often find that payment is slow because the contractor has not submitted necessary paperwork to ODOT. [#OS5]

ODOT has considered a new program that requires subcontractors to log into an ODOT system to confirm that they were paid, but Interviewee #OS5 reported that there were ODOT firewall issues that complicated this potential initiative. [#OS5]

- An ODOT staff person commented that contracts between primes and subcontractors must include clauses concerning timely payments. [#OPMP17]
- In response to a comment from a local firm owner, an ODOT staff public meeting participant said, “You can always come to us if you have issues with payment or nonpayment or anything pertaining to DBE issues ... use your field coordinators as a resource, because they really are.” [#OPMP18]

This staff person added that payment of primes is public record so he can give that information to a subcontractor that makes an inquiry. He added, “We’ll help and do all we can. That’s why we’re here.” He went on to explain, “Oregon’s public contracting code does have prompt payment provisions ... and there’s actually penalties, automatic penalties if they fail to pay within 30 days.” [#OPMP18]

- However, one ODOT staff person stated that ODOT faces challenges knowing their relationship is with the prime contractors and not the subcontractors. ODOT cannot interfere unless safety matters arise as disputes could result. [#OPMP17]

Some comments pertained to slow payment because of change orders or other changes in the project. For example:

- The white male president of a majority-owned construction business reported, “The [ODOT] change order process is very slow. Sometimes we are unpaid for six months for change orders. This problem seems to be regional.” [#1]
- The white male owner of a specialty contracting firm commented, “In general, ODOT pays ... fairly quickly. It’s when you get into a dispute [that] it can drag ... out and take a while.” He added that for subcontractors, any change in project scope could be problematic. He noted that when working as a prime, his firm sometimes pays its subcontractor prior to receiving their own payment. He commented, “... to build a job on your subcontractor’s back and make them be the financier of the job [is not a good business practice].” [#22]
- When asked about timely payment by agencies or primes, the representative of a majority-owned construction firm commented, “It is what it is.” He added that it should be faster, but noted that adjustments to bonuses and quantities may be a cause of delay. [#19]

Retainage and related issues were also mentioned, by some. Comments include:

- The white male executive of an African American-owned engineering and consulting firm expressed that they had an issue on a job as a subcontractor; they completed their work early, and ODOT did not pay the prime until the job was almost entirely finished. He went on to say that when his firm approached ODOT to request earlier payment, the prime “didn’t have a sympathetic ear.” He added that for small companies without lines of credit, delayed payment is a challenge. He went on to comment that cash flow problems are definite barriers for small businesses. [#9]

- The Native American male owner of an MBE- and ESB-certified specialty contracting firm commented, “I have a little bit of a problem with [timely payments] [the project] was for ODOT ... even though I was finished with the job, the prime contractor couldn’t pay me because they had to wait for ‘final,’ so I had to wait until he got his ‘final’ before I could get paid, which was three months out ... if the prime doesn’t get paid ... I can’t get paid.” [#15]
- A female ODOT staff person indicated that timely payment is still an issue on ODOT contracts. She reported on an ODOT committee dealing with timely payment and release of retainage issues. ODOT has decided on quarterly release of retainage. She said that eliminating retainage entirely could affect bonding and insurance on ODOT contracts. And, ODOT needs completed paperwork to release retainage on a quarterly basis, which can be an issue for some subcontractors. There are also provisions that allow ODOT to withhold potential payments to a prime contractor. [#OS5]
- A public meeting participant indicated that although ODOT has changed policy for requesting retainage, her firm waited two years for payment after submitting all required documents. She stated that late payments are not always the fault of the prime, but ODOT’s attitude that their contract is with the general contractor and not the subs. [#PMP13]

One firm had a negative comment about how ODOT calculates what to pay each month:

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm has had issues with timely payment from ODOT specifically. He reported that ODOT does not consider the invoice he sends them detailing the work hours accomplished by his firm over the course of projects. He went on to say that ODOT instead pays him the price of the bid divided by how many days were spent on the project. He went on to comment, “Their method of assessing monthly cost to pay the project is not industry standard. It is so flawed It’s a sure way to destroy a business and put a business in debt.” [#28]

Some comments pertained to slow payment because of lack of complete documentation from prime contractors and subcontractors. Examples include:

- A male ODOT senior executive reported a barrier that recently surfaced. He explained that in order to pay a contractor, ODOT must have documentation including the payroll from the prime, DBEs and all other subs. Technically ODOT can withhold 25 percent of the payment from any business that does not submit payroll. Once that happens, if the subcontractor provides payroll, ODOT has to pay the firm within 14 days or they face a large penalty. He indicated that to avoid penalties, ODOT does not enforce the rule about withholding 25 percent. [#OS1]
- A female ODOT staff person reported that contractors complain about ODOT’s requirements for payment reports. ODOT is considering going from requiring monthly reports to quarterly reports. [#OS5]

Others indicated it is not an issue for their firms or were complimentary about payment on ODOT projects. [e.g., #14, #24, #26, #27, #29, #35, #43, #44, #49b] Comments include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that payment can take up to 120 days on federal contracts. For cities and the State of Oregon, she reported that it can take 30 to 60 days. When asked about ODOT specifically, she reported no complaints. [#2]
- When asked about timely payments by agencies or primes, the Native American male owner of a DBE- and MBE-certified specialty contracting firm commented that it typically takes longer to receive payments in the private sector, and added that the public sector usually pays within 30 days. [#16]
- On the topic of timely payments by agencies or primes, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented, “You always get paid for your work.” He added that ODOT and other public agencies do a good job making primes pay their subcontractors. [#18a]
- The white female owner of a DBE-, WBE- and SBE-certified construction business stated that ODOT is much better than they were in the past regarding timely payments. She reported, “They [ODOT] have become much better They upload [payments] between the first and the eighth of the month ... so you know really by the seventh what they’re planning on paying you.” [#32]
- When asked about timely payments from agencies, the owner of an ESB-certified engineering-related firm reported, “I’ve had no problems, no problems at all.” He went on to note a few instances where agencies or primes forgot to pay him, but promptly corrected the problem after being contacted, resulting in him being paid 1 to 2 months late. [#21]
- A white female principal of a DBE- and WBE-certified consulting firm commented, “I work closely with the project managers to make sure I put on the invoice exactly what they want” She went on to indicate that this is why her payments are routinely timely. [#5]

Other experience with ODOT or other agencies regarding any barriers. In addition to factors discussed above, interviewees had other comments specific to ODOT processes, and some shared recommendations for improving the process.

Some interviewees brought up the ODOT inspection or testing processes or ODOT project managers. Comments included:

- The Hispanic American owner of a construction business reported that contractors get frustrated when they have to “jump through hoops.” He stated, “Sometimes they want to argue [about “jumping through hoops”] whether it be an inspector, a project manager for ODOT, or whatever. It always helped me if you just accept the fact that that’s what that individual is required to do Maybe it doesn’t seem logical at this specific time, but just understand they’re doing their job, that’s what they have to do.” [#58]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm reported that public agency work has specific requirements to fulfill the customer’s request; however, private work does not have that same “hardline” contracting. She went on to say that the firm still tries to meet the paperwork and “red tape” requirements of public agencies. [#54]

When asked about ODOT specifically, the same female representative added that the owner has worked with ODOT several times, and that ODOT is consistent with other public agencies. [#54]

- The white male representative of a white woman-owned WBE-certified construction business reported that they [ODOT] have more “hoops to jump through,” and that their testing of materials is more stringent than other public agencies due to federal highway standards. He went on to comment that ODOT disagreement settlements are a long process, and that this is a disadvantage for small contractors who likely do not have access to the same legal resources as ODOT. [#50]
- The white female owner of a WBE- and ESB-certified specialty construction firm reported that when comparing ODOT to WSDOT (Washington State DOT), WSDOT tends to form better relationships with contractors; their project inspectors make a point to introduce themselves and provide contact information. She went on to comment, “They [ODOT supervisors] put blocks in front of you ... they’re not there to help you They’re there to catch you ... that’s the image I get. They’re there to catch you because you are going to cheat them, that’s the feeling ... all the time.” She went on to say that ODOT has a “standing culture” of not supporting contractors. [#35]
- On the topic of barriers for firms when working with public agencies, a white male board member of a contractors association commented, “It’s all about how you present yourself ... it affects your work out on the job. If you don’t follow all the rules, [all the] necessary steps, the inspector can get a little ‘cranky’ ... [and be] more difficult to deal with.” He went on to say that following schedules and timelines are important when doing business with public agencies, and noted specifically that ODOT is very adamant about firms following their schedules and meeting their deadlines. [#TO2]

Other comments made by some interviewees pertained to a variety of topics. For example:

- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that at the state level, there are multiple “barriers of entry.” He commented, “... [at] the federal level, as far as I can tell, it’s really high level integrity It’s been all positive They want to see the best in a veteran-owned business ... a Hispanic owned business.” He commented, “[With] the state, it feels [like] there’s more obstructions, there’s more resistance, more lack of understanding for small, Hispanic contractors All around ... a major missing foot in the door.” [#33]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm reported that private agencies typically have one point of contact; meanwhile, public agencies such as ODOT have multiple points of contact, which “can be confusing, inefficient and cause delays.” He went on to indicate that the level of bureaucracy at ODOT can also be a barrier for some businesses. [#30]

The same business representative went on to say that there is an “educational gap” that exists when it comes to knowing ODOT processes. He then suggested that ODOT hold workshops on how to follow their processes. [#30]

- The white female director of a professional trade association, when asked about members’ experiences with ODOT specifically, responded that her organization has an ODOT liaison committee that meets with ODOT to try and resolve issues. She added that small firms have access to the ODOT committee, and noted that it is good for them to get involved. [#TO1]

H. Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denial of the opportunity to bid;
- Bid shopping and bid manipulation; and
- Unfair treatment.

Denial of the opportunity to bid. The study team asked business owners and managers if they had ever been denied the opportunity to bid.

A number of interviewees said that they had been denied the opportunity to bid on projects, or had knowledge of this happening. [e.g., #20, #55]

Some attributed the denial of opportunity to bid to prequalification requirements. (Prequalification as a barrier is also discussed elsewhere in this appendix.) For example:

- A white male board member of a contractors’ association reported knowing of membership firms denied opportunity to bid due to prequalification requirements. [#TO4]

- A white female owner of a specialty construction business reported that her firm was denied the opportunity to bid on an Oregon public agency project because they were not prequalified for the preferred contractors list. [#41]

Other related comments included:

- The white male owner of an ESB-certified engineering firm reported that his company was denied work on a federal highway project. He stated that ODOT said his company was denied, and that he could not protest because he was not a prime contractor. [#44]

Some specifically attributed the denial to discrimination based on race or gender. Comments included:

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that in the past, when the previous disparity study was published, “Latino businesses” were excluded from ODOT opportunities to bid. She elaborated by recalling an instance where an ODOT representative indicated that her bid would not be accepted due to the specific goals for Subcontinent Asian and African American contractors. She went on to say that for many years, her assumption was that ODOT projects with specific goals did not include “Latinos or Hispanics,” and noted that her firm, and possibly others, lost many opportunities because of it. [#25]
- The white female owner of a DBE- and WBE-certified specialty contracting business commented that her firm rarely wins contract bids due to hard goals. When asked if she feels she was ever denied the opportunity to bid because of her ethnicity, she went on to say, “Yes ... it’s pretty consistent ... [nobody is] looking for bids from my ethnicity.” [#42]
- When asked if her firm has ever been denied the opportunity to bid, the African American female president of a DBE- and MWESB-certified specialty contracting firm reported, “Yes, a lot of times it may be because I am a woman ... they don’t take us as being as responsible as a male.” She went on to comment, “They’ll allow you to bid You will go through an interview process, [and] it just depends how they like you.” [#8]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that before ODOT required larger companies to hire certified firms, her firm missed opportunities, as they were not perceived as “legitimate bidders.” She added, “When they quit doing [that], it was obvious that the same people I’d been doing business with ... quit asking. I had to pursue them. [#32]

Most interviewees indicated that they have never been denied the opportunity to bid. [e.g., #10, #11, #12, #13b, #14, #15, #16, #19, #21, #23, #24, #26, #27, #28, #29, #30, #31, #33, #34, #35, #37, #43, #45, #46, #47, #48, #49, #50, #51, #54, #56, #58, #TO3]

Bid shopping and bid manipulation. Business owners and representatives often reported being concerned about bid shopping and bid manipulation, and the possibility of unfair denial of contracts and subcontracts through those practices. [e.g., #6b, #19, #23, #27, #29, #32, #34, #35, #37, #43, #44, #45, #55, #59, #TO4, #AI11, #PMP23]

Many interviewees indicated that bid shopping and bid manipulation is prevalent in the Oregon construction industry and negatively affects subcontractors. Comments include:

- When asked about bid shopping, the white male owner of a specialty contracting firm indicated that it happens frequently on “bid day.” He went on to say that he is skeptical when a firm receives a subcontractor bid, and then 20 minutes later the firm receives another subcontractor’s bid that is \$100 cheaper for the same job. He added that there are a few subcontractors known for bid shopping who tend to undercut the lowest bid on bid day. [#22]
- When asked about bid shopping, a Native American owner of a construction firm reported, “Yes ... it happens a lot ... that’s why people ... send their numbers in at the very last minute One guy will get ahold of another guy’s number, and next thing you know ... the next morning he cuts his price and he’s just like \$1,000 or \$5,000 underneath the other guy’s price, [changing the number overhead].” [#26]

When asked about bid manipulation, the same business owner stated that he does not see much of it. He went on to recall an early experience with a contractor who called him to let him know that he was underbidding the job. It turned out that he did not take into account the project’s entire costs when he submitted the bid, and he commented, “To me, I don’t think that’s unfair.” [#26]

- The white male representative of a white woman-owned WBE-certified construction business reported that bid shopping and manipulation are common in the private sector. While his firm does not participate in bid shopping, he noted that some general contractors contact them after the bid to lower their bid. [#50]
- When asked about bid shopping and bid manipulation, a white male board member of a contractors association commented, “We all assume there is some of that going on. We just don’t know who is doing it.” [#TO2]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented that bid shopping and bid manipulation happen most often when working with general contractors on private projects. [#25]
- The African American male president of a DBE-, MBE- and ESB-certified specialty services and supply firm commented, “Bid shopping? Come on ... those guys always do that ... but I have never had a problem with it.” [#7]

- A white male owner of an ESB-certified general construction firm commented, “[It is] hard to know ... I feel like [bid shopping] has probably happened in the past Nothing recent comes to mind, but it’s something you suspect at times, yeah.” He reported the same opinion about bid manipulation, but “I couldn’t prove it.” [#14]

Owners and representatives of engineering and other consulting firms also reported that bid shopping or bid manipulation affects them. [e.g., #13b, #15] Comments include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported of an instance where an agency requested a cost estimate from her and later developed a competitive RFP that was very similar to the figures discussed with her firm. [#2]

On the topic of bid manipulation, she reported that the firm has been included on proposals that did not result in work for the firm, even if the prime got the job. [#2]

- When asked about bid shopping, the white male executive of an African American-owned engineering and consulting firm reported that he has experienced it with prime contractors. [#9]

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that she has only experienced bid shopping from one firm. [#10]

When asked about bid manipulation, the same female representative reported that a prime contractor used her firm to help win a bid, and did not use her firm on the project. When asked if she had reported this mistreatment, she indicated that she did not, and stated that she did not know what steps to take to do so. [#10]

- When asked about bid shopping in his industry, the Native American male owner of a DBE- and MBE-certified specialty contracting firm commented that while he cannot prove that he has experienced bid shopping, he believes that it definitely exists in his industry, unrelated to race. [#16]

When asked about bid manipulation, the same business owner commented that bid manipulation exists when general contractors solicit bids to fill their minority goals. He added that the minority firms are contracted to just do the minimum to meet goals, and stated, “Use me for what I bid, or don’t use me I’ve had it go both ways.” [#16]

- When asked about bid shopping and manipulation, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented, “We ran into a little of that, not on public work, or at least not on work directly for a public agency ... more for work with a general contractor or owner.” [#18a]

- Regarding bid shopping and bid manipulation, a Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm commented, “That’s hard to answer.” He went on to say, “You do not know what happens once your proposal has been submitted.” [#47]
- An African American female owner of a DBE- and MWESB-certified engineering firm reported of instances where larger prime firms have her firm listed on their proposals to meet goals, though she never performs the work or hears from them again. [#3]

One interviewee reported of a unique “shut out” tactic to prevent firms from bidding and securing contracting opportunities. For example:

- The African American representative of a workforce organization reported that prime contractors require minority-owned firms to submit early bids, which allows time to shop those bids. He went on to say that on occasion, prime contractors require subs to include work types outside of the required workscope so that they can report that the subcontractor bids they received were too high. He added that if subs, in response, do not include outside scope tasks, then the contractor reports them as non-compliant. He commented, “This is a way of keeping you from bidding the work.” [#TOFG1c]

Others interviewees indicated that they were not concerned about bid shopping or bid manipulation. [e.g., #8, #12, #24, #28, #30, #31, #33, #39b, #46, #49, #54, #56, #TO3]

Unfair treatment of subs by primes. The study team asked companies in general about other unfair treatment.

Some businesses, including minority- and women-owned firms, reported unfair treatment. [e.g., #13a, #23, #35, #50, #58] Comments include:

- When asked about unfair treatment by prime contractors and customers during the performance of work, the African American female president of a DBE- and MWESB-certified specialty contracting firm indicated that it happens frequently in the construction industry. She commented, “[Primes] change their mind, they change [it] a lot ... sometimes they stretch [what you are qualified to do] into more” She added that doing work outside of the original scope could lead to accident and injury. [#8]

On the topic of unfair treatment regarding approval of work by prime contractors, the same interviewee commented, “You ... meet face-to-face with these contractors ... their consultants ... [and] no matter what, they want more than they ask for.” [#8]

- Concerning unfavorable treatment, the female owner of a specialty construction firm reported that her firm worked on a project where a prime did not properly inspect the jobsite. The jobsite was in poor condition, and the prime blamed her firm for substandard [specified] work. She added that perceived damage was more than her firm could financially cover at the time. [#13b]

- A white male owner of an ESB-certified general construction firm reported that the firm has experienced unfair treatment where expectations were higher for certain subcontractors. He then considered the possibility of a double standard in these instances, and noted that the experience was not on an ODOT project. [#14]
- The white male owner of a specialty contracting firm reported that he has experience with unfair treatment by both prime contractors and customers during performance of work. He recalled an experience on a job where the prime had a “god complex.” For award of a concrete project, they required that his firm place funds in an escrow account for 20 years. [#20]
- When asked if his firm has ever experienced unfair treatment regarding approval of work by prime contractors, the owner of an ESB-certified engineering-related firm reported that some private sector companies expect bigger insurance limits from him. However, he noted that he sometimes receives lenience because his work tends to be “non-intrusive.” [#21]
- The African American president of a DBE- and MBE-certified construction business reported that he has experienced unfair treatment by primes, and gave an example where a prime accused him of being inefficient. However, after a job “walk-through,” the prime found that he was actually being very efficient. [#49]
- The African American representative of a workforce organization reported that prime contractors often add additional scope to subcontractors’ work; the options for the sub are to pay out more money to complete the added work, or to enter a legal battle with the prime contractor. He stated, “Usually, we default. We’ll take the loss and just do the work.” [#TOFG1c]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported knowledge of a public agency prime contractor giving a walk-through privately to a contractor, when there should have been a mandatory walk-through for all of the contractors interested in bidding. [#40a]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported that in one instance a larger firm’s actions bordered on being unethical. He explained, “Yeah I have an example of it.” He explained that, while working under a subconsultant to a prime, his company received orders he believed to be incorrect. When he reported the issues, the subconsultant denied his firm the opportunity to speak to the prime directly for clarification; so, his firm followed the subconsultant’s orders. The prime found the work done wrong, blamed his firm and demanded corrections. His firm never received payment for any work. [#47]

- When asked about unfair treatment, the white male owner of a specialty contracting firm reported that although he has not witnessed unfair treatment firsthand, he acknowledges that it exists, “I don’t think it’s necessarily racial or gender, or a small business or a big business I just think there’s a practice sometimes that happens, that somehow, that parties get crosswise and then the fair treatment goes out the door Again, I don’t think it’s prevalent in the industry I think it’s out there a little bit.” [#22]
- On the topic of unfair treatment by primes and customers during the performance of work, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male commented that unfair treatment is “the nature of the beast,” and not based on gender or race. [#27]
- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm reported that he has encountered a lack of respect towards his company’s services from those who benefit from the safe environment that it provides. He indicated that he has heard trash talking, yelling directed at his employees and an overall lack of respect. He described these instances because of lack of communication between his company and the construction workers. He went on to report that while this behavior happens frequently with several prime contractors, he has not heard any racial or derogatory insults from their workers. He has, however, heard such insults from civilians. [#48]

Other interviewees reported that they had no experience with unfair treatment. [e.g., #10, #12, #15, #16, #18a, #19, #21, #23, #24, #26, #27, #28, #29, #30, #33, #34, #37, #46, #54, #56, #TO3]

I. Information Regarding any Racial-, Ethnic- or Gender-based Discrimination

Part I reports factors that specifically affect industry entry and advancement for minorities and women (or MBE/WBE/DBEs) including racial-, ethnic- or gender-based issues concerning:

- Stereotypical attitudes and other unequal treatment;
- “Good ol’ boy” network or other closed networks; and
- Unfavorable work environment or other factors specifically affecting entry or advancement.

Stereotypical attitudes and other unequal treatment. The study team asked interviewees about whether or not they experienced or were aware of any stereotypical attitudes, unequal treatment or other forms of discrimination affecting minorities or women, or minority- and women-owned businesses.

Many interviewees reported unfair treatment based on race, ethnicity or gender. Comments included:

- When asked about unfavorable treatment for minorities or women, the white male executive of an African American-owned engineering and consulting firm commented that he has not witnessed this from public agencies, though he has seen individuals show their own “personal bias.” [#9]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm commented that white firms in his industry “go in [to a job and are] considered competent until proven incompetent.” He added, “[DBEs and MBEs] go in competent and are considered incompetent [by default].” On the topic of unfavorable treatment that is based on race or ethnicity, the same African American business owner added, “... the problem is that it’s covert, you know where it’s coming from, but we haven’t been called [N-word] on the project in a long time.” [#6b]
- An African American female owner of a DBE- and MWESB-certified engineering firm reported that ODOT is tougher on smaller firms, especially DBEs, even if the small firm has delivered quality work. She went on to say that the mindset of ODOT is DBEs do not deliver. [#3]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female commented that her firm works twice as hard as others to “have the same result,” and called this a “hard fact” for minority firms. [#10]
- When asked about unfair treatment by prime contractors and customers during the performance of work, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she had an experience as a subcontractor where a superintendent on the site made unfair “demands” of her firm because her workers were Hispanic. She went on to say that her workers were told to clean their site while a group of white workers did not have to clean theirs, even though their site was dirty as well. She added that many general contractors and superintendents are not “trained in diversity.” [#25]
- When asked about unfair treatment, the white female owner of a DBE-, WBE- and SBE-certified construction business reported, “Yes, I’ve experienced that ... holding you to a different standard ... changing schedule ... those kinds of things I think are unfair, [and] have been unfairly done to me personally.” [#32]
- When asked if she sees discrimination because of her race or gender, an African American female owner of a DBE- and MWESB-certified engineering firm reported, “I am right there saying ‘hi’ and there are people who just give me the cold shoulder They are not just whites, as whites always get blamed, but other minorities as well.” [#3]

- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm reported knowledge of unfair treatment of small minority subcontractors. She indicated that most general contractors are white, and do not speak highly of certain subs because of cultural differences and language barriers. [#36]
- When asked about unfavorable treatment that has affected minority- or women-owned businesses, the Hispanic American female representative of a minority business association commented in regards to previous disparity studies, “Yeah, we’re not the ‘right’ color Again, I think the consensus is that the data that was used last time was old data ... at the time ... [they used] others that are large contractors that are no longer in the area, no longer available, no longer in the industry The data was bad ...the ... conclusions that were made were bad, and ‘Latinos’ got left out.” [#TOFG2a]
- When asked about unfavorable treatment that has affected minority- or women-owned businesses, the African American representative of a minority contractors association stated that the result of previous disparity studies did not accurately reflect where the community was, from a minority- and women-owned business standpoint. He added that there are many underutilized firms, and indicated that prime contractors have treated individuals as if they are “unimportant,” offering them limited support. [#TOFG2c]
- When asked if he knew of any factors that may unfairly affect opportunities for minorities or women to enter and advance in the industry, the Native American owner of an MBE- and ESB-certified specialty contracting firm identified capital. [#15]

Many reported on negative stereotyping of women and minorities in business. [e.g., #23, #36, #47, #TOFG2b] Others reported no such experiences. [e.g., #10, #12, #13b, #15, #19, #20, #21, #27, #28, #29, #30, #39b, #56, #TOFG2c, #TO3] Comments from the in-depth interviews include:

- An African American female owner of a DBE- and MWESB-certified engineering firm commented, “Because I’m disadvantaged, I don’t know which one is the problem in a particular situation. Is it because I’m ‘black’ or the fact that I’m a DBE? I don’t really know.” She added that the common perception is “if you are a woman, if you are black, if you are DBE, you are going to get projects very easily.” [#3]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm indicated that there is a negative attitude from primes towards minority- and women-owned firms. She stated that this is likely because primes now “have to have them involved ... it’s not an option.” [#8]
- When asked about any stereotypical attitudes about minorities, women or certified firms, the Native American male owner of a DBE- and MBE-certified specialty contracting firm reported, “I see that a lot ... yeah ... I feel [that] the stigma of being a MBE or DBE contractor is [that] if you have this certification, all of a sudden you’re in this bucket of contractors that can’t do this job or can’t do that job ... you can only do these small little jobs ... we can compete with everyone else.” [#16]

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that it is a challenge being a minority-owned firm. Although she and her firm are highly educated, she reported barriers related to her accent, limited communication skills and issues of cultural awareness. She added that these barriers can make it difficult to earn a client’s trust. [#10]
- A white male board member of a contractors association reported that there is an assumption that bids from certified firms will not be competitive. He added that this perception is most common in the trucking industry. [#TO4]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm indicated that it is discouraging to walk onto a job site and be considered incompetent. He commented, “[This is] because they have federal regulations and state regulations that say they have to work with us,” and added that it is going to take “a long time” before this mentality changes. [#6b]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm expressed that her firm experienced double standards when her crew of Hispanic workers was told by a supervisor to clean their worksite while a corresponding crew of white workers did not have to clean theirs. [#25]
- When asked about double standards for minority- or women-owned firms, the Native American male owner of a DBE- and MBE-certified specialty contracting firm commented that certified contractors get penalized by being required to submit extra paperwork (ODOT’s DBE work plan proposal). He added that non-certified firms do not need to do the extra paperwork, and can start on the job right away. [#16]
- When asked if she experienced any double standards for minorities or women, the white female owner of a DBE- and WBE-certified specialty contracting business commented, “Yes ... on the 3(a) form ... it’s not the same for all the companies.” She elaborated that the 3(a) form is the DBE work plan proposal; this shows that a firm is a DBE and is a supplier form. She added that there are discrepancies on some of these forms that give certain DBEs advantages over others. [#42]
- When asked about stereotypical attitudes about minorities or women, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he has not generally experienced any stereotypical attitudes about certified firms. However, he did note that there is an underlying perception that successful minority firms are not at the same level as non-minority firms. He added that this perception tends to come from prime contractors. [#18a]
- When asked about stereotypical attitudes about minorities or women, a Native American owner of a construction firm commented, “... there’s [still] a few ignorant people out there.” [#26]

- When asked about her experience with any stereotypical or negative attitudes toward minorities or women, the white female owner of a DBE-, WBE- and SBE-certified construction business reported that when she was on a contractors association board, "... they didn't like having to use certified firms ... they didn't want to They thought working with DBEs, WBEs, MBEs were ... one more layer, one more step that ... [they] had to jump through more hoops and treat them fairly" She went on to add that this caused the board to feel "resentment" toward certified firms. [#32]
- When asked if he has experienced any stereotypical attitudes, the Hispanic American owner of a construction business commented, "Maybe a little bit" He went on to say that some think that if a firm is DBE, they could not otherwise stand on their own two feet. [#58]
- A white male partner of a WBE- and SDVO-certified construction firm stated that some people fail to take the firm seriously unless they know the firm's history. He went on to note that when clients see "nice equipment" labeled [with initials], they do not expect to see a young woman as the firm's owner. [#43]
- The Hispanic American owner of a DBE-, MBE-, ESB-and SDVOSB-certified specialty construction firm stated, "At least for me, it feels like in Oregon ... [if you are] a Hispanic contractor, you're not up for being a prime" He went on to comment that many assume that his place is in landscaping, and think that that is what his firm should focus on. He added that he does not like being "pigeon-holed" into landscaping because of his ethnicity. [#33]
- On the topic of discriminatory treatment, the African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm reported that the "hovering" ODOT inspector issue is unfair treatment, and elaborated that at times, his employees would receive conflicting instructions between the prime and ODOT inspectors. He stated, "My employees ... they don't know what to do then We don't know where it comes from. And sometimes, it's almost like ... unfair treatment." [#48]
- When asked about double standards, the African American male president of a DBE- and MBE-certified construction business stated that on an ODOT and another public agency's project, there was a much higher degree of performance pressure on minority contractors than their majority-owned counterparts. [#49]

- The African American male representative of a workforce organization said that primes should utilize all ethnicities and women. Instead, primes report that subs cannot bid if they are not African American-owned. He stated that regardless of goals, primes should welcome all bids. [#TOFG1c]

When asked about factors that may affect entry or advancement for minority-owned firms, the African American male representative of a workforce organization commented that bonding is often used as a tool by general contractor to exclude minority- or women-owned firms from participating on projects. He went on to add that because of the color of his skin, primes require him to insure his work; meanwhile, majority-owned firms on similar projects are not required to provide a bond. [#TOFG1c]

- When asked about stereotypical attitudes about minorities or women, the Hispanic American female representative of a minority business association commented that there is a long history of discrimination, exclusion and lack of opportunity. She added that the impacts are “statewide.” [#TOFG2a]
- A public meeting participant commented that minorities do not have the “faith that their voice matters” especially when dealing with contractors. [#PMP15]
- When asked if there are factors that affect opportunities for minorities and women to enter and advance in the industry, the African American owner of a now-closed construction firm reported, “Yes, without a doubt” He went on to note the stereotypes of “not being able to do things” right and “being lazy.” [#23]
- The white male partner of a WBE- and SDVO-certified construction firm commented that some minority-owned firms or WBEs have “taken advantage” of companies, and in return, give minority-owned businesses and WBEs a “bad name.” [#43]

When asked about unfavorable treatment, the same business partner added, “We’ve experienced nothing of our own,” though he went on to report that he is aware of minority-owned businesses and WBEs that were let go when the prime reached its “quota.” [#43]

Many comments made by interviewees focused on gender. For example:

- A white female owner of a specialty construction business reported experience with stereotypical attitudes about women. She went on to say that there are “male chauvinists” prevalent in her work area. [#41]
- The white female owner of a WBE- and ESB-certified specialty construction business reported that she completes most of her work over the phone, and that many callers do not realize that she is the owner. She went on to comment, “... nor do I tell them [that I am the owner].” She went on to say that she tries to encourage other women to get into the industry, stating, “If he can do it ... you can do it.” She went on to say that there is still a perception that women are unable to perform equally as well as men. [#35]

- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm reported of an instance of discrimination that ended with her removal from a job for a public agency; she added that three other white women also were removed from the project. [#36]

The same business owner added that when ODOT asked if she would like to file a formal complaint about the incident, she declined; she was afraid that it would lead to negative repercussions on her career. [#36]

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm indicated that she has experienced stereotypical attitudes. She commented, “I think there is always a challenge there for minorities and women, and I work with a lot of engineers ... when you are one of a few women in the room, people sometimes think you are going to take notes.” She added that she thinks it is part of the perception of [the industry], and part seeing a young woman in the room. [#2]

- When asked about any double standards for minority- or women-owned firms when performing work, the African American female president of a DBE- and MWESB-certified specialty contracting firm reported, “Yes, there are plenty of those [double standards] ... mainly, it’s a ‘man’s industry.’ Having a woman who they are either having to deal with on a daily basis or a weekly basis ... just the way they talk to you, they don’t respect the women as much.” [#8]

- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported that she felt uncomfortable as a woman going to pre-bids. She commented that she is treated like “she has two heads.” She went on to say that she is ignored at the pre-bid conferences even though she takes notes and wants to ask questions, and indicated that others at the conferences make her feel unwelcome. [#40b]

- The white female owner of a DBE- and WBE-certified specialty contracting business reported that as a white woman, she has “insignificant opportunities” to advance in the industry. She added that DBEs who has been in the program for an extended period of time do not have the same level of program support as newer DBEs. [#42]

She also commented that when her firm started, primes looked at the firm as a “dating service,” because women were on the jobs and the men were often were away from home. She went on to say that she implemented a policy that prohibits her staff from dating other workers while on a job. [#42]

- When asked about factors that may affect opportunities for minorities and women to enter and advance in the industry, the African American female president of a DBE- and MWESB-certified specialty contracting firm commented, “The basic thing is that, especially [with] contractors, prime contractors too, they don’t appreciate women-owned businesses. They just don’t have the respect for you Sometimes you have to really argue to get your point across.” [#8]

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm added, “I think it’s especially hard for a woman-owned business, not to be held to a higher standard They look for you not to be able to do the job.” She went on to add that male-owned firms are paid faster, and that the agencies are not as ‘picky’ with them.”[#32]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm indicated that she has experienced stereotypical attitudes about women in the workplace. [#54]
- A white female owner of a specialty construction business reported that poor treatment of women occurs regularly on private sector work. She went on to say that on public sector work, male public agency employees are educated to know that a report will follow if they treat women poorly. [#41]

Some interviewees indicated that conditions have improved over time. For example:

- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that stereotypical attitudes happen less often now than 20 years ago, now that the older superintendents are gone. [#37]
- When asked about other allegations of discriminatory treatment, a Native American owner of a construction firm indicated that unfair treatment based on race/ethnicity and gender has been experienced by nearly everybody in the construction industry. When asked if it is an ongoing problem, he stated, “No ... since I’ve been in business ... it’s gotten a lot better.” [#26]
- The white female owner of a WBE- and ESB-certified specialty construction firm said, “In the beginning ... thirty years ago [stereotypical attitudes were more commonplace].” She went on to say that there is now a younger generation entering into the industry, so there are less stereotypical attitudes about minorities or women. [#35]
- When asked about stereotypical attitudes about minorities or women, the white male owner of a specialty contracting firm stated that these attitudes likely come from “the older generation” of workers. [#22]

He added that gender stereotypes are more prevalent than racial stereotypes, and commented, “You just have to work through that and get your crews to work through that and understand that it’s unacceptable, and it’s a different world.” He went on to say that stereotypical attitudes about women were more prevalent when women first entered the construction industry. [#22]

Some interviewees were aware of stereotypical attitudes or other unequal treatment, but did not relate any first-hand experience with it. For example:

- An African American male owner of an MBE-certified professional services firm reported that he has heard about stereotyping of minority- and women-owned firms. He also suggested that people try to avoid its impact since the job takes precedent. [#55]
- A white male owner of an ESB-certified general construction firm commented, “I’m sure [stereotypical attitudes] are out there, but I am not aware of any, no.” [#14]

One interviewee reported that new businesses often fall victim to stereotyping.

- The white male president of a majority-owned construction business commented, “There is a concern that the quality and safety of work [in small firms] is lacking due to the firms [often] being new start-ups.” [#1]

Some interviewees said that minority- and women-owned firms are advantaged. For example:

- A white male board member of a contractors’ association commented, “No If anything, they’re on ... the preferred side ... ‘kid gloves’ [is a good way to put it].” [#TO2]
- When asked about any disadvantages for small, minority- or women-owned firms, the white male owner of a specialty contracting firm reported, “These days I see advantages This is a sore subject for me because I grew this company myself ... being a white male ... but lately I’ve noticed ... I have not been invited to bid on projects because I was a white male” He went on to comment, “My company did not have a DBE or MBE ... and they told me we need to get our status, our percentage up ... so don’t even bother. So I have seen [specified construction] go to unqualified people ... and they’ve called me later to fix it ... finish it, several times ... so I feel just because you’re a minority, small business or a female, that sometimes you can get work that you’re not qualified to do.” [#20]
- On the topic of double standards, the representative of a majority-owned construction firm reported that they exist, and that minority firms receive “special treatment” when compared to majority-owned firms. [#19]
- When asked about double standards for minorities or women, the white male owner of a specialty contracting firm commented that he believes it is “the other way around.” He stated, “I think ... you will be tougher on a non-DBE firm on what you expect them to perform than on you will on a small business DBE firm You’ll give the smaller business a bigger break on getting something done ... because you need to You’re trying to help them expand their business, but you also need to meet the goals. Then you got a contract that says you [need to] have this much percentage. So I actually think, if anything, contractors in general will bend over backwards the other way ... and are tougher on their non-DBE subs” [#22]

- A white male partner of a WBE- and SDVO-certified construction firm reported that he has witnessed other programs that have practiced double standards. He offered an example where a woman did not have to do her work because there was no strategy in place for firing her for lack of performance. [#43]
- The white male president of a majority-owned construction business stated, “[I’m] aware of ‘pop-up’ DBEs who pop-up all over the state of Oregon to get a piece of the pie based on their ethnicity.” He added that a prime does not always know a DBE’s professional background including what they can and cannot do. He went on to say that they still attempt to use these firms in “good faith.” [#1]

“Good ol’ boy” network or other closed networks. The study team asked business owners and representatives about their experiences with any “good ol’ boy” networks or other closed networks.

Many interviewees reported experience with closed networks. [e.g., #18a, #35, #46, #47, #55, #TO4] Comments from the in-depth interviews include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional service consulting firm reported, “Yeah, I think there are all sorts of ‘good ol’ boy’ networks ... go to an ACEC event. It took me, like two years probably, to feel like I broke into ACEC There are a lot of guys who have worked together for 20 years and they are happy to keep doing that, they don’t need new folks.” She added that she always needs new people with whom to work; and is coming from a “totally different perspective.” [#2]
- A public meeting participant from a DBE- and WBE-certified firm reported that it is difficult to break into existing networks. [#PMP22]
- A public meeting participant remarked that the good ol’ boy network is frustrating to small business owners. He indicated that primes want to work with subs they know whether or not another small business could do the job well or save money. [#PMP12]
- An African American female owner of a DBE- and MWESB-certified engineering firm stated that she gets discouraged when seeking work from a prime. She went on to indicate that primes often give the work to “friends.” She commented, “That is why we need the goals.” She stated that only when the goals came, did people started calling her wanting her to do work. She added that access to information is limited in her industry due to closed networks. [#3]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that his firm primarily works in the public sector, and that they prefer to work there because private work is “tied to ‘good ol’ boy’ networks.” He went on to comment that the work margins better suit them in the public sector. [#6b]

- When asked about “good ol’ boy” or other closed networks, the white male executive of an African American-owned engineering and consulting firm commented, “I suspect that exists” He added that while he has no definite experience with such networks, he was among the first to inquire about an ODOT job that he later learned was “filled” before it went officially public. [#9]
- The representative of an international engineering business reported that he has no experience with “good ol’ boy” or closed networks when working with ODOT, but referenced city council as “challenging.” [#12]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that the existing “good ol’ boy” networks negatively affect minorities and women. She went on to say that this played part of her decision to move away from strictly construction work; she thought that the industry would have moved past closed networks by now. [#36]
- When asked if her firm has had experience with any “good ol’ boy” networks or other closed networks, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented, “Of course, there’s always those ... how do you break those ... it’s a barrier General contractors reach out to us when they have to meet a certain goal ... but if they don’t have to meet that goal on private projects ... they’re not going to call you.” [#25]
- When asked if she has had any experience with “good ol’ boy” networks, the white female owner of a WBE- and ESB-certified specialty consulting firm stated that she has heard public sector people claim that because it is too time-consuming to put a project out to bid, they will manipulate the bid to give it to someone they know. [#31]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm remarked on having attended pre-bids where it appeared as if “good ol’ boy” relationships already existed, and contracts already awarded. When asked if “good ol’ boy” networks negatively affect minorities, he responded, “100 percent Definitely ... it’s predesignated.” [#33]
- On the topic of “good ol’ boy” networks, the African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business commented that the “good ol’ boy” mentality will likely persist for another 50 years. [#40a]
- A white female owner of a specialty construction business reported that Eastern Oregon is very old fashioned and conservative; it has an “old boy” mentality. She went on to comment that because of this, her firm does not advertise as a woman-owned business. [#41]

- When asked about “good ol’ boy” networks, the African American president of a DBE- and MBE-certified construction business commented, “They are pretty sophisticated The ‘good ol’ boy’ network ... they keep everything tight ... and closed.” He went on to report that because there are no minorities [in his experience] at AGC meetings, it is a sort of “good ol’ boy” network. [#49]
- An African American male owner of a DBE- and MBE-certified specialty contracting firm indicated that it can be difficult for minority-owned firms to break into the industry. He commented, “Most of the game is like an ‘old boys’ club, so it’s really hard to get into position.” [#46]
- An ODOT public meeting participant commented that when she goes to business events to recruit, or makes cold calls, she often hears that a “good ol’ boy” network exists and small businesses fear that they will not have opportunities to get contracts. She added that small businesses feel bidding projects is a “waste of [their] time.” [#OPMP5]
- An African American male representative of a workforce organization suggested that to avoid closed networks, ODOT should require that primes open their doors to others outside their current networks. [#TOFG1c]

The same organization representative added, “ODOT has five general contractors, you can count them on one hand, that do 90 percent of the work The way that their bids are set up, it’s all line item pricing.” He went on to comment that those five primes get access to certain information that explains the type of the work and level of difficulty, and noted that this should be public record, but its “extremely buried.” [#TOFG1c]

- The white male owner of an ESB-certified engineering firm, when asked about any “good ol’ boy” networks, commented, “Oh yeah, I think that’s what your whole engineering RFP system is about If you’re new to it, they have no interest in including you.” [#44]
- A white male owner of a now-closed ESB-certified engineering firm remarked that he is “painfully aware” of the “good ol’ boy” network; those doing the work continue to receive work, and new firms are blocked from opportunities. He added that it is “part of the system,” and that he does not know how to stop it. [#38]

The same business owner remarked that ODOT’s relationship with ACEC is “too cozy,” and that it is part of the “good ol’ boy” network. He added that he does not know why ACEC lobbies on behalf of ODOT; the ACEC member firms are those that receive ODOT work. He added that ACEC and its members contribute to forming ODOT policies, and reported, “It’s a system that continually feeds itself.” [#38]

- The African American owner of a now-closed construction firm reported that he believes “good ol’ boy” networks to be “all over the place ... in construction, in bidding” [#23]

- The white female owner of a WBE- and ESB-certified professional services firm commented she has witnessed “good ol’ boy” networking “fairly often,” and noted that it affects woman-owned businesses. [#24]

Some were aware of “good ol’ boy” and other closed networks, but had not experienced them first-hand. [e.g., #26, #34] For example:

- The African American representative of a minority contractors association stated that while members of his organization have reported a “good ol’ boy” network of ODOT heavy highway contractors, he has not had any personal experience with the network. He went on to add that he has heard that prime contractors work together to negotiate who will bid on what contracts. [#TOFG2c]
- A white female principal of a DBE- and WBE-certified consulting firm commented, “I’m sure it’s out there, but we have never experienced it.” [#5]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that while he is sure that “good ol’ boy” networks exist, his firm has not had direct experience with them. [#11]

A number of others reported no experience with closed networks, while some indicated that the “good ol’ boy” network is a thing of the past. [e.g., #10, #13b, #14, #15, #16, #19, #20, #21, #22, #27, #28, #29, #30, #32, #37, #39b, #54, #56, #TO2, #TO3] For example:

- When asked if “good ol’ boy” networks are relevant in today’s industry, the white male president of a majority-owned construction business stated, “No, not for awarding of work in today’s environment.” [#1]

Unfavorable work environment or other factors affecting entry or advancement. The study team asked interviewees about work environments in the local industry for minorities and women as well as any other factors that could affect entry or advancement in the industry.

Many business owners and representatives reported unfavorable work environments or other factors that can affect the entry and advancement of minorities or women in the industry. [e.g., #55, #A115] Comments include:

- When asked if he experienced unfavorable treatment that may have been racial/ethnic or gender-based, the African American president of a DBE- and MBE-certified construction business reported, “No, not from 2006 [onward].” But, he went on to add that prior to 2006, “[N-word] heads” was an expression used to describe the boulders in an excavation area. He added that on a job in Eastern Oregon, he was asked, “How many [N-word] heads did you hit today?” He went on to say that he could “see on their faces” that they were trying to offend him. [#49]

- When asked about unfavorable work environments, an African American female owner of a DBE- and MWESB-certified engineering firm recalled being insulted by a male business trainer. She reported that he asked her an offensive question about “male-female things ... I found that just offensive...” She also reported, “... I get [the] cold shoulder from government employees” [#3]
- When asked about unfavorable work environments for women, the white female owner of a DBE- and WBE-certified services firm said, “Maybe.” She added, “I think some have been, could be a little bit challenging. Just sort of that, sense of safety, you know, is there going to be any jokes or things said that are uncomfortable.” [#34]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that she has experienced what could be considered sexual harassment while working on a construction site. [#36]

She provided the example of restrooms that do not meet women’s needs, and commented that sites often have a shared restroom for everybody. [#36]

The same business owner commented that because women’s physical strength differs from men’s, women need additional breaks, and commented that there is no accommodation for additional breaks. She added that with the correct utilization of women, no job production slows. [#36]

- When asked about if there are any unfavorable work environments for minorities, a white female owner of a specialty construction business commented that certain types of work are dangerous and physically demanding for women, and noted that this can make it difficult for women to advance in that industry. [#41]
- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported knowledge of unfair treatment of their minority employees at one job site. This event involved writing of names in the Porta-Potty. She spoke to the superintendent on the job site and told him that the firm will walk out if the treatment persists. [#40a]
- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported that the mentality in the field is that women do not belong there. [#40b]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm reported that she worked on a project with a work trailer that had only a men’s restroom with a broken toilet. She added that although it was unrelated to the work, it contributed to an unfavorable work environment. [#54]

- When asked about unfavorable work environments for minorities or women, the white male owner of a specialty contracting firm commented, “It’s not acceptable If it’s perceived ... by the individual as harassment, it’s harassment Several times, we’ve investigated and that’s not what [the harasser] thought they were doing.... But it’s usually an individual that makes a comment that’s inappropriate ... and, I would say, the majority of the time, [the harasser doesn’t] even realize that it’s inappropriate. So it’s a little bit of training, and we hold training sessions with our people and talk to them about it, what’s appropriate and what’s inappropriate.” [#22]
- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm commented that it is difficult for minorities and women to get into the industry because it is a small group of “old timers,” and that the unions “will try to cut your legs out.” [#37]
- The African American male owner of a DBE-, MBE- and ESB-certified specialty construction firm commented that the chance of minority workers to be promoted on the job is “slim to none.” He added that he has specific knowledge a minority construction worker who has never been promoted to project manager, even though he has been in the construction field for nearly 20 years. [#6b]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that just trying to get one’s “foot in the door” to get experience is a major barrier for minorities and women who want to enter or advance in the industry. [#28]
- An African American female program manager with a local public agency indicated that she sees good participation of minorities and women as laborers, but “when you get to the higher [level] trades, you don’t see that much diversity.” [#LA8]

One interviewee reported that she joined an organization that benefits the entry and advancement of women in the industry.

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm commented that she has been part of a women’s transportation organization for many years, and that it advocates for industry women within and outside of the organization. [#2]

Some indicated no knowledge of factors affecting entry or advancement, or that it is improving. [e.g., #9, #12, #13b, #14, #18a, #20, #21, #27, #29, #34, #56]

- The white male executive of a majority-owned equipment firm reported that several barriers in his industry have been “broken down.” He added, “It’s a matter of getting the word out [there] that construction is an area of employment that doesn’t have those barriers [anymore]” [#57]

- A representative of a white woman-owned specialty contracting firm reported that factors that prevent women and minorities from entering the industry are “just getting them to apply, and letting them know [that] there’s a good working environment for them to join.” He added that companies that advertise to employ women and minority workers tend to have difficulty finding them. [#39b]

One interviewee reported that minorities and women have an advantage entering and advancing within the industry.

- The male representative of a majority-owned construction firm said that he believes that minorities and women have an advantage when it comes to opportunities to enter and advance in the industry due to the “minority requirements.” [#19]

J. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures

The study team asked businesses and other industry representatives to discuss current and potential business assistance programs and contracting processes, including those offered or potentially offered by ODOT or other public agencies, trade associations and other organizations.

Information gathered included comments on knowledge and utilization of certain business assistance programs, and potential for improvements.

- Knowledge of assistance programs in general;
- On-the-job training;
- Mentor-protégé relationships;
- Other agency outreach, such as vendor fairs and events;
- Joint ventures;
- Financing and bonding assistance;
- Insurance assistance;
- Business licensing assistance;
- Assistance with emerging technology;
- Bidding procedures;
- Contracting processes;
- Hardcopy/electronic directory of potential subcontractors;
- Unbundling of large contracts;
- Price or evaluation preferences for small businesses;
- ODOT small business contracting program and other programs;
- Small business set-asides;
- Mandatory subcontracting minimum;
- Small business subcontracting goals;
- Formal complaint and grievance procedures; and
- ODOT successes and areas for improvement.

Knowledge of assistance programs in general. Some indicated having general knowledge of assistance programs. [e.g., #18a, #27, #29, #31, #32, #33, #35, #36, #37, #38, #44, #46, #LA1, #TO1, #TO2, #TO3, #TO4, TOFG1c, TOFG1d] Others reported no general knowledge of assistance programs. [e.g., #20, #22, #26, #39b, #43, #45]

Many interviewees knew of programs and found them useful. When some were not aware of a program, they sometimes reported that they might have taken advantage of it, had they known. Comments included:

- An African American female program manager with a local public agency reported, “We need to find some funding for technical assistance ... the need is still there.” [#LA8]
- The white male president of a majority-owned construction business had a favorable impression of the volume of ODOT supportive services, “ODOT is very good; they have something going on weekly.” [#1]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that while her company is already good at responding to RFPs, technical assistance can be helpful when working with specific agencies. [#2]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that she has participated in ODOT’s technical assistance and supportive services for her field. She also reported that she took advantage of training and networking through OAME. She stated that she also worked with SCORE (Service Corps of Retired Executives) to help refine their business plan, and noted that the SBA gave them a lot of training. [#10]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that his firm utilizes SBA technical assistance services, and added that they sometimes take advantage of the SBA’s GCAT (Government Contracting Advisory Team) program. [#11]
- An African American female owner of a DBE- and MWESB-certified engineering firm reported that she attended an ODOT small business management class that was helpful to her firm, and noted that the customized one-on-one advice was valuable. [#3]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that she is a member of the Oregon Association of Minority Entrepreneurs (OAME), and noted that having a positive relationship and access to the contractors has been beneficial. [#8]
- When asked about his general knowledge of business assistance programs, a white male owner of an ESB-certified general construction firm commented that the staff took a small business management course at Central Oregon Community College, and added that this course was administered by SBDC. [#14]

- When asked about small business start-up assistance, the Native American owner of an MBE- and ESB-certified specialty contracting firm commented that he is aware of programs offered by PTAC and GCAP. [#15]
- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that he participated in a City of Portland program in business and strategic action growth plans. He went on to comment that he is not aware of, and has not taken advantage of other services or programs because his business was already established by that point. [#16]
- A Hispanic American male owner of a DBE- and MBE-certified engineering firm reported that the program he is most familiar with is the Small Business Economic Development Agency in Corvallis. He noted that they help small businesses with start-up, and added that he is aware of their resources. He went on to say that he has also looked into the SBA and state-run assistance programs. [#17]
- The male representative of a majority-owned construction firm reported that his firm takes advantage of “continued education” programs in his field. [#19]
- The African American owner of a now-closed construction firm reported that they took advantage of classes on how to bid and fill out forms. He commented, “Should there be more [programs]? I think so.” When asked if he had knowledge of other small business start-up assistance, the same business owner commented, “No. I would have loved to take advantage if I knew ... especially [with] getting a loan ... buying equipment ...” [#23]
- The white female owner of a DBE- and WBE-certified services firm said that she has taken classes in small business financing through multiple organizations including the SBDC. [#34]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she has worked with organizations for technical assistance, coaching and counseling. She also reported that she attends various workshops and OAME sessions. [#25]

The same female business owner commented that most workshops are geared towards business start-ups, making them somewhat redundant for her. She went on to say that strategic planning and growth topics would be more helpful for her firm. [#25]

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he has participated in ODOT’s mentor-protégé program. He went on to comment that he took advantage of a lot of assistance and training programs, and said that he recommends them to new firms. [#28]

- The African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm stated that he is familiar with OAME, and that he did not find them useful. He went on to say that he has also used Metropolitan Contractor Improvement Partnership (MCIP), and that he regrets not utilizing them more. [#48]
- A white female owner of a DBE-, MBE- and ESB-certified general construction business reported having attended an ODOT training program and found the program helpful. She explained that she would meet periodically with representatives from the SBDC; she appreciated that she could bring problems to the meetings and discuss them with professionals. [#40b]
- The Hispanic American female representative of a minority business association reported awareness of ODOT's supportive services. She commented, "There is a tremendous need for a competent services provider that understands the construction industry that can work effectively and be fighting with the general contractors You have to bring the general contractor to the table, and you have to make them understand that it's to their financial benefit that we [ODOT] resolve ... whatever issue is there." [#TOFG2a]
- A Native American owner of a construction firm reported that his firm participated in continuing education classes that covered material that he does not find applicable to the firm's work. However, he still plans to take a workshop with attorneys to discuss changes to contract law. [#26]
- The white female owner of a WBE- and ESB-certified specialty consulting firm stated that she saw helpful ODOT training online on. She also reported that while Oregon's Small Business Centers have a variety of resources, they tend to be geared toward store sales rather than services. She went on to say that she has worked with SBA and SCORE on business plans, marketing, insurance, budgeting, QuickBooks and other small business resources. [#31]
- An African American male owner of an MBE-certified professional services firm reported that during the start of his business, he attended any workshop or program that was available, and never missed a training opportunity. He went on to say that he no longer attends these events himself, and instead he sends his coworkers. [#55]
- The Hispanic American representative of a minority business association reported that his organization helps small businesses grow and develop by providing business incubators, one-on-one technical assistance, access to capital and networking. [#TOFG2b]

Some interviewees reported that they did not find the training useful or suggested improvements. For example:

- When asked about her general knowledge of programs, the white female owner of a WBE- and ESB-certified professional services firm reported that she attended an ODOT event on how to work with the State. She indicated that it was not a pleasant experience, and explained that there was poor follow-up, too much information in too little time, and an “impractical” presentation. [#24]
- When asked about supportive services, a female ODOT staff person said that there is a need to “scale back, go through a needs assessment, and partner better with what is out there.” We also discussed the need for “real time” support services. For example, ODOT partners with others to provide classes, including the Turner School of Construction Management. There is financial support to help business owners get to those classes. [#OS4]

Some who were aware of ODOT’s and other agencies’ technical assistance and training had not necessarily taken advantage of those opportunities. [e.g., #1, #3, #7, #9, #29, #50]

- When asked if the programs have been helpful to his firm, the Native American owner of an MBE- and ESB-certified specialty contracting firm reported, “No ... When I’m working, I can’t get to [training programs] ... I can’t watch a video or watch someone talk. When I’ve got work, I’ve got to do work and that’s my problem ... I can sit and watch a seminar ... or I can go out and make a dollar.” [#15]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that her firm does all of its training “in-house.” [#8]

Some were not aware of ODOT’s programs. [e.g., #6b, #13b, #20, #21, #22, #24, #39b, #51, #53]

- A white female owner of a specialty construction business reported not knowing of any assistance programs. She speculated that this was probably because her firm is uncertified. She added that once she is certified, she hopes to learn of programs. [#41]
- The representative of an international engineering business reported that his firm participates in technical societies and professional associations, but no technical assistance or support services programs. [#12]

On-the-job training. Many interviewees were aware of or have participated in on-the-job training programs, and found them to be helpful. [e.g., #9, #19, #34, #43, #59, #LA5] Others were not aware of such programs. [e.g., #32, #49, #53]

- An African American female owner of a DBE- and MWESB-certified engineering firm commented, “There’s one that I’m looking forward to being in,” and described project-specific training offered by ODOT where the program provides a job mentor. [#3]

- When asked about on-the-job training programs, the female owner of a specialty contracting firm reported that she is familiar with AGC programs, and commented, “[AGC] has some good programs ... especially for safety.” [#13b]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm participated in an on-the-job training program while working on a public project. [#18a]
- When asked about on-the-job training programs, the white male owner of a specialty contracting firm reported that his firm is currently working on a proposal for an on-the-job training program. He went on to say that this type of participation is important to his firm and employees. [#22]

Mentor-protégé relationships. Many interviewees had knowledge of or experience with mentor-protégé relationships. [e.g., #5, #9, #28, #33, #34, #36, #39b, #TO2, #LA5, #LA6]

Many interviewees, aware of these relationships, had positive comments about mentor-protégé programs. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm reported that the Port of Portland offers a mentor-protégé program that works very well in training those in her field. [#3]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that her firm is part of a mentor-protégé program with a public agency, and added that the experience has been very positive so far. [#25]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that OAME and several mentor-protégé programs have helped her understand how to run a business successfully. [#36]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business reported that the mentor programs and training opportunities offered by City of Portland and ODOT are have been major factors to his firm’s success. [#40a]
- On the topic of mentor-protégé relationships, the African American female president of a DBE- and MWESB-certified specialty contracting firm commented that she has specific contacts that help her find the necessary help, and that OAME has helped her find assistance in the past. [#8]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm indicated that training programs and mentor-protégé relationships should be “stand-alone projects” available to everyone, rather than linked to specific contracts. [#47]

Some interviewees had served as mentors themselves. For example:

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm worked with and mentored an engineering firm from out-of-state, and noted that the program was successful. [#18a]
- The African American male owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that his firm has started to mentor other small, minority businesses. [#6b]
- The representative of a majority-owned construction firm reported that he acted as a mentor for a public agency assistance program on multiple occasions. [#19]
- When asked about mentor-protégé relationships, the white male owner of a specialty contracting firm reported that his firm has had project managers and other employees serve as mentors on a variety of programs, including the National Association of Minority Contractors Oregon, the Port of Portland and ODOT. [#22]
- The representative of an international engineering business reported that while his firm does not participate in a formal mentor-protégé program, they work with re-employment programs and provide college student internships. [#12]

An ODOT staff person suggested that ODOT might do more related to mentor-protégé programs.

- She said that there is a need to better coordinate ODOT support for mentor-protégé programs. ODOT needs to see whether they can partner with the many other local agencies that have programs, including the Port of Portland, OAME and Portland Development Commission. The critical question is whether primes are willing to participate. [#OS4]

Other agency outreach, such as vendor fairs and events. The study team asked interviewees about their experiences and knowledge regarding agency outreach, such as vendor fairs and events.

Vendor fairs and events. Some spoke favorably of vendor fairs and events. [e.g., #1, #3, #6b, #7, #8, #9, #10 #23, #27, #34, #OPMP13, #PMP22] Others do not find them as useful, or indicated that their firms would not benefit from them. [e.g., #39b]

Some interviewees gave positive comments or expressed interest in more vendor fairs and other outreach. Comments include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that vendor fairs and events have been very helpful to her firm. She commented that the firm's first job came as a result of attending the Governor's Marketplace Conference. [#10]

- The representative of a Hispanic American woman-owned professional services firm stated, “There needs to be a little more outreach and guidance in working with small contractors like ourselves, to give us an opportunity to find work. It has been difficult to complete with the on-call primes.” [#AI22]
- A public meeting participant representing a DBE- and WBE-certified firm recommended that ODOT provide more outreach and networking opportunities. [#PMP22]
- Regarding outreach, a Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm identified the need for ODOT regional offices to be more active in OAME efforts, and to promote small contracts to multiple regions. [#47]
- A male ODOT senior executive reported ODOT has industry meetings on a monthly basis; one with the director and one with the leadership of AGC and other associations; topics include discussions on work zone safety, prompt payment and DBE issues. He went on to say that DBE conversations are lively discussions that include many recommendations for improvements. He commented, “I think there is a common desire not to have disparity-type studies because the playing field is viewed as level. But at the same time ... how do we encourage DBEs to act ... as a normal business?” He commented that while many people can go out and get a dump truck or do concrete work, but the back office part is often lost. [#OS1]
- The Hispanic American female representative of a business assistance organization reported that in her experience, many businesses rely on ODOT for work. For example, contractors can go to the Legislature, examine potential project budgets, and learn about what ODOT has “down the pipe.” She added that organizations like ACEC lobby heavily for the early notification of potential work opportunities, and indicated that there are currently about 20 on-call contracts. However, she reported that none of these are with small businesses; the larger firms at AGC are the ones talking to the Legislature. [#TOFG1d]
- When asked about other agency outreach, the African American male president of a DBE- and MBE-certified construction business stated that more vendor fair outreach is necessary for small business development. [#49]

Many interviewees had favorable comments about ODOT, AGC and ACEC conferences. [e.g., #9, #12, #13b, #16, #17, #19, #20, #22, #25, #26, #27, #32, #38, #41, #54, #56, #57] Comments include:

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm periodically attends the ODOT conferences for the opportunity to meet others and network. [#18a]
- The owner of an ESB-certified engineering-related firm reported that he has attended AGC conferences in the past, and indicated that they were helpful for his firm. [#21]

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he attends the ACEC-ODOT conferences frequently. [#28]
- The white male owner of an ESB-certified engineering firm reported that he has attended ACEC conferences in the past, and that they are useful for his firm. [#44]
- The African American president of a DBE- and MBE-certified construction business reported that he attended the AGC-ODOT conference for the first time this year, and indicated that it was helpful. [#49]

Some interviewees had negative comments about outreach events and some had suggestions for improvement. Comments include:

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm periodically attends “meet the primes” events with little success; he added that in many cases, primes already know who they want to subcontract. [#18a]
- A public meeting participant reported facing challenges in attending in-person events in eastern Oregon and suggested conference calling as a method for inclusion. [#PMP21]
- On the topic of other agency outreach such as vendor fairs and events, the Native American owner of a DBE- and MBE-certified specialty contracting firm indicated that they have not been useful to his firm. He commented, “I typically don’t go to a lot of those, because [they’re] not very specific” [#16]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she has attended fairs and events where booth staff are not helpful. She then indicated that more knowledgeable staff such as a project’s project manager should be at each booth. [#25]
- A white female owner of a specialty construction business reported no knowledge of any assistance programs, and noted that the firm is too busy to attend vendor fairs and events. She went on to recommend that organizations hold fairs, events and classes during the winter to increase attendance. [#41]
- When asked about vendor fairs and events, a white male owner of an ESB-certified general construction firm indicated that they are not important to the success of his firm, and that most things they need are available online. [#14]
- A male representative of a contracting organization provided a written comment regarding ODOT’s need for increased outreach, “... coordinated activities will lead to contractors cultivating relationships and learning more about each other’s businesses...” [#WPC11]

- A white female manager from a state business assistance agency suggested that instead of inviting contractors to events, agencies should go to the contractor. She gave the example of a Spanish-speaking representative that presented to the Hispanic American community. [#LA5]
- The white male owner of a specialty contracting firm reported that while his firm has attended several vendor fairs, more contractors need to attend to help foster relationships between prime and subcontractors. He added that there are sometimes very few subcontractors at the events, and that this can discourage primes from attending. [#22]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm reported that she has not attended the AGC or ACEC-ODOT conferences because of location and time constraints. She added that the meetings are inconvenient for her when they are held early in the morning on weekdays. [#36]
- When asked about AGC and ACEC-ODOT partnering conferences, the Hispanic American representative of a minority business association reported that he has not been to one ACEC-ODOT conference in the last ten years, and stated that in his experience, “[The conference] is not really a connection, there’s no connection.” [#TOFG2b]

Joint ventures. Some interviewees had knowledge of or experience with joint venture relationships. [e.g., #9, #25, #TOFG2b] For example:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that the firm has considered doing joint ventures to expand the company. She stated, “The best way to handle some larger projects is to form a joint venture That’s our short-term goal in the next [few] years.” [#10]
- The Hispanic American owner of a construction business reported that while he has never done a formal joint venture, he has participated in a teaming agreement for big design projects; he likes the idea of joint ventures without profits splitting. [#58]
- A female ODOT Region 1 staff person commented that Home Forward recently led a successful joint venture project. She added that the project’s bidding required a joint venture relationship, and that one of the partners was a MWESB. [#OS2a]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that in order to consider a joint venture relationship in her industry, a job would have to be very large. [#2]

Financing and bonding assistance. Some interviewees reported knowledge of financing assistance, including assistance with bonding. [e.g., #9, #24, #39a]

Some businesses reported needing financial assistance. (Also see Access to Capital section of this appendix.) Comments include:

- An African American female owner of a DBE- and MWESB-certified engineering firm reported that she was dissatisfied with a local bank's restrictive loan program and high interest rates. However, she noted that she has a positive impression of OAME's lending and resources. [#3]
- A female Native American business owner contacted the Disparity Study hotline designated for public input. She reported that the biggest barrier to her start-up has been access to capital. She has been using credit cards to finance her operations. [#OT1]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that the only program he has experience with is "Albina Opportunities," which offers financing assistance. [#51]
- An African American owner of a DBE- and MBE-certified specialty contracting firm commented that he tapped into his "nest egg" to take out several personal loans. Because of the newness of his business at the time, they could not secure business loans. He commented "... even though we've got way over \$100,000 worth of contracts, we're still getting tripped around as far as getting a decent size loan for operating costs." On the topic of obtaining loans, he commented, "I would like to get at least \$50,000 operating costs funds." [#46]
- The representative of a majority-owned construction firm recommended that for smaller businesses, ODOT should help with financing so that they can pursue larger jobs and gain experience they would otherwise not have. [#AI8]

A few indicated that financing assistance was unnecessary for their firms, or had negative experiences with such programs. [e.g., #2, #18a] For example:

- When asked about financial assistance, the male representative of a white woman-owned specialty construction firm commented that they utilized SBA at one point, and that they would "never do it again." [#13a]

Insurance assistance. There were limited comments about assistance with business insurance.

- Some interviewees reported no awareness of any insurance assistance programs, but thought they would be helpful. [e.g., #3, #13b]
- Others reported no need for insurance assistance. [e.g., #9, #20] For example, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he does not currently receive insurance assistance. He went on to say that he has to pay out-of-pocket, and noted that this can be very expensive. [#28]

Business licensing assistance. There were limited comments about assistance with business licensing. When asked about business licensing assistance, the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm indicated that assistance in obtaining a business license would “absolutely” be helpful for firms in her industry. She added that Small Business Oregon and OAME have programs that assist with business licensing. [#2]

Assistance with emerging technology. Some interviewees reported that they use assistance to learn about emerging technology. [e.g., #10, #55] Others had no knowledge about this assistance, or no need. [e.g., #20, #21, #29, #39b] Comments from the in-depth interviews include:

- When asked about emerging technology assistance, an African American female owner of a DBE- and MWESB-certified engineering firm answered, “That would be great.” She went on to indicate that Port of Portland has an accounting program that has a good technology component. [#3]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm stated, “We try to be leaders in helping others use emerging technology and I’m always interested in training about that as well.” She added that she is interested in both conducting and receiving training. [#2]
- On the topic of pursuing assistance in using emerging technology, a Native American owner of a construction firm reported that he and his partner wanted to enroll in the SBA program but were not eligible. [#26]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that his firm attends every emerging technology seminar due to the ever-evolving nature of his industry. [#28]
- A representative from an engineering firm, commented that small businesses experience difficulties in staying current with technology. Barriers exist where a prime and subcontractor do not have the same version of engineering software. Acquiring software is a great expense and relates to the size of a project. Small business must consider the technology cost versus the scope and size of a project. He also said that learning new engineering software is a big transition for a small business and can be difficult to learn. [#PMP12]
- When asked if his firm has pursued assistance in using emerging technology, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that his firm has always had considerable experience with the technology in their field, and indicated that they have never needed additional assistance. [#18a]

Bidding procedures. The study team asked business owners and representatives about their experience with bidding procedures and any training around those systems.

Experience with eBIDS, ORPIN and planholders lists. Many reported taking advantage of eBIDS, ORPIN or planholders lists. [e.g., #8, #10, #11, #12, #13b, #14, #15, #18a, #19, #20, #22, #24, #25, #26, #27, #28, #29, #30, #32, #38, #40a, #43, #44, #46, #47, #48, #49, #51, #54, #55, #57, #59, #LA4, #TO2]

Some interviewees had positive comments about ORPIN and eBIDS. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm reported that using ORPIN is a good way to find opportunities. However, she did note that ORPIN can sometimes be repetitious and time-consuming, and added that she believes its recent streamlining has improved the service. [#3]
- The representative of a majority-owned professional services firm reported that ODOT’s program structure for issuing bids can be challenging because it is often “confusing and unclear.” He went on to say that it can be difficult for small firms to identify projects appropriate for them. [#AI6]
- The white male executive of an African American-owned engineering and consulting firm reported that he has no experience with eBIDS, though he uses ORPIN and planholders lists daily. He went on to comment that he wishes they could do their RFPS and proposals electronically, and stated, “[ODOT] still want six copies of everything ... hardcopies, signed originals and all that for just proposals.” [#9]
- Regarding information on public agency contracting procedures and bidding opportunities, the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm stated, “I think it’s helpful ... I think that we know about ORPIN, and we know the sites that different agencies use, so we don’t need that [training on ORPIN]. Once you figure it out, you’ve got it. You don’t need ongoing training for that.” [#2]
- On the topic of public agency contracting procedures, the Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that bidding procedures work well overall. [#10]
- Regarding information on public agency bidding procedures, the representative of a majority-owned construction firm indicated that there is not much room for improvement. He commented, “[They] do a good enough job as it is.” [#19]
- The owner of an ESB-certified engineering-related firm reported that while he has signed up for eBIDS, he has never used the service. He went on to say that his experience with ORPIN has been positive overall. [#21]

- When asked about his experiences with ORPIN, the African American owner of a now-closed construction firm commented, “I did register any bids that came up ... things I knew I had skills for ... and put bids out on them. ‘But, did anything pan out? No’ I wish somebody would have called me back [to at least say I didn’t get it].” [#23]
- The white male representative of a white woman-owned WBE-certified construction business commented that ODOT is improving its bidding process through electronic processes such as Bid Express, and stated that he hopes they plan to make electronic bidding mandatory. However, he went on to note that a mandatory electronic bidding process with monthly fees could be burdensome for small minority firms. [#50]
- The white female owner of a WBE- and ESB-certified specialty contracting firm stated that her firm has used eBIDS in the past, though ever since a change affecting the accessibility of eBIDS, she has not gotten around to using them again. [#53]
- The Hispanic American representative of a minority contracting association stated that membership attends his organization’s contractors committee meeting to learn about contracting opportunities. He added that his organization’s business incubator has a plans section where small businesses can connect to ORPIN and find what they need. [#TOFG2b]

A few made some negative comments about ORPIN. For example, some said it was cumbersome and difficult:

- An ODOT staff person reported difficulties with ORPIN. He indicated that he had an inquiry from a small business complaining of difficulty accessing ORPIN information. The same ODOT representative reported that he also attempted to use ORPIN and found it “very cumbersome and hard to find what you need.” [#OPMP11]
- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty services firm reported that ORPIN can be overwhelming because her firm uses multiple NAICS codes; this makes it difficult for her firm to locate corresponding work on the website. [#36]

Many interviewees indicated that distribution of planholders or other lists of primes to potential subcontractors is helpful. [e.g., #2, #3, #7, #13b, #19, #25, #34, #45, #58] One interviewee also suggested improvements:

- The male executive of a majority-owned services firm reported that while planholders lists are helpful, ODOT and other public agencies could do a better job of distributing them and other lists. [#45]

A few discussed online registration as a potential bidder. Many interviewees reported that online registration as a potential bidder was helpful. [e.g., #8, #9, #10, #19, #21, #22, #23, #25, #34] Some reported otherwise. Comments include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm indicated that that online registration with a public agency as a potential bidder is helpful. However, she commented that it can be a challenge for her firm to check the websites regularly. [#2]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented that it would be helpful if all public agencies had one, uniform online registration system. [#11]
- On the topic of online registration, a white female principal of a DBE- and WBE-certified consulting firm reported, “A consistent format of required information [across agencies] would be helpful. The online registration has not worked.” [#5]

Many interviewees said that pre-bid conferences where subcontractors can meet prime contractors were useful. Many interviewed spoke favorably of pre-bid conferences. [e.g., #2, #9, #10, #12, #13a, #16, #25, #27, #33, #48, #PMP32] A few did not. Comments follow:

- On the topic of pre-bid conferences where subcontractors can meet primes, the male representative of a majority-owned construction firm reported that they would be beneficial not only to meet primes, but to review job plans before bidding. [#19]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented that all contracts should have pre-bid conferences for primes and subs to meet. He added that he is aware of the City of Portland doing pre-bid conferences, and noted that he has no knowledge of ODOT doing the same. [#11]
- The white female owner of a WBE- and ESB-certified professional services firm reported that pre-bid conferences would be beneficial as long as she was properly informed about them and when they occur. However, she went on to note that she does not like mandatory pre-bid conferences. [#24]

Other interviewees pointed out some limitations of pre-bid conferences. For example:

- The white male owner of a specialty contracting firm reported that pre-bid conferences can sometimes be difficult because subcontractors will not “open up” to a prime when they have their competition sitting right next to them. He went on to report that pre-bid conferences are a good way to disseminate information to all parties so that subcontractors know what the prime is wants on complex projects. [#22]
- The African American female president of a DBE- and MWESB-certified specialty contracting firm indicated that she has missed opportunities to attend many pre-bid conferences due to lack of awareness. [#8]

- When asked about pre-bid conferences, the male owner of an ESB-certified engineering-related firm stated, “I’ve been to a few [pre-bid conferences]. I felt like everybody was there to talk to the agency. I didn’t have any opportunity to talk ... with the primes.” [#21]
- A male representative of a minority trade organization provided a written public comment suggesting that pre-bid meetings be mandatory so contractors and certified firms can collaborate more effectively. [#WPC8]
- A male representative of a contractors’ trade organization provided a written public meeting comment suggesting that pre-bid meetings be mandatory to disseminate information on projects and ODOT’s expectations. [#WPC11]

Some reported limited time to attend pre-bid conferences, or having not attended a pre-bid conference in many years. [e.g., #3, #7, #31]

Streamlining/simplification of bidding procedures. Many favored streamlining or simplifying public agencies’ bidding procedures. [e.g., #2, #3, #11, #33, #34, #36, #44, #53, #56, #PMP38] For example:

- When asked if simplifying the bidding process would be helpful, a white female principal of a DBE- and WBE-certified consulting firm reported that “short turnaround” bidding requirements are a challenge. She added that it can be confusing for DBEs or WBEs to know what percentage of their firm counts when a proposal includes goals. She commented, “Clarity of RFPs can be a challenge” [#5]
- The representative of a majority-owned engineering-related firms indicated that the process sometimes requires too much paperwork. He commented, “For small contracts, it would be [helpful] if there were less paperwork.” [#AI7]
- When asked about streamlining and further simplifying the bidding process, the white male executive of an African American-owned engineering and consulting firm stated that a possible improvement would be to make it “all electronic.” [#9]
- The representative of a majority-owned engineering firm commented, “I think it would be helpful if [ODOT] got some consultant input on RFPs to make them clearer and easier to respond to.” [#AI13]

A number of ODOT staff reported on the need to streamline internal processes regarding bidding and project awards. For example:

- An ODOT staff person and public meeting attendee commented that internal processes are cumbersome and lengthy. He said that contract signatures within ODOT are difficult to get within a timely manner. [#OPMP14]
- Another ODOT staff person reported that ODOT scares away many newer businesses due to the lengthy cumbersome bidding processes required by primes. [#OPMP3]

- An ODOT public meeting participant said a barrier that exists for business is the procurement process being “onerous, very time-consuming, regardless of the size of the contract.” This staff person explained, “It’s very discouraging for us to want to do a lot of small contracts because of that factor.” [#OPMP13]

Others thought that bidding procedures would not benefit from streamlining and simplification. [e.g., #12, #26, #45] For example, the male representative of a majority-owned construction firm indicated that the bidding process is already simplified. He commented, “[It’s already] ... good now.” [#19]

One interviewee suggested that ODOT provide a list of pre-bid conference attendees. A white female principal of a DBE- and WBE-certified consulting firm indicated that it would be helpful if ODOT published a list of who attended pre-bid conferences. [#5]

A public hearing participant reported on a specific barrier to bidding experienced by minorities. The participant reported that minority business owners are concerned about mobilization, travel time, lodging and do not know how to add these items into bids or negotiations. [#PMP14]

Contracting processes. The study team asked business owners and representatives to share their overall experience with ODOT’s contracting processes.

For many the process is positive. Some interviewees were able to offer suggestions for improvement as well. [e.g., #15, #22, #33] Comments from the in-depth interviews include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that overall, working with ODOT has been a positive experience. She added that ODOT’s willingness to reach out to DBE firms has improved their contracting opportunities and relationships. [#10]
- On the topic of ODOT’s contracting process, the white male director of a contractors association reported that for the most part, it works well. However, he did note that one little “hiccup” can cause “a snowball effect” that negatively affects the rest of the bidding process. He went on to express that ODOT should be consistent in how they define the “commercial useful function” requirement for subcontractors on projects. [#TO3]
- A white male project manager from a local government agency reported that the County does a good job keeping track of what has been turned in and what has not been turned in to ODOT. He went on to say that he has liaisons that “stay on top of making sure everything is done appropriately.” He added that his experience working with ODOT employees have been positive. [#LA3]
- When asked about ODOT’s contracting processes, a white male owner of an ESB-certified general construction firm reported, “Their bidding system is pretty well done ... it’s easy to access information in the bid documents ... it’s also easy in eBIDS to submit a bid for an ODOT project.” [#14]

- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that ODOT’s online bid submittal works well. [#16]
- When asked what works well with ODOT’s contracting process, the owner of an ESB-certified engineering-related firm commented that the “announcement part” works well. He went on to indicate that overall, it is a smooth process, commenting, “I don’t think I’ve had any issues.” [#21]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that ODOT does a good job by having only one process for every type of project, and commented that there are “no surprises” in their requirements or expectations. [#25]
- When asked what works well about ODOT’s contracting process, a Native American owner of a construction firm commented, “I like that you can do electronic bidding It’s helpful to be able to change your bid as you get quotes coming in.” He added, “I think the biggest struggle ... would be the DBE designation ... trying to get all that together ... to make sure that you meet that percentage [DBE requirement]. It’s a challenge. I don’t know how you fix it” [#26]
- When asked what works well about ODOT’s contracting process, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that “uploads of bids” and timely payments are both handled well. As a negative for ODOT, she commented that it is a barrier that retainage is held for five years if a firm is the first on a job. [#27]
- When asked what works well with ODOT’s contracting process, the African American president of a DBE- and MBE-certified construction business reported that their website and DBE Program representatives have been helpful. [#49]

When asked about any needed improvements, the same interviewee suggested that ODOT have workshops regarding their contracting specifications. [#49]

- When asked what works well about ODOT’s contracting process, the Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that he knows that ODOT will pay, even if it is sometimes late. He added that if his bank sees an old outstanding bill from ODOT, they still assume that the payment is forthcoming. He went on to say that ODOT advertises its projects well. [#37]
- The female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm stated that their experience with the DBE Program and the ODOT contracting process has been a “mostly positive” experience. [#56]

Some interviewees had more negative perceptions and offered suggestions for improvement (which somewhat overlap with other input in this appendix). Comments include:

- On the topic of ODOT's contracting processes, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reiterated that while he does not like ODOT's audited overhead rates, he appreciates that they have attempted to negotiate rates. [#18a]

The same business owner added that there are provisions in ODOT contracts that his firm does not like. For example, ODOT requires that the rate offered to them be equal to the lowest rate the firm offers. He added that while he can discount his rates for the Port of Portland on large contracts, he cannot afford these discounts on small ODOT projects. [#18a]

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that the firm is challenged by the ODOT procurement process. His firm is not able to get the necessary mark-up they need for certain subcontractors. He went on to say that this cuts the firm's profit margins by one-third. [#18b]
- When asked what works well with ODOT's contracting process, the African American owner of a now-closed construction firm indicated that he struggled with the process, and suggested that ODOT be more aggressive when it comes to posting opportunities for minorities. He added, "[There] needs to be more education and more outreach [to minorities]." [#23]
- On the topic of ODOT's contracting process, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that ODOT should establish an avenue for reporting complaints that is inclusive all the way "to the top of the chain." He commented that ODOT gets very defensive with complaints, and that bringing issues forward is like "talking to a wall." He went on to express that their paperwork process is severely outdated, and that they need to adopt the private sector's [strictly digital] modern practices. [#28]
- A white male board member of a contractors association reported that the organization has lost some of their women-owned members because they spent a lot of time working on unanticipated [ODOT] paperwork; they left because they didn't feel that the required paperwork was worth the trouble. [#TO2]
- A female ODOT Region 1 staff person reported that both prime contractors and DBEs need reminding of the paperwork process, particularly when a prime or sub has limited history with ODOT. She stated, "I think our processes are hard for anybody who hasn't done a lot of work with ODOT, whether you're a sub or a prime It's a different animal." [#OS2a]

Some of the comments indicated some level of distrust of ODOT. For example:

- When asked how ODOT or other public agencies could improve their contracting processes, the African American female president of a DBE- and MWESB-certified specialty contracting firm stated, “They have to make sure that they know and try to recruit minority businesses and minority- and women-owned businesses, because usually they would have a list that would have all of us on it, but I think they sometimes just don’t even put us in the bid process.” She continued, “... they already know who they want to have in it, and they have their special ... friends that they’ll put in there. And, a lot of times they are not minority- or women-owned businesses.” [#8]

Hardcopy/electronic directory of potential subcontractors. A number of business owners and representatives reported use of a hardcopy or electronic directories of potential subcontractors. Comments include:

- The white male president of a majority-owned construction business reported on how the firm utilizes the “DBE” directory, “[We] sort out the African Americans and Asians, and highlight the ones whose scope of work fits in.” [#1]
- For the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm, an electronic directory of potential subcontractors “would be nice.” She went on to say that it would be helpful to see who else has downloaded the bidding documents, and who has used those lists to make teaming calls. [#2]
- On the topic of a hardcopy or electronic directory of potential subcontractors, the representative of a majority-owned construction firm indicated that he prefers electronic directories, and that hardcopies are unnecessary. [#19]
- When asked about hardcopies or electronic directories of potential subcontractors, the male owner of an ESB-certified engineering-related firm commented, “I’ve never had any ‘hardcopy’ experience with wanting hardcopies or anything, but the electronic works great.” [#21]

Unbundling of large contracts. Interviewees discussed advantages and disadvantages of unbundling large contracts.

Many interviewees thought unbundling would be helpful to their firms, and some recognized ODOT’s current efforts to accomplish this. [e.g., #11, #14, #16, #19, #21, #23, #25, #27, #30, #31, #33, #34, #36, #37, #38, #44, #45, #47, #50, #51, #56, #AI5,#LA5] Comments include:

- An African American female owner of a DBE- and MWESB-certified engineering firm indicated that smaller A&E contracts specifically for individual pieces of a project would be helpful. She added that it would be easier for a small or one-person firm to bid on these types of contracts. [#3]

- The African American male president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that ODOT already does a fair amount of unbundling, and indicated that it has been helpful to small firms. [#7]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that she finds unbundling beneficial because it allows multiple firms to work together and build relationships. She added, “Metro is doing a good job, and ODOT has been leading the way.” [#10]
- A female representative of a consulting firm who called the Disparity Study hotline reported a need “to break contracts into smaller pieces.” She asked that ODOT consider unbundling jobs to expand her access to public sector work. [#OPC2]
- The white female owner of a WBE- and ESB-certified professional services firm indicated that unbundling contracts would be helpful to her firm. She commented that unbundled contracts would be more practical than larger, “unmanageable” contracts intended for one firm. [#24]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm suggested that ODOT unbundle contracts and delegate them to small businesses, much like TriMet does. He stated that this can benefit both small business and primes because the primes do not need to take on as much of the work themselves. [#28]
- An ODOT representative questioned why ODOT doesn’t do more to contract certain portions of large contracts to small firms that would otherwise be subcontracted if it were bundled. He said, “I think there’s an excellent opportunity to save one’s cost and also provide small business opportunity” [#OPMP2]
- An ODOT staff person commented that ODOT would benefit from saying, “Hey, we’re trying to play nicer with small local firms and really help the local firms ‘up by their bootstraps.’” [#OPMP4]

Some interviewees pointed out some negative aspects of unbundling, including making contracts too small to be of interest. For example:

- When asked about unbundling large contracts, the white male executive of an African American-owned engineering and consulting firm stated, “That’s a two-edged sword On the one hand, we always like to see large contracts divided into multiple pieces, [as] we get more opportunities. On the other hand, we spend that much more time pursuing them, writing proposals, making all the calls ... so it’s a very time-consuming and expensive thing to respond to a whole bunch of little [opportunities].” [#9]
- A white female project administrator from a local government agency commented that she has heard of subcontractors being worried that unbundling contracts could result in project pieces that are too small and not worth pursuing. She added, “There’s a fine line between how you break out that dollar amount.” [#LA1]

- When asked about unbundling contracts, the Native American male owner of an MBE- and ESB-certified specialty contracting firm reported, “[Unbundling is] tough for a contractor ... it’s hard to take one piece of a contract and then run it from there on because you don’t know the exact scope of work that you have to do ... it could require more, but then again, it could require less Something like that would have to be exacted to the ‘I’” [#15]
- When asked if the unbundling of ODOT’s contracts would be helpful, the white male representative of a majority-owned ESB-certified specialty contracting firm commented, “... unless ODOT changes their format instead of lumping it all into one bid, [if] they decide to piecemeal it out ... that’s the only way to open up an opportunity for someone in our industry.” [#29]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm indicated that unbundling contracts would not necessarily benefit his firm. He commented that breaking up large contracts benefits firms that struggle with bonding and financing, and added that those are not barriers for his firm. [#6b]
- The white male owner of a specialty contracting firm reported that his firm prefers to do larger contracts. He went on to note that ODOT bundles both large and small jobs, and commented that they need to pay attention to how they can best help businesses grow. [#22]
- An ODOT staff person commented that ODOT should review the possibility of unbundling large projects to provide opportunities to small businesses. However, he questioned whether unbundling could be cost effective for ODOT. [#OPMP4]
- While at a public meeting, an ODOT staff person reported regarding unbundling, it is easier to manage one contract and write one Request for Proposal (RFP) than many smaller ones. [#OPMP3]
- An ODOT public meeting participant said, “Small contracts, especially for using federal funds, are difficult.” He added that the difficulty exists because they must go through OPO in Salem, ODOT Procurement Office. [#OPMP3]

Price or evaluation preferences for small businesses. Some business owners and representatives indicated that price or evaluation preferences would be helpful. [e.g., #33, #44, #53, #56] Comments include:

- On the topic of price or evaluation preferences for small businesses, the male owner of an ESB-certified engineering-related firm reported that the ESB program provides an opportunity for exposure, and noted that it has worked well so far. [#21]

Others spoke unfavorably about price or evaluation preferences for small business.
[e.g., #13b, #18a, #19]

- The male representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that not all public agency evaluation preferences are clear, and that this can dissuade small businesses. [#11]
- When asked about price or evaluation preferences for small businesses, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented that they sound great in theory, but he does not know the specifics of how they would work. He went on to say that if you bid a job in a different state, it can put an out-of-state contractor at a disadvantage. [#16]

ODOT Small Contracting Program and other programs. ODOT has a Small Contracting Program for A&E contracts, constructions and other services contracts that uses streamlined bidding procedures. Some interviewees had knowledge of the program and some did not.

The program was beneficial to some of the businesses interviewed. Comments include:

- A white female principal of a DBE- and WBE-certified consulting firm reported that they had secured work from the Small Contracting Program. She went on to say that the jobs are sometimes sole-sourced. [#5]
- The owner of an ESB-certified engineering-related firm indicated that the Small Contracting Program it has been very helpful to his firm, commenting, “[It] works great!” [#21]

There were some comments indicating that ODOT might better communicate the Small Contracting Program and make other improvements to the program. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm reported experience with an ODOT small projects program that requires no RFP under a certain dollar amount. She stated, “If your number is on their desk, they [ODOT] will call you. My number is not going to be there unless I have established a relationship and the way to establish a relationship is to call them ... and I keep calling them and they keep telling me ‘no we don’t have [work].’” She continued, “If it’s because they don’t want me or they don’t have [work] ... the only way I can find [out] is if they [ODOT] make their records [transparent].” [#3]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that she was not aware of ODOT’s Small Contracting Program. [#2]
- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he has participated in ODOT’s Small Contracting Program in the past, and noted that it has much room for improvement. [#28]

- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm stated, “[ODOT’s] Small Contracting Program needs a lot of work ... I don’t see anything coming across the board, and I have been asking about that for over a year. They promoted it, but I didn’t see anything.” [#36]

Small business set-asides. Many interviewees indicated that small business set-asides would be helpful. [e.g., #3, #9, #21, #23, #33, #45, #48, #53, #56, #59, #WPC9] Comments from the in-depth interviews include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that while small business set-asides would be beneficial, she has only seen them at the federal level. [#10]
- When asked if small business set-asides would be helpful to her firm, the white female owner of a WBE- and ESB-certified specialty consulting firm indicated that they would be very beneficial, commenting, “[Small business set-asides] would be fabulous.” [#31]
- On the topic of small business set-asides, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that there is some benefit to the firm’s engineering service area due to set-asides. [#18a]
- A public meeting participant indicated that he has not seen an ODOT small business, women’s or minority set-aside for engineering in the last five or six years. This participant suggested that ODOT set-aside projects for local small businesses. He indicated that costs would be lower if local firms were utilized who do not have large billable travel expenses. [#PMP12]
- When asked if small business set-asides would be helpful to his firm, the white male representative of a majority-owned ESB-certified specialty contracting firm reported that they would not benefit his firm in their current form because their current work is still bundled with larger projects. [#29]

Mandatory subcontracting minimums. Mandatory subcontracting minimums ensure that prime contractors subcontract out at least a certain portion of a contract.

Many business owners and representatives reported that mandatory subcontracting minimums would be helpful to their firms. [e.g., #3, #6b, #9, #10, #11, #15, #21, #22, #23, #31, #33, #34, #44, #48, #50, #56] Comments include:

- The African American female president of a DBE- and MWESB-certified specialty contracting firm stated that mandatory subcontracting minimums would help to “equal the playing field.” [#8]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm spoke favorably of mandatory subcontracting minimums, and indicated that they have helped her firm get work in the past. [#2]

- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that mandatory subcontracting minimums and unbundling contracts would be “helpful.” [#51]
- When asked about mandatory subcontracting minimums, the white female owner of a WBE- and ESB-certified professional services firm reported favorably on the requirement that large companies work with small businesses such as her firm, but she would need to know about those opportunities. [#24]

Others interviewees were not in favor of mandatory subcontracting minimums. [e.g., #19, #26, #45, #53, #TO2] For example:

- When asked about mandatory subcontracting minimums, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented that it is a “very tough topic.” He added that if he bid an ODOT job that entails work he’s accustomed to doing, why would he need to sub out the work? He went on to say that it can be a “catch-22.” [#16]
- The white male president of a majority-owned construction business stated that while his firm has not had much experience with subcontracting minimums, he does not think they would be helpful. He went on to compare them to his experiences in meeting TERO requirements. He reported that the Native American workers were sometimes only “on-site” to meet subcontracting goals, and added that because they were oftentimes not capable of doing the high-skilled labor, they instead “stood there and watched.” [#1]

Small business subcontracting goals. Many interviewees indicated that small business subcontracting goals would be helpful to their firms. [e.g., #3, #6b, #8, #9, #10, #21, #23, #28, #34, #44, #45, #56, #PMP27, #PMP32] Others reported issues stemming from small business subcontracting goals. Comments from the in-depth interviews include:

- When asked about small business subcontracting goals, the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported, “I think they’re helpful I think the size of the contract is something to factor in there though.” She went on to say that it would not make sense to include small business subcontracting goals on small contracts. [#2]
- When asked if subcontracting goals have been helpful to his firm, the African American owner of a DBE-, MBE- and ESB-certified specialty construction firm stated, “Yes ... not as helpful as [they] could be, but yes.” [#6b]
- A public meeting participant representing a contractor trade association commented, “I think the [DBE] goal should be higher” He added, “It seems to me we should ... be aggressive and move the goal a little bit forward because we’ve shown that there is some availability” [#PMP25]

- When asked about small business subcontracting goals, the male representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that ODOT is doing more with subcontracting goals in the construction industry. He added that he is unaware of similar goals for his industry, and commented that they would have a very positive impact there. [#11]
- When asked about small business subcontracting goals, the white male owner of a specialty contracting firm suggested that the agency setting the goals be very familiar with the construction community when setting the goals. He added that the goals are reasonable for the most part, and that they usually do consider the availability of DBE subcontractors in the area, since goals vary by geographical area. [#22]
- On the topic of small business subcontracting goals, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male commented, “[Subcontracting goals] need to be a DBE or [not] a DBE ... we’re in the middle ... we’re a DBE, but we don’t count for anything.” She went on to say that some DBEs take advantage of the status, and make obtaining work difficult for legitimate DBEs. She gave the example that an African American-owned firm can start their business because they can be classified as a DBE to receive jobs. Meanwhile, her more experienced Hispanic American-owned company loses potential business because they are not eligible for DBE goals based on the current definitions. [#27]
- On the topic of small business subcontracting goals, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “I wish they would just make it easy Aspirational goals ... it’s more complicated than it needs to be.” [#16]
- An ODOT public meeting participant stated that he is aware of large firms that utilize the same small subcontractors repeatedly. He commented, “Whether it’s flagging, truck driving ... it almost seems kind of that smaller, miniscule-type work that they do find DBEs to fill in to try and get to their goals.” [#OPMP3]

Formal complaint and grievance procedures. Many interviewees had knowledge of formal complaint and grievance procedures, but had limited experience. [e.g., #10, #31, #34, #39b, #53] Comments from the in-depth interviews include:

- When asked about formal complaint and grievance procedures, a white male owner of an ESB-certified general construction firm reported that the complaint procedures are well outlined and effective. [#14]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that she does not have any experience with formal complaint or grievance procedures. However, she indicated that she is aware of the formal procedures detailed on each of their contracts. [#2]

Some interviewees reported that there are preferable ways to handle issues than through a formal complaint. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm stated that while she is aware of the procedures, she does not use them. She commented, “If they’re not willing to work with you, you’re probably better off not working with them.” [#3]
- On the topic formal complaint and grievance procedures, a white female principal of a DBE- and WBE-certified consulting firm commented, “Dialogue is beneficial to small businesses ... [and] ‘formal questioning’ might be better than ‘formal complaints.’” [#5]
- On the topic of formal complaint and grievance procedures, the African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that while formal procedures are necessary, there should also be a system to address informal complaints. He added that there should be people in ODOT who specialize in addressing informal complaints. [#6b]
- When asked about formal complaint and grievance procedures, the African American female president of a DBE- and MWESB-certified specialty contracting firm commented, “When times are good they do have those [formal complaint and grievance] processes ... but when things are like the economy is right now, those things are set aside and they’re just trying to get the work done.” [#8]
- On the topic of ODOT’s formal complaint and grievance procedures, the male representative of a white woman-owned specialty construction firm commented, “[The procedures are] a diversion of ODOT’s manpower ... it’s just one more thing they’ve got to do ... and [it] would require hiring another 500 people to work for them.” [#13a]
- When asked about formal complaint and grievance procedures, the African American owner of a DBE-, MBE- and ESB-certified engineering firm expressed that ODOT should establish an inclusive platform for reporting complaints. [#28]

Some reported negative experiences related to ODOT complaint procedures. For example:

- On the topic of formal complaint and grievance procedures, a Native American owner of a construction firm stated that the processes “seem slow.” He added, “I think they [ODOT] could speed it up ... the first step is at the project level, the next is at the region My experience is ... you get the same answer all the way through” He went on to add, “It seems like people at the project level should really be the ones in power to resolve an issue.” [#26]
- The white female owner of a WBE- and ESB-certified specialty construction firm commented that she has used the grievance procedures and expressed dissatisfaction with them. She went on to say that she had little opportunity to voice her opinion during the process, and added that she does not think there is any legitimate way for a sub to complain. [#35]

- The white male owner of an ESB-certified engineering firm reported that he has made complaints to ODOT with no reply. He went on to say that the system should be more regulated. [#44]

ODOT successes and areas for improvement. The study team asked interviewees a general question about any ODOT successes and potential areas for improvement.

A few interviewees made comments regarding ODOT successes. For example:

- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm stated that ODOT has a good contracting office with dedicated staff. [#54]
- When asked what ODOT is doing well, the Native American representative of a minority business association reported that ODOT set a goal for Native Americans on the professional services side, and noted that his firm secured work as a result. [#TOFG1a]
- An African American male owner of an MBE-certified professional services firm reported that ODOT has excellent commitment “from the top.” He added, “If the person at the top buys into it, you can get it done.” He noted that ODOT’s employees do not tolerate any “shenanigans.” He went on to say that they follow the rules, and get work done which is what makes them so successful. [#55]
- When asked what ODOT is doing well, the female representative of a Hispanic American-owned DBE- and MBE-certified specialty contracting firm stated that she likes that there are “quotas” for minority-owned firms. [#56]

Many interviewees made comments related to potential improvements. Comments included:

- An African American female owner of a DBE- and MWESB-certified engineering firm commented that ODOT should be more transparent in their project and bidding processes. She reported, “Some, not all [of] ODOT managers are not responsive [to my phone calls]. It is difficult to do business when the client [ODOT] abandons the project. You’re hesitant to do the work [with them again]” [#3]
- The managing member of a Subcontinent Asian American-owned construction firm commented, “I’d like to see more workshops where I can network with the points of contacts in [my local area] to find out more and learn how I can be involved.” [#AI17]
- The representative of a woman-owned engineering-related firm said, “ODOT should have organized events for subconsultants to meet prime consultants. I don’t have the resources of the big companies” [#AI21]

- When asked how ODOT and other public agencies could improve their contracting processes, the Native American male owner of an MBE- and ESB-certified specialty contracting firm commented, “By networking with minority [firms] Those associations that are Native American We’re out there, they just don’t search and get us They don’t do any networking I’m supposed to be a number two contractor ... I should get first crack because I am a Native American, but it hasn’t worked that way.” [#15]
- When asked what ODOT could do to improve their bidding process, the Native American owner of a DBE- and MBE-certified specialty contracting firm commented, “Maybe, in some of those larger projects ... ODOT could have some kind of outreach [to subs] I know they have all these ‘good faith efforts,’ but what does that mean?” [#16]
- When asked how ODOT could improve their contracting process, a Native American owner of a construction firm stated, “There are plans and specifications ... sometimes the way they [ODOT] write them, they’re very ambiguous. So as bidder, I have to assume a best-case scenario based on what their plans and specs are implying And when they’re not like that ... if I assume something else, I know I’m not going to get the job.” He went on to indicate that to comply with ODOT’s plans is often costly for a contractor, commenting, “It’s an issue that shouldn’t exist ... if they [ODOT] had clearer plans with specifications that were less ambiguous ... that would help out.” [#26]
- When asked how the bidding process could be improved, the white female owner of a DBE-, WBE- and SBE-certified construction business suggested, “[You should be required to name] your subs at the time of your bid.” She added that this would help to stop bid shopping. [#32]
- The white male director of a contractors association reiterated that it is difficult to meet ODOT goals in the paving industry, and identified a lack of clarity and frequent inconsistency as barriers. He went on to add that if “hypothetical” examples of commercial useful functions were provided by ODOT, the clarity issue would largely disappear. [#T03]
- The Hispanic American owner of a construction business stated that in comparison to other public agencies, he is not very aware of what ODOT is doing well regarding contracting. He went on to note that it takes too long to execute change, and commented, “They’re horrible about that.” He added that this can negatively affect smaller contractors. [#58]

- A white female owner of an ESB-certified specialty contracting firm reported that some public agencies such as ODOT teach a firm how to sign up, but offer little or no assistance for getting actual jobs or getting their “foot in the door.” She commented, “I feel like we’re doing all the stuff they tell us to do, but then nobody calls.”[#59]
- The white male owner of an ESB-certified engineering firm commented that nothing about ODOT’s contracting process works well for his business. He went on to say that to improve their contracting processes, RFPs go to subcontractors as well as small and local business. He also suggested that RFPs be “public knowledge.” [#44]
- When asked how ODOT could improve, the white female owner of a WBE- and ESB-certified specialty construction firm commented that when ODOT accepts a low bid, they get what they pay for. She recommended that there be an alternative bidding system such as a score or merit system. [#35]
- The white female owner of a WBE- and ESB-certified specialty consulting firm suggested a way to improve ODOT’s contracting processes. She recommended that ODOT acquire a list of small businesses and local businesses in local areas so that they can encourage prime contractors to consider those smaller firms. [#31]
- A white male owner of a now-closed ESB-certified engineering firm commented, “I don’t think it [ODOT’s contracting process] is working well at all.” He went on to say that while it may work for large firms, the process is broken when it pertains to small firms and MWESBs. [#38]

The same business owner also recommended the elimination of the on-call roster program, particularly when making calls only every three to four years for firms to get on the list. He suggested that it be made into a process where firms “pass a bar” with automatic placement on the list. He went on to say that this works well for WSDOT. [#38]

- The male representative of a contractors’ organization provided a written public comment regarding ODOT’s bidding process and DBE goals. He commented, “... ODOT DBE goals aren’t being met largely because of policies and systematic usage of low-bid processes ...” He added that low-bid processes do not bind ODOT and therefore “alternative bidding methods to increase DBE goals” is strongly encouraged. [#WPC11]
- An African American owner of a DBE-and MBE-certified specialty contracting firm reported that financing assistance for businesses operating for less than two years would be helpful, especially for individuals with lower than average credit scores or criminal records. [#46]

- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented that ODOT could improve by not only considering low-bid, but also considering alternative pricing options. She added that alternative bidding options could help on “out-of-town” jobs that require per diem hotel accommodations. [#25]
- When asked how ODOT can improve, the Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm recommended ODOT staff improve their understanding of minority, second-language business owners with little capital. He added that while disparity studies are great, a “shift in mentality,” openness and transparency at ODOT is necessary to improve the system as well. [#33]
- To improve the contracting process, the Hispanic American female representative of a business assistance organization recommended that ODOT require primes to use “rotating” subcontractors, or open their doors to new subcontractors. [#TOFG1b]
- When asked about areas for improvement for ODOT, the African American representative of a minority contracting association suggested that the funds available to trade organizations not go to one specific organization, but be shared equally among them. He added that merging relationships between the groups would help because they are all “fighting for the same scraps.” [#TOFG2c]

The same representative went on to suggest that ODOT review some of the programs that the cities offer, and that they should revisit their mentor-protégé program to “update” it. [#TOFG2c]

K. Insights Regarding DBE/MWESB Programs and Other Related Race- and Gender-based Measures

Interviewees, participants in public hearings and other individuals commented on race- and gender-based measures that ODOT or other public agencies use, including the Federal DBE Program, State MBE/WBE Policy, Emerging Small Business Program, Small Contracting Program, and other business support. Part H includes:

- Experience with ODOT’s DBE/MWESB Programs and others’ race- and gender-based programs;
- ODOT’s or other agencies’ monitoring and enforcing of their programs; and
- Effects of DBE contract goals on businesses not eligible for the program.

Experience with ODOT’s DBE/MWESB Programs and others’ race- and gender-based programs.

The study team asked business owners and representatives to share their experience with ODOT’s DBE/MWESB Programs and others’ race- and gender-based programs.

Some firms reported successes with some programs administered by ODOT. Some reported successes of the DBE/MWESB Programs and other race- and gender-based programs. Comments include:

- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that all of the firms he is aware of that obtained contracts as DBE firms did well, though there are not a lot of them. He added, “Not enough work is always a complaint.” [#7]
- The white male executive of an African American-owned engineering and consulting firm stated that at his previous place of employment, they received a significant amount of federally-funded work because of their DBE certification. [#9]
- An African American owner of a DBE- and MBE-certified specialty contracting firm reported that DBE personnel are extremely helpful in finding information for the company. He added, “The program itself is good,” and reported that he gets more opportunities to work because of the DBE Program. He went on to comment, “[The DBE Program allows me] to get in and play with the ‘big boys.’” [#46]
- When asked if the DBE Program has been helpful to his firm, the African American owner of a DBE-, MBE-, and ESB-certified specialty contracting firm stated, “Yes ... because they [primes] wouldn’t use me if they didn’t have to.” [#48]
- The white female owner of a DBE- and WBE-certified services firm indicated that the DBE Program gave the firm new opportunities, adding, “... they’re [ODOT] making an effort to include small businesses.” [#34]
- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female reported that her firm has not gotten a job yet because of her certifications. However, she did note that her firm saw success after presenting to a public agency; they invited her firm to bid on a project. [#10]
- The white female owner of a WBE- and ESB-certified specialty consulting firm stated that she credits one of her awarded projects to her WBE certification. [#31]
- A male ODOT staff person reported that a positive benefit of the Federal DBE Program is that ODOT is putting people to work. He added that when it comes to the hiring of DBEs, race and the fact that they are a DBE firm is not an issue. If DBEs show up on time, they do the work and give a fair price, then they are hired. [#OS3a]
- A white female principal of a DBE- and WBE-certified consulting firm spoke in favor of DBE subcontracting goals and certifying as a DBE. She commented, “I think they are great. There were a lot of years without goals.” She added, “If there are goals to be met and they [uncertified firms] are not certified, and woman-owned, they should get certified.” [#5]

- When asked about his experience with DBE subcontracting goals, the African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that he is in favor of them. When asked if his firm faces barriers in obtaining subcontract work, he responded, “As long as a job has goals, DBE goals, then ‘no’ ... but not every job has those goals.” He added that obtaining work depends on both the size of the job and the ODOT DBE goals. He explained that on small jobs, ODOT does not have goals, and that this can sometimes be a problem for his firm. [#7]
- The white female owner of a WBE- and ESB-certified professional services firm reported that the MWESB certification has been helpful to her company because it has allowed her to “stand out against the rest.” [#24]
- When asked about successes related to the DBE Program, the white male owner of a specialty contracting firm commented, “I think without a doubt ... there’s firms that benefited from the DBE Program ... but my own take, is that those same firms would have probably succeeded without being part of the program. And, I’m sure that there’s some that are out there that maybe wouldn’t have [succeeded] that have grown. But for the most part, I think the good firms that are well run, they’re ... [going to] be successful, whether they’re a DBE or a non-DBE.” [#22]
- The African American president of a DBE- and MBE-certified construction business reported that his firm got more calls from primes and secured more work as a result of the FHWA waivers in 2013. [#49]

Some businesses reported success within other agencies’ programs. Comments include:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that he has had positive past experience with the City of Portland’s PPCD (Portland Prime Contractor Development) program. He added that he is not aware of similar programs from ODOT. [#6b]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented, “I appreciate that [DBE subcontracting goals programs] are there We are extremely successful [with City of Portland] because we are a minority-owned business ... and also because we have a lot of long-term history of successfully working with them” He added, “ODOT ... overall their program has not benefitted us There’s not enough incentive for a general contractor to hire a firm like us.” [#18a]
- When asked about ODOT or other public agency DBE subcontracting goals programs, the Native American male owner of a DBE- and MBE-certified specialty contracting firm commented, “I don’t like the race-conscious goals, I think it’s counterproductive in our industry ... I don’t think they’re achieving the goal by doing that.” [#16]

When asked if the program has been helpful to his firm, the same business owner reported that the ODOT DBE Program has not significantly helped his firm get work, though he went on to comment that the DBE certification helped him get work with TriMet and WSDOT. [#16]

- The white male executive of an African American-owned engineering and consulting firm reported that like ODOT, Port of Portland and TriMet are very helpful because they have a senior manager position, or “advocate,” to oversee race and gender conscious programs. [#9]
- The white male representative of a majority-owned ESB-certified specialty contracting firm suggested that if the SBA’s HUBZone process were to be more simplified, it would increase opportunities for companies to certify and get more work with larger firms. [#29]
- The Hispanic American owner of a construction business reported that the SBA 8(a) certification is more helpful than a DBE certification. He went on to say that the SBA 8(a) program includes more minorities and ethnicities than ODOT’s DBE Program. [#58]
- When asked about other public agency programs, the white female owner of a WBE- and ESB-certified specialty consulting firm stated that many public agencies are encouraged to hire minority or women-owned businesses. She went on to note that EPA grants and state grants encourage collaboration with minority- and women-owned businesses as well. [#31]

Many owners of ESB-certified firms said that the program helped their companies. Comments include:

- When asked about program successes, the white male representative of a majority-owned ESB-certified specialty contracting firm reported that he was able to earn a larger company’s business because of his ESB certification. [#29]
- The male executive of a majority-owned services firm stated that being an ESB had enabled his firm to secure more work based on the certification; his firm has since graduated from the program. [#45]
- The owner of an ESB-certified engineering-related firm indicated that being an ESB has helped him secure work. He added that he occasionally gets work from companies trying to fulfill a “quota,” commenting, “It’s not the majority of jobs, but it has happened.” [#21]
- When asked about ODOT or other public agency DBE or ESB subcontracting goals programs, a white male owner of an ESB-certified general construction firm commented, “I think [ODOT] do a pretty good job of setting aside some projects for ESBs ... some of their bigger projects require a certain percentage of the work to be subcontracted to a DBE or ESB firm ... which is nice.” [#14]

- When asked about ODOT or other public agency DBE subcontracting goals programs, the owner of an ESB-certified engineering-related firm reported that he felt privileged to be able to be part of the program. He commented, “It has been helpful ... I was contacted because I was on the list, and I like that.” [#21]

The same business owner went on to report that he knows of women-owned firms whose businesses have “boomed” because of the DBE Program, and commented that this is a perfect “example of a success.” [#21]

Some MBE-, WBE- and ESB-certified businesses indicated that those certifications have not been helpful. Comments include:

- A white male partner of a WBE- and SDVO-certified construction firm said that he does not know if his firm is doing any better than it was before becoming WBE-certified. He stated that when his firm receives opportunities based on the certification, they often do not turn out well. [#43]
- When asked if the ESB program was helpful to his firm, a white male owner of a now-closed ESB-certified engineering firm responded, “No, it was not The excuse I get from ODOT is [that] FHWA ... does not allow them to have goals for ESB firms ESB firms are not regarded as a disadvantaged firm [But] we are disadvantaged because of size ... that’s just the way the law is written.” [#38]
- When asked for suggestions to improve ODOT or other public agency subcontracting goals programs, the African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported, “I think they should split the ESB and WBE out of the MBE.” He added that the MBE should be paired with “historically underutilized elements,” not just “white women.” [#6b]
- A white female owner of an ESB-certified specialty contracting firm indicated that the DBE Program has not benefited her firm as much as it could have. She noted that while there have been a fair amount of job opportunities, none have given a real “boost” to her business. She went on to say that there should be access to more “worthwhile jobs” through from the DBE Program. [#59]

Some DBE-certified firms reported that the program is less important to their firms now than it has been in the past. For example:

- The African American female president of a DBE- and MWESB-certified specialty contracting firm reported that while the program has been very helpful in the past, its helpfulness may have declined in recent years. She indicated that the economy is partially to blame, and commented that primes are no longer required to solicit her business. [#8]

- The white female owner of a DBE-, WBE- and SBE-certified construction business commented, “I think it was helpful ... up through ... the mid-2000s when they [ODOT] ... went to aspirational [goals].” She added, “I feel sorry for those who only have aspirational goals at this point.” [#32]

The same business owner reported that it forces primes to look at the total “DBE bank” and to solicit firms. She added, “... they [primes] try to get bids from certain categories ... so your focus is to meet that goal ... or your best effort is documented” She commented that while she does not mind doing this, the subcontractors “aren’t out there.” [#32]

Some engineering-related firms have benefited from the Federal DBE Program at ODOT since DBE contract goals have been set for A&E contracts. For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm who has secured work with ODOT in the past, commented, “Since goals were set, I have seen improvement Without goals, it’s meaningless.” She added that she experienced significant differences in the past six or seven months. [#3]

Some engineering-related firms perceived that the program did not apply to those types of contracts. For example:

- On the topic of ODOT and other public agency DBE subcontracting goals programs, the African American owner of a DBE-, MBE- and ESB-certified engineering firm reported, “They do a good job It seems to me they are trying hard, but it’s all for construction.” He then expressed that some goals should be delegated to his industry. [#28]

A few DBE construction firms that have not been eligible to meet DBE contract goals in recent years said that their certification was still helpful. For example:

- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that his certifications are helpful for the firm’s visibility and generating opportunities. [#51]

Many representatives of firms not currently eligible to meet DBE contract goals for ODOT construction contracts (because of the FHWA waiver) reported that DBE certification is not helpful to them. Comments include:

- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that the DBE Program was more helpful when their firm was first starting, because Hispanic Americans were included in goals. [#27]
- A public meeting participant commented that there is a perception that being a DBE does not count under the current waiver by stating, “I don’t count, it is just extra paperwork.” [#PMP37]

- When asked if the DBE and MBE certifications have been helpful to her firm, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm commented that they have not. She then explained that every job awarded to her firm was because they were capable of performing the work, or because they were the low bidder. [#25]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that the DBE Program was only somewhat helpful to his firm because he had already been in business for several years prior to certification. He went on to say that he already had an established client list prior to certification, and noted that he did not have to market the firm as a DBE. [#51]
- A female business owner said she has been in business for 20 years. Since white female-owned DBEs no longer met DBE contract goals, her contracts dropped every year. This has resulted in her firm's inability to compete with larger companies. [#PMP13]

She went on to report, by written comment, that her new contracts averaged over \$1 million each year over a 15-year span, but instantly began dropping once white women-owned firms were no longer eligible to meet DBE contract goals. "We finished 2014 with only \$13,000 in new contracts. Contractors who customarily used my ... company to fill goals began doing more of the work themselves or subcontracting with big name corporations who could offer larger packages ... or significantly reduced their prices in an effort to put me out of business. Once the competition is out of the way, the big companies can then raise their prices." [#WMP1]

She indicated that she has let her DBE certification lapse and was no longer interested in being certified as a DBE. "I am interested in the ESB program, but the benefits appear to be minimal at best." [#WMP1]

- The white female owner of a WBE- and ESB-certified specialty construction firm reported that she lost 35 to 40 percent of her business when the goals were set in 2013, and noted that she very rarely sees any women on jobs. [#35]
- The white female owner of a DBE-, WBE- and SBE-certified construction business reported that there are disadvantaged businesses that are overlooked because of the new rule that limits contracting goals to African American and Subcontinent Asian American DBEs on federally-assisted construction contracts. She added, "They [other minority groups] might as well be invisible." [#32]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm commented that at the time of FHWA waivers in 2013, "It was a mass exodus Nobody wanted anything to do with ODOT." He went on to say that because many primes are not calling DBEs in Oregon, many Hispanics relocated to Washington. [#33]

- An African American male owner of an MBE-certified professional services firm reported that some people felt discriminated against because of the waivers' exclusions. He stated that he does not like pitting one race against another because it causes unnecessary conflicts; certain ethnicities feel left out, even if the waiver changes every few years. He went on to say that he did not notice a difference in regards to his business because he is working hard no matter what "anyone or any waiver says." [#55]
- On the topic of FHWA waivers, a female ODOT Region 1 staff person commented that she has heard DBEs express that it is unfair that some groups are not counted toward "hard goals." [#OS2a]
- The Native American male representative of a minority business association reported that in his experience, the FHWA waivers have negatively affected Native American contractors. [#TOFG1a]
- When asked about the FHWA waivers, the African American representative of a minority contracting firm reported that he has not observed any African American-owned firms receiving increased contracting opportunities. [#TOFG2c]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm indicated that that the waivers denied Hispanic American contractors opportunities while it created opportunities for African American contractors to become general contractors. [#25]
- When asked if he noticed any differences related to the FHWA waivers, a Native American owner of a construction firm said, "I saw other DBE companies [that] were actually very good, and could perform the work ... go away [go out of business]." He added that he knows of two women-owned DBE firms in particular that went out of business due to the waivers. He commented, "Now that there's a requirement out there ... that you have to have the specific designation of DBE ... now firms are out finding these other companies to fulfill the percentage requirements" [#26]
- When asked if the FHWA waivers have affected her firm, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male reported that firm has lost work, especially heavy highway work, because Hispanic American DBEs do not meet the goals. She went on to say that there are now fewer eligible DBEs for primes to pick from for projects, and noted that this can increase costs. [#27]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm indicated that the owner lost the DBE goal advantages because of the preferences for African American- and Subcontinent Asian American-owned firms. He went on to say that they have lost low bids to DBE firms with higher bids because of the new goals definition. [#30]

- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm indicated that Hispanic Americans' exclusion from ODOT "hard goals" has hurt his firm. He went on to say that while establishing goals for a small group of minorities may sound good, it benefits very few people in practice. [#37]
- A female construction firm representative said her firm has DBE and ESB certification. She remarked that she is not sure why she is certified. "Sometimes I wonder why I'm certified because ... we don't count towards any hard targets or any aspirational goals, so it's kind of superfluous." [#PMP17]
- Another public meeting participant said that the reason there was no disparity for Hispanic contractors in the past MGT disparity studies, and therefore Latinos were excluded from the DBE contract goals program, was because of the high utilization of only two Hispanic contractors. "So what we've come up with is that the Hispanics that are successful are one or two." She also reported at least 50 DBE-certified firms that MGT did not include in the availability analysis of their most recent disparity study update. She concluded that because of flawed data in the past studies, "It creates a waiver or a system that is discriminatory against many groups." She said that participation of Hispanic-owned firms went from \$50 million in 2011 to just \$9 million as a result. [#PMP4]
- Referring to ODOT's current implementation of DBE contract goals as "a curious hodgepodge of racial preferences," the author of a written public comment stated, "It is clear that ODOT's race-conscious subcontracting goals provide unfair racial preferences to some racial minorities at the expense of others." [#WPC7]

A few DBE-certified firms reported no changes in opportunities for their businesses because of the waiver. Examples follow:

- The Native American owner of an MBE- and ESB-certified specialty contracting firm commented that he is not aware of any changes in contracting as a result of the FHWA waivers. [#15]
- The female representative of a Hispanic American- owned DBE- and MBE-certified specialty contracting firm reported, "We didn't really notice a difference." She added that her firm kept busy working for prime contractors. [#56]

Some interviewees described the challenge construction prime contractors have when only certain types of DBEs are eligible to meet DBE contract goals. They offered other insights and ideas for program improvement as well. Comments include:

- The white female owner of a WBE- and ESB-certified specialty construction firm commented that it was "asinine" for ODOT to limit DBE goals to African American- and Subcontinent Asian American-owned firms. She stated, "Sub Asian [firms] ... name one ... name two ...there are none." [#35]

- When asked about any impacts of the 2013 ODOT waiver permitting only African American and Subcontinent Asian American DBEs to be counted toward contract goals, the white male president of a majority-owned construction business commented that although a firm may hire DBE and minority firms, there is no “credit” with ODOT for such hiring. He went on to say that estimators have difficulty finding pools of DBEs to meet project goals. [#1]
- A white male board member of a contractors association reported that meeting race-conscious goals is challenging for members that prime their work, and that some goals are particularly high. [#TO2]

He elaborated, “[Meeting goals] can be challenging You have more than one goal that you have to meet ... this is what people don’t realize. By statute, [primes] have to do a minimum of 30 percent of the contract You can easily get almost 60 percent of your contract [dedicated to these goals].” He went on to comment that it can be challenging to get the best subcontractors for a job while simultaneously meeting the goals. [#TO2]

- The white male owner of a specialty contracting firm reported that his firm observed a big impact when ODOT implemented the waiver in 2013. He indicated that it was a challenge to meet those goals, as there were not many African American- or Subcontinent Asian American-owned firms active in the industry. He added, “The ones that are active ... have gotten spread pretty thin, I think, over that time period.” [#22]
- When asked if he noticed any differences related to the FHWA waivers, the white male representative of a white woman-owned WBE-certified construction business commented that it is more difficult to find qualified firms in his area that are African American- or Subcontinent Asian American-owned. He went on to say that many of those who do qualify rarely bid on jobs that require travel due to the additional [travel] expenses. [#50]

The white male representative of a white woman-owned WBE-certified construction added that it is difficult to meet ODOT’s current goals because there are not enough qualified DBEs. [#50]

- When asked what his thoughts were on ODOT or DBE subcontracting goals and programs, the representative of a majority-owned construction firm commented that he would like to see a broader range of minorities classified as DBEs, as primes sometimes struggle to meet goals. He added that the goal is “too high,” and that it is “a real struggle trying to obtain the percentage.” [#19]
- The white male owner of a specialty contracting firm stated, “[There are] firms out there that have gone on the list, but they either never bid or they’re not really qualified to build the work.” He added that some DBE firms want to be on the DBE list, “but they are not quoting,” which wastes time for both his firm and theirs. [#22]

- A public hearing participant said that he experiences difficulties in locating DBEs to perform as subs. [#PMP11]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported on the challenge of meeting DBE goals. She reported that some projects are too small, and do not lend themselves well to partnering. Although the firm she represents is DBE-certified, it gets marked down for not teaming with other DBEs. She went on to say that a large firm could give “a little sliver” to a DBE, and still get more points than a smaller firm gets. [#2]

The same female business representative went on to compare ODOT with City of Portland and Metro. She commented, “I think it is great that ODOT is developing goals.” She went on to say that City of Portland and Metro are clearer in terms of scoring and encouraging the inclusion of minority- and women-owned firms. [#2]

- A female ODOT Region 1 staff person commented that some prime contractors complain of a limited pool of DBEs that specialize in highway construction. [#OS2a]
- A Native American owner of a construction firm reported that he would not have used a certain DBE firm (who proved later not to perform) if it were not for the designation requirement. He commented, “Ourselves, we would install the [specified materials] ... and ... we were probably \$15,000 cheaper.” [#26]
- A male ODOT staff person reported the need for a broader spectrum of DBE firms who are qualified to do the work. [#OS3a]
- A written participant comment described the experience of attempting to obtain DBE participation on different bridge projects in Oregon. The author said that ODOT set very aggressive DBE and DBMWESB goals on the projects and that it was difficult to find certified firms that had sufficient financial stability to take on the work. [#WPC5]

“To be successful and to protect our own company we had to bankroll several of the firms. There are firms on your [the disparity study] advisory committee that are now debarred from bidding on public works contracts due to prevailing wage issues. There are also other DBE firms currently working on [a bridge project] that will also ultimately be debarred from bidding on public works contracts. There is no easy way to protect yourself as a prime contractor from a firm that is not paying their employees or their suppliers. They sign the lien waivers and state that everyone is paid and then you learn that this is not the case. Prime contractors are spending a lot of money playing private investigator and tracking DMWESB expenditures to make sure that they are paying their bills.” [#WPC5]

This individual went on to write, “Providing set-aside money to minority contractors is not working. We have been doing the same thing for 30 years and nothing is changing other than trying to grow the number of dependent contractors available to work. A business cannot be successful when the owner of the company does not know how to build the work in the field.” He concluded, “We have to make a 20 year plan to educate and train future minority construction firms.” [#WPC5]

- The white female owner of a DBE- and WBE-certified specialty contracting business commented that the support DBEs need now is the support that existed when the program first started. She went on to say that only putting goals on certain minorities does not benefit the program. [#42]

The same female business owner went on to note that bids, not minority status, contributes to a firm’s success. She added, “The [DBE] program has been convoluted, having it based on our race ... not based on our performance ... or our abilities.” She then commented that the DBE Program is “misconstrued” now with its current goals. [#42]

- When asked about ways to improve ODOT’s DBE and MWESB program, a Native American male owner of a construction firm commented, “I think they should move away from ... specific ethnicities.” [#26]
- A female ODOT staff person reported that “the program has been fairly gutted by the waiver situation,” and went on to explain that if there were more DBE groups eligible to meet DBE contract goals, DBEs would benefit from “competition within a sheltered market.” [#OS5]
- The Hispanic American owner of a construction business stated that he prefers that there be “hard goals” as in the past, and that the FHWA waivers terminate. [#58]
- A female representative from a specialty contracting firm, said her firm does ODOT work regularly. She commented it is difficult to meet ODOT DBE goals in the area where she works. Most of the DBE contractors are in Portland area. [#PMP17]
- A male ODOT staff person commented that the primes “almost always” complain about the DBE goal and the size of the goal. [#OS3a]
- A written participant comment made a related observation. This individual indicated that the availability of minority contractors for work is affected by whether they are participating in the SBA 8(a) Program. “Once the minority is approved in the SBA 8(a) Program they are out of the market for eight years because they have access to set-aside projects, which are much more lucrative for them.” [#WPC2]

- When asked if he noticed any differences related to FHWA waivers, the Native American owner of a DBE- and MBE-certified specialty contracting firm reported, “Yes Before, I would get calls from all the big general [contractors] ... when [the waivers] happened, it stopped Those big companies can do all the work themselves, they don’t need minorities to do the work ... all they need is to fulfill their goals, so that is that.” [#16]
- The representative of a majority-owned construction firm commented that most of the same minority-owned firms are getting the work because of the restrictions to “the two groups of people.” He went on to say that this has prevented many minority contractors from competing. [#19]

Some interviewees pointed out other difficulties with the DBE Program. For example:

- A white male project manager from a local government agency identified the need to help contractors understand what they face before submitting bids, including contract specifications and required forms. He reported that DBE subcontractors that do not know the ODOT system or the federal system bid on projects without knowing what might unfold, and noted that this can hurt the primes that hire them. [#LA3]
- One written public comment states, “ODOT implements the Federal Disadvantaged Business Enterprise Program (DBE) in a manner that strongly encourages prime contractors to discriminate against some subcontractors, and prefer others, on the basis of their race. We would like to take this opportunity to urge that ODOT cease engaging in such discrimination. There is much ODOT could do to ensure true equal opportunity and nondiscrimination.” The authors of the written comment go on to indicate, “Programs that prefer contracts on the basis of race, ethnicity, and sex are divisive, unfair, and have not worked in Oregon to eliminate reports of ‘substantial underutilization.’” [#WPC7]

This same written comment reports that ODOT’s operation of the Federal DBE Program has the danger of reinforcing common stereotypes holding that certain groups are unable to achieve success without special protection. [#WPC7]

- A female ODOT staff person is concerned that the DBE annual goal is set too high given the types of DBEs eligible to meet the DBE contract goals for construction contracts. ODOT is now putting contract goals on projects in Southern Oregon and Eastern Oregon. However, she indicated that DBEs located in the Portland area will not do work outside that region. There also needs to be a “commitment to finishing jobs” among DBEs. [#OS4]

- A male ODOT Region 1 staff person reported that it is difficult for primes to find ways to meet DBE goals when projects near completion, and reported having to meet with contractors to find ways to facilitate goals compliance in cases like these. [#OS2c]

The same staff person added that many prime contractors would like for the DBE Program to go away because of the overwhelming paperwork and quality-of-work issues. He added that this also applies to local agencies, and that flagging, trucking and landscaping are the main types of DBE work on local agency contracts. He went on to say that some primes say they would like to utilize certain DBEs, but are concerned that those DBEs might lack the capacity to do the work. [#OS2c]

- A female ODOT staff person described three DBEs that have caused problems on ODOT projects. One refused to perform and walked off a project because she wanted to renegotiate her contract with the prime. ODOT offered to the prime contractor to add a mentor-protégé component to its contract to assist the subcontractor, but this did not happen. The prime contractor was able to find another DBE to step in. [#OS5]

Another of the DBEs was successful in winning a number of subcontracts on ODOT projects throughout the state. This interviewee perceived this DBE as unreliable and untruthful, and known for threatening people. In a third instance, ODOT received a complaint about a subcontractor on a project from a motorist. The subcontractor was a DBE. [#OS5]

- A male ODOT Region 1 staff person reported that he sometimes works with prime contractors when they struggle to meet a goal because of a change in the project. He gave an example that a project may estimate that a DBE flagger will work for 1,000 hours on the project, even though flagging ultimately requires only 500 hours. He went on to say that in cases like these, he works with the prime and to identify a path to make it work and move forward. [#OS2e]
- A female ODOT staff person reported that the DBE Program competes with low bid, best price policies at ODOT. “How to fairly implement the Program without outraging other people is difficult.” [#OS5]

This same interviewee pointed out a number of very strong DBEs, but also reported that some DBEs do not appear to care about learning ODOT’s process for successfully winning work, “they just want more.” She indicated that when ODOT holds sessions to educate businesses about the process for building relationships and winning ODOT work, some businesses “want us to hand it to them” instead of taking the time to go through the process. [#OS5]

She observed that prime contractors tend to meet DBE contract goals by using disciplines that they view as being least risky to the project, and as a result, DBEs only get certain types of “low risk” work. [#OS5]

The same female ODOT staff person discussed potential overconcentration in flagging, an area in which ODOT has had problems with DBEs on projects. [#OS5]

- The white female owner of a DBE-, WBE- and SBE-certified construction business remarked that aspirational goals are “worthless,” and added, “I don’t think the people in our business really are aspiring to those goals.” [#32]

Recommended improvements. Some interviewees suggested ways to improve the ODOT DBE/MWESB program. Comments include:

- An African American female program manager for a local agency worries about “overuse of the same people” that are certified. She reported need for more outreach to identify new MBEs and WBEs to participate in the programs. [#LA6]
- When asked, if there were any advantages to DBE certification for his members, a white male board member of a contractors’ association stated, “There are some [firms] ... that basically live by that program ... [DBEs] don’t seem to graduate [from the program] very much.” [#TO2]
- A male ODOT senior executive recalled a project where a DBE competed for a prime contract and won by low-bid. He commented that it “was a miserable failure” because the DBE was in “way over their heads.” He added that ODOT cancelled the contract in the end, and that it was a financial loss for the agency. [#OS1]
- A white male owner of a now-closed ESB-certified engineering firm mentioned that he was part of a public agency’s advisory group. He recalled a meeting where staff discussed DBE programs and ways to ensure that goals are met; however, he reported that they did not care how they met the goals. He recommended that the program’s focus be on the program’s intent rather than its “numbers.” [#38]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented that he would be interested in knowing how much work has come from the subcontracting goals program. He added that this transparency would give ODOT and other agencies a better idea of what needs to be improved. [#11]
- An African American male owner of a DBE-, MBE-, ESB- and SBA 8(a)-certified general construction business recommended that ODOT increase its diversity in ODOT offices, especially because people like to see “someone who looks like [them].” He went on to say that while ODOT has women in their offices, he wonders if they have women inspectors in the field. [#40a]

- The white female director of a professional trade association, when asked about insights regarding the DBE and MWESB programs or other programs, reported that more firms would prosper if more funding was provided for civil projects. She went on to add that her majority-owned members have enjoyed working with DBE firms over the years. [#TO1]

The same interviewee also indicated that membership would like to meet more DBE firms that are qualified to do the work, commenting, “When you’re working [with] a qualifications-based selection ... you’re being hired by qualifications, you need people who are qualified That’s what we prefer [people who are qualified to do the work]” [#TO1]

- The African American representative of a minority contracting firm reported that white women-owned business receive a “large piece of the pie,” and that very few minority female-owned businesses receive comparable opportunities. He went on to say that this should change, and that there are many minority-owned firms that are underrepresented. [#TOFG2c]
- An African American female program manager with a local public agency reported on the goal of graduating DBEs, “The goal is to graduate [DBEs] out.” She commented that there are a few that can be primes. [#LA8]
- A male ODOT staff person contributed the need for advanced training for those entering the DBE Program, changing DBEs mid-contract and graduation of DBEs. He reported that DBEs require teaching and training on how to do paperwork and to manage their responsibilities efficiently (because currently they are simply in the program with no training). [#OS3b]

He added that changing DBEs mid-contract if a DBE is not performing could be advantageous explaining that the primes have no “leverage” over their DBEs, the DBEs have all of the power, “and they know it.” [#OS3b]

The same interviewee reported the need to graduate DBEs. He stated that some DBEs purposefully do not graduate from the program so they can remain small to sustain program eligibility. [#OS3b]

- A female ODOT staff person identified a need for supportive services assistance that would help DBEs work out contract issues with prime contractors. This is part of a broader need that DBEs have for legal and business advice. She reported that ODOT does not currently have this assistance. [#OS5]
- One written public comment urged ODOT to implement a race-neutral program, concluding, “To the extent ODOT is concerned that two racial groups may face discrimination in the transportation construction industry, there are effective responses that do not require race-conscious goal setting.” Examples cited include:

- If small minority firms are excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for all companies, regardless of the owner's race.
- If companies who could submit bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up to all potential bidders, regardless of race.
- If it can be shown that bids are denied to the lowest bidder because of race, safeguards should be put in place to detect discrimination and punish it with sanctions. Those safeguards and sanctions should protect all companies from race discrimination. This should be applied to the award of both prime contracts and subcontracts.
- This author recommends review of the 2005 U.S. Commission on Civil Rights report *Federal Procurement after Adarand*. [#WPC7]

The same written public comment added, "Contracts are not like hiring, promoting, or even university admissions, whether there is an irreducible and significant amount of subjectivity in the decision-making. Contracting is an area that can be made transparent, allowing ODOT and its regional office to detect and remedy discrimination." [#WPC7]

Effects from changes to the DBE contract goals in 2006. Business owners were asked to report about observed changes in ODOT's operation of the DBE Program in 2006. Comments include:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm commented before contract goals were set, his firm did not even receive phone calls from primes. He added that "the goals were necessary," and noted that his firm is now doing business with ODOT because of them. [#6b]
- The representative of an international engineering business commented that he noticed a change in federal projects rather than ODOT projects. He added that it was the set-asides that changed, and noted that a general contractor stopped hiring his firm in order to hire a minority firm out of Portland. [#12]
- When asked if his firm experienced any positive or negative effects from changes in ODOT programs in 2006, the Native American male owner of a DBE- and MBE-certified specialty contracting firm reported, "No, back in 2006, we weren't bidding a lot of the work ... [while] housing was going good ... we weren't bidding a lot of public work." [#16]
- The white male owner of a specialty contracting firm reported that he knew of a few DBE firms that had dropped off of the DBE list after the change. After the new goals were set, he stated that some of the firms went back through the recertification process to become a DBE, though the end result was a smaller pool of DBE subcontractors to select from. [#22]

- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction firm noted a negative effect from the changes in ODOT programs. He stated, “We noticed at least a 50 percent drop,” and reported that primes started doing the work themselves. [#30]
- The African American president of a DBE- and MBE-certified construction business reported that he did not notice ODOT’s DBE goals in 2006 or in 2008. He stated, “I had not really shown too much interest at that time, because [of] the way the primes were soliciting DBE contractors I would get solicitations two hours before the bid opening, or days before the bid opening And [they weren’t] giving me an idea of what to bid on.” [#49]
- A white male board member of a contractors association reported, “I think that we’ve had less involvement since [ODOT] put hard goals down.” He added, “[Hard goals] limits your non race-conscious contractors.” He went on to comment that he preferred it in 2006 when there were no goals and that ever since ODOT implemented the waiver ODOT has been “paying for it immensely.” [#TO2]

ODOT’s or other agencies’ monitoring and enforcing of their programs. Some interviewees had comments regarding the implementation of the DBE Program, including any false DBE reporting by primes or abuse of “good faith efforts” processes. [e.g., #LA5, #LA7, #TO3, #55]

Some of the comments concerning monitoring and enforcement were very general.

For example:

- An African American female owner of a DBE- and MWESB-certified engineering firm indicated that ODOT project managers be responsible for goals compliance. She commented, “Everyone keeps saying you’re going to get work, so where’s the work?” [#3]
- When asked about public agency monitoring and enforcement of its programs, the African American female president of a DBE- and MWESB-certified specialty contracting firm commented, “... they don’t include us ... can’t say anything about what they’re doing there now Unless they’re changing ... calling out for minorities ... we’re just left out right now.” [#8]
- The representative of an international engineering business commented that he has no knowledge of the monitoring and enforcement of programs. He noted that he is aware of a woman-owned firm where the owner has never appeared in the office. [#12]
- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that he is aware of many minority construction and engineering businesses that subcontract a lot of work to non-minority firms. He went on to say that these businesses are now being monitored. [#18a]

- When asked about public agency monitoring and enforcement of its programs, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm indicated that there should be someone “behind the scenes” to ensure transparency throughout the process, and to make sure that no one is “playing the system.” [#25]
- A white male owner of a now-closed ESB-certified engineering firm questioned if ODOT monitors its programs at all; he went on name a public project that did not meet goals. [#38]
- The white female owner of a DBE-, WBE- and SBE-certified construction business commented, “[ODOT] used to be better at enforcement, I think. There isn’t as much to enforce because we’re only dealing with aspirational goals ... so it’s easy to say, ‘we’re doing a good job’ But they’re not.” [#32]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm commented that public agency monitoring and enforcement of programs is “very lax.” [#33]

Some interviewees had specific examples of concerns about monitoring and enforcement. Comments included:

- The African American representative of a minority business association reported that he knows of an Asian-Pacific American-owned construction firm that employed undocumented minorities. He added that when his organization brought the issue forward, public agencies “turned their heads” and reported no awareness of the problem. [#TOFG1e]
- The African American male owner of a DBE-, MBE- and ESB-certified specialty construction firm commented that he believes there to be insufficient monitoring of the DBE programs. [#6b]
- The white male owner of a specialty contracting firm reported no knowledge of “follow-up” procedures if the goal is not met by the prime. He reported that, at times, a contract changes, resulting in a goal that is not met. However, he noted that the expectation to still meet the goal based on the original contract remains intact. [#22]
- The African American president of a DBE- and MBE-certified construction business stated that while he has read about false reporting occurring, it was not in Oregon. When asked about abuse of “good faith efforts,” he stated that primes rarely give DBEs enough time to bid on projects. [#49]
- The African American representative of a workforce organization reported that ODOT “got in trouble” with commercially useful function (CUF) when a majority-owned business used a DBE firm as a “pass-through.” He went on to say that the same majority-owned company has repeated this again, and indicated that more compliance on CUF reports is needed. [#TOFG1c]

- When asked about good faith efforts, a female ODOT staff person reported that ODOT has received good faith efforts submissions on construction contracts two or three times in recent years. She added that as DBE contract goals have only recently gone into effect for A&E contracts, sometimes there is confusion by consultants as to how to meet a goal. On occasion, ODOT has agreed that consultants made adequate good faith efforts on A&E contracts. She added that ODOT is in the process of having a DBE goal setting committee for consulting contracts. [#OS5]
- When asked about ODOT's monitoring of their programs, a male ODOT senior executive reported that the ODOT Office of Civil Rights has field coordinators that conduct audits to monitor DBE compliance; ODOT also has inspectors trained to do CUF reviews. CUF inspectors talk to a minimum of three employees to inquire about payment issues. Inspectors' reports go in the permanent project record and back to the Office of Civil Rights. He went on to say that if an issue arises, the project manager is informed. [#OS1]

Some interviewees reported positive comments or no knowledge of false DBE reporting or abuse of "good faith efforts." [e.g., #8, #12, #14, #15, #16, #19, #23, #24, #26, #27, #28, #29, #35, #39b, #48, #51] Comments from the in-depth interviews include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female indicated that ODOT does well in monitoring their program. She went on to comment that ODOT maintains a good public presence, and that they have helpful small business specialists. [#10]

Effects of DBE contract goals on businesses not eligible for the program. Some business owners and managers provided insights on the impact of DBE project goals on non-certified firms.

- The representative of a majority-owned transportation business commented, "Being required to use DBE contractor's takes away from owner operators." [#AI2]
- The representative of an international engineering business reported that his firm has lost work because of DBE and MWESB firms. He added, "To me, it's [a] kind of discrimination, a reverse discrimination, but ... we don't let it bother us. There's plenty to do, and do a good quality of work. It is what it is." [#12]

The same business representative went on to say that his firm struggled to secure federal projects as a prime while meeting the minority requirements in contracts. [#12]

- The white male director of a contractors association commented that he has heard of DBEs holding primes "hostage" to some of the requirements in terms of negotiating pricing. He added, "I don't think it's an industry-wide situation, but I think it has happened." [#TO3]

- A white male project manager from a local government agency said that the general system of DBE requirements is “kind of lopsided.” He gave the example of when a majority firm low bidder does not get the job because minority participation is required. He indicated, “I don’t know how you make it balanced but that’s not balanced, it’s privileged.” He added, “Maybe there’s a point system for each contractor. If a DBE [were] doing [well], they would get points I’m not sure how you would do it to make it balanced. It just seems like a privileged system.” [#LA3]
- The representative of a majority-owned construction services company stated, “I get calls from contractors looking for [a] sub and pricing, and they are looking strictly for female- or minority-owned businesses. This presents a barrier to me.” [#AI12]
- The representative of a majority-owned construction business commented, “It is very difficult to see projects go to woman-owned and minority-owned businesses, and then I don’t have a chance to bid on them.” [#AI18]
- When asked how the DBE Program affects other firms not eligible for the program, the representative of a majority-owned construction firm reported that there is greater liability when using a subcontractor that may not be bondable, and explained that bonding constraints for minority businesses could increase overall project costs. [#19]
- When asked about any negative effects of programs on businesses not eligible for them, the white male owner of a specialty contracting firm stated, “I’m sure there has been. I don’t have a specific instance. I’m sure if I was a non-DBE small business, trying to break into the [industry], not being able to have access to that program ... to bid, and have contractors [not] use me for that reason, I’m sure there has been some.” [#22]
- When asked if DBE contract goals have negative effects on businesses not eligible for the program, a Native American owner of a construction firm commented, “I’m sure it happens every day.” He continued, “At the end of the day, it doesn’t matter how you get your foot in the door ... it’s whether you take advantage of the opportunity. And whether you’re minority, or you’re not minority ... it’s up to them, to whether they want to take the opportunity.” [#26]

L. DBE and MWESB Certification

Business owners and managers discussed the process for DBE certification and other certifications, including comments related to:

- Experience with DBE/MWESB certification;
- Ease or difficulty of becoming certified;
- Advantages and disadvantages of DBE/MWESB certification;
- DBE/MBE/WBE fronts or fraud;
- False reporting of DBE participation or falsifying good faith efforts; and

- Recommendations to improve the certification process.

Experience with DBE/MWESB certification. The study team asked for insights about DBE and other certifications.

Some business owners discussed their initial perceptions of DBE certification and other certifications. For example:

- The white female owner of a WBE- and ESB-certified specialty construction firm indicated that she underestimated the benefits of the DBE Program when she first became certified. She went on to say that she credits her company's success to it, and commented that they would not be where they are without it. [#35]
- The Native American owner of an MBE- and ESB-certified specialty contracting firm reported that he was not aware of any potential advantages or disadvantages of certification when he first pursued it. He went on to indicate that this was to his benefit because it did not give him unrealistic expectations. [#15]
- An African American female owner of a DBE- and MWESB-certified engineering firm commented, "Initially, I started thinking that I'd get government work very easily, [it's] ... so exaggerated that I thought I could get work like that, but it took way too long." [#3]
- A white male owner of a now-closed ESB-certified engineering firm stated, "We [only] got a nice plaque ... I thought with getting certified ... it would open doors ... [it] would expand opportunities I think if we were in manufacturing or construction [or as a supplier], it might have been different." He concluded that in his industry, certification has little positive impact. [#38]
- A white female owner of a specialty construction business reported that she is still unaware of the certification opportunities available to her, and went on to say that while certification could increase her work, it is now "laughable" because they have enough work as it is. [#41]

Ease or difficulty of becoming certified. A number of interviewees commented on how easy or difficult it was to become certified. Some interviewees found it to be easy, while others found it difficult.

For some, the certification process was difficult or should be improved. Comments include:

- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that while State of Oregon certification was easy as compared with SBA 8(a) certification can take months. [#51]
- The white female owner of a WBE- and ESB-certified specialty contracting firm stated that actual certification was an easy process, although sending in tax information and paperwork every year can be "irritating." [#53]

For many interviewees, certification was a challenge, or in some cases impossible to secure. Many indicated that the certification process was time-consuming, difficult and required considerable paperwork and recordkeeping. [e.g., #28, #32, #33, #34, #41] Comments included:

- A white female owner of a specialty construction business reported that she did not know of any assistance programs when she first investigated certification years ago; the process overwhelmed her with “hoops” and paperwork. [#41]
- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that the certification process is was very time-consuming and difficult for small firms. [#16]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male indicated that the certification process is difficult for small firms due to the large amount of necessary paperwork and documentation. [#27]
- The Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported that he paid an outside service \$900 to help complete his certification paperwork due to its complexity. He explained that he got into the business because he knew how to do his job, not to fill out “government forms.” [#37]
- When asked if the certification process was difficult, a white female principal of a DBE- and WBE-certified consulting firm commented, “The process is long. An annual update is good, and recertification every three years is good It’s just too much copying of tax returns.” [#5]
- When asked about the ease or difficulty of becoming certified, the Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm stated that there is a lot of paperwork, and that this can be intimidating for small businesses. She also reported that renewals are very time-consuming, and noted that the electronic process is difficult because it does not accept digital file attachments. [#25]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that the firm holds certification in many states, and that keeping track of all of the requirements can be challenging. [#2]

Several interviewees reported incidents in which state officials seemed too quick to make a judgment that the company applying for certification was a front. Others indicated that the overarching process and administration discourages certification. Comments include:

- An African American female owner of a DBE- and MWESB-certified engineering firm commented that she found it strange that ODOT wanted to visit her home office to confirm that a woman was working there. [#3]

- One written public comment indicated that the State of Oregon’s Office of Minority and Women’s Business Enterprise certification department makes an erroneous interpretation of 49 CFR Part 26 rules and regulations. This owner of a DBE-certified firm asserts that the State:
 - Forces a firm to obtain a license as a condition for certification.
 - Denies certification for a lack of work experience.
 - Does not advocate appropriately for minorities and women.
 - Fails to be W/MBE/DBE-friendly in all aspects of the certification process. [#WPC4]

NAICS codes were a barrier to certification, for some. For example:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported that he had problems with understanding NAICS (North American Industry Classification System) codes. [#6b]
- When asked about the ease or difficulty of becoming certified, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm reported that it was challenge to get all of the NAICS codes listed because the firm offers multiple services. [#18a]

Local public agency representatives, trade organization representatives and ODOT staff also commented on certification. Some commented on issues with internal processes and certification requirements including disclosing of financials:

- When asked about feedback from subcontractors regarding the DBE Program, a white female project administrator from a local government agency reported that the paperwork as too convoluted for some. She went on to say that many firm owners are uncomfortable providing financial information. [#LA1]
- The white male director of a contractors association, when asked about the ease or difficulty of membership becoming DBE- or MWESB-certified, reported that it varies for each firm. For example, he noted that some suppliers certify only to learn that they are not performing ODOT’s commercially useful function. [#TO3]
- A white female manager from a state agency reported that attending conferences outside of Oregon helps her realize that her agency is not alone in its frustration. She commented, “We’re right up there with the best of them!” She indicated a need for USDOT to make decisions and write guidelines, as all of the 50 states currently function differently. [#LA5]
- A female ODOT staff person reported that the State DBE certification effort “could be better.” [#OS5]

Some interviewees said that the DBE and other certification processes were mostly reasonable. [e.g., #3, #8, #10, #14, #15, #17, #21, #31, #35, #44, #45, #48, #49, #58] Many of these interviewees found the process to be reasonable because of help they received, or because they had previous experience with certification processes in other states. Comments include:

- The African American owner of a DBE-, MBE- and ESB-certified engineering firm reported that becoming certified was not difficult, and noted that he appreciates being able to renew his certification online. [#28]
- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that the State of Oregon helped him set up as a minority entrepreneur, and that this made the process “easy.” [#7]
- When asked about the ease or difficulty of becoming certified, the white male representative of a majority-owned ESB-certified specialty contracting firm reported no difficulties in becoming certified other than the fact that it was time-consuming. [#29]
- Having first gone through certification in Washington, the white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that her experience made the Oregon certification simpler but still time consuming. [#2]
- Although a white female manager from state business assistance agency reported that she often hears that the certification process is lengthy, and that the application “is huge,” she commented, “We are trying to dispel that myth.” She added that the new online system takes only one or two hours to complete. [#LA5]

Advantages and disadvantages of DBE/MWESB certification. The study team asked interviewees to discuss whether DBE certification and other certifications help them get work.

Some interviews indicated that there are limited advantages, or even disadvantages, to being DBE-certified, or to having other certifications. [e.g., #33, #44] Comments include:

- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm commented that certification does not always translate to a lot of work. She added, “I definitely see primes’ ears perk up when I say I’m a DBE. Most of our competitors are also DBEs, so it’s not necessarily a differentiating factor.” [#2]
- The white female owner of a WBE- and ESB-certified specialty construction firm stated, “There are no advantages anymore [to being certified].” She went on to say, “They will take my dollar amount on a job and put it towards the DBE goal, which I am not benefiting from.” [#35]
- The white female owner of a WBE- and ESB-certified specialty contracting firm reported that the DBE Program has not benefited her business. She indicated that she has not secured any work due to her certifications. [#53]

Some businesses reported that there is a negative stigma associated with being a certified DBE, minority- or women-owned firm or small business. For example:

- When asked if there are any negative stigmas associated with being a certified DBE, an African American female owner of a DBE- and MWESB-certified engineering firm commented, “In a way; some government managers or people think DBEs are disabled ... we’re not, we just don’t have money.” [#3]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm reported that she does not like to use her certification often because there is a mentality that certified firms are small “mom and pop” shops. She also noted that some question their capacity to perform work. She added that certification is only advantageous when the “check the box” opportunities arise. [#25]

However, other interviewees indicated that certifications help businesses secure work. [e.g., #6b, #8, #10, #11, #27, #31, #47, #56] For example:

- The Native American owner of a DBE- and MBE-certified specialty contracting firm reported that the DBE certification has given his firm opportunities with primes that it would not have had otherwise. [#16]
- The white male representative of a white woman-owned WBE-certified construction business reported that with certification a prime has more incentive to hire the firm. [#50]
- The white female owner of a WBE- and ESB-certified professional services firm reported that her certifications have had a positive effect on her firm because they set her apart from others as primes are encouraged to use businesses with her types of certifications. [#44]
- When asked about the advantages of certification, the owner of an ESB-certified engineering-related firm indicated that certification gave his firm additional exposure. He added that in approximately one year, his business will be ineligible to renew his certification, and commented, “... and at the end of that, I’ll be very happy that I did it.” [#21]
- The white female representative of a white woman-owned DBE- and WBE-certified professional services consulting firm reported that the DBE designation has been a benefit when working with public agencies such as Metro, the City of Portland, and ODOT. She added that allowed them to team with others to secure federal contracts. [#2]
- An African American female program manager for a local agency reported that the two largest prime contracts went to white women-owned firms. In total, 42 percent of its dollars for recent contracts under the program went to MWESBs. [#LA6]

- A white female manager from a state business assistance agency reported that the advantage of the ESB Program is that for ESBs, contracts are small and much more attainable for certified firms that cannot compete for larger projects. [#LA5]

MBE/WBE/DBE fronts or fraud. Interviewees from a diverse range of experiences and opinions commented on fronts or fraud. Some gave first-person accounts of instances they witnessed, whereas others spoke of less-specific instances or those of which they had no first-hand knowledge. [e.g., #8, #10, #12, #16, #18a, #21, #25, #33] Comments from the in-depth interviews include:

- When asked about any experiences with “fronts” or fraud, the Hispanic American owner of a DBE- and MBE-certified specialty construction firm reported, “[Some firms] have learned the ropes and have done very well ... and some of the most successful ... have learned how to milk the system [through fronts].” [#37]
- A white male partner of a WBE- and SDVO-certified construction firm reported that a lot of fraud has accompanied successes that he has observed. He noted that some businesses claim they are DBE, but certify to take advantage of the “perks” without actually having any knowledge of the business. He added that his firm misses work opportunities because of these instances. [#43]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported that he has heard of instances where husbands operate their wives’ businesses. [#51]
- The white female owner of a WBE- and ESB-certified specialty contracting firm reported an instance where she suspected, but had no proof of a “front.” She knew of a business that changed from 100 percent male ownership to 51 percent of the firm acquired by the wife. [#53]
- To help “weed out” certification fraud, the white female owner of a WBE- and ESB-certified specialty construction firm recommended that ODOT ask more questions and better monitor the certification application process when it comes to individuals’ knowledge of business operations and the industry. [#35]
- The African American president of a DBE- and MBE-certified construction business reported no knowledge of abuse of firm certification. He went on to comment that he has no problem if a husband does most of the work in a women-owned firm, and remarked that this is a way to “survive” in the construction industry. [#49]

Some firms reported no knowledge of certification abuse. [e.g., #7, #13b, #14, #15, #24, #27, #28, #TO2]

False reporting of DBE participation or falsifying good faith efforts. Some public agencies in Oregon (including ODOT) set DBE contract goals on certain projects. Prime contractors can meet the goals through subcontracting commitments or show good faith efforts to do so. The study team asked business owners and managers if they know of any false reporting of DBE participation, or falsification of good faith efforts submissions.

Some business owners reported widespread abuse of the DBE Program through false reporting of DBE participation or falsifying good faith efforts. Interviewees referenced good faith efforts abuse and false reporting, for example:

- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm reported being aware of “good faith efforts” abuse. He stated, “The ‘good faith efforts’ [process] is a joke.” [#6b]
- The African American president of a DBE-, MBE- and ESB-certified specialty services and supply firm reported that he has witnessed many cases of abuse of “good faith efforts,” and commented that he could “probably write a book” about them. [#7]
- The male representative of an international engineering business stated, “... one complaint I have [is that] I watch some firms out of the Portland area ... I don’t know how they become minority status ... I’ve lost work to them ... [or] ... they’ll put it in a woman’s name and really it’s a man running the company. I can name two or three right now that have beat me on projects.” [#12]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male reported that he is aware of larger firms at the federal level that try to appear as small business. [#11]
- A white male board member of a contractors association reported that in his experience, the abuse of certification by firms is frequent in the trucking industry. [#TO4]

Recommendations to improve the certification process. Some interviewees gave insights on possible improvements to the certification process. [e.g., #6b, #32] Comments include:

- The white female owner of a DBE- and WBE-certified services firm indicated that making the certification guidelines clearer would be beneficial for everybody. She commented, “It’s not about strictness, it’s about a fair playing field or equal treatment of everyone that’s going through the process based on the qualifications set up.”[#34]
- The white female owner of a WBE- and ESB-certified specialty consulting firm commented that it is cumbersome when applying for multiple types of certification. She added that it would be beneficial if there were a way to simultaneously apply for state and federal certifications. [#31]
- When asked about any opportunities for improvement, the white female owner of a WBE- and ESB-certified professional services firm suggested that the required paperwork should have online submittal. [#24]
- The white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male said that because her firm performed on a very large contract, they are no longer eligible to be an ESB, even though her firm did not make a lot on the project. [#27]

M. Any Other Insights and Recommendations for ODOT

The study team asked interviewees to report on the effectiveness of ODOT contracting processes or programs, as well as provide recommendations to improve contracting processes or programs.

- How ODOT is succeeding;
- Opportunities for improvements;
- Other insights for ODOT; and
- Final comments specific to the 2016 Disparity Study.

How ODOT is succeeding. A number of business owners and representatives discussed how they believe ODOT is succeeding.

Some reported no problems working with ODOT. For example:

- The African American male president of a DBE-, MBE- and ESB-certified specialty services and supply firm commented, “I’ve never had a problem with ODOT.” [#7]
- On the topic of how ODOT is succeeding, the principal of a construction firm stated, “I’ve worked with them for the past few years: no issues with them at all. Great program.” [#A119]
- When asked what ODOT is doing well, the white male executive of an African American-owned engineering and consulting firm stated, “I think ODOT does a pretty good job of trying to get firms started and connected and successful ODOT is doing everything they should be doing. I don’t know what else you [can] do” [#9]

More specifically, some reported positively on ODOT outreach, and bidding, contracting and other processes. [e.g., #49, #22, #46, #54] Comments include:

- The Subcontinent Asian American female representative of a DBE-, MBE- and ESB-certified professional services firm owned by a Subcontinent Asian American female stated that the programs and practices that ODOT has in place are very helpful, and that their outreach to minorities is impressive. [#10]
- When asked what ODOT is doing well, a white male owner of an ESB-certified general construction firm reported, “Their bid process and procurement process is well-organized ... I like their payment method of electronic deposit every month [Those are] pretty important things ... do the work and get paid for the work.” [#14]
- When asked what ODOT is doing well, the Native American owner of an MBE- and ESB-certified specialty contracting firm reported that he is satisfied with their contracting processes and DBE Program. He added, “They’re doing well They’re doing a good job ... working with people, working with subcontractors, contractors.” [#15]

- A Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that he appreciates ODOT's subcontracting lists where primes can locate a firm and contact them for opportunities. He added that ODOT is progressive because they allow negotiated billing rates as opposed to multiplier rates. He went on to say, "Without [negotiated billing rates], we would be handcuffed" [#18b]
- When asked how ODOT is succeeding, the white female owner of a DBE- and WBE-certified services firm stated, "I appreciate the fact that ... they [ODOT] are making an effort to try and keep the MWESB small business stuff as part of their purchasing process, and [that ODOT is] continuing to look for ways to improve it." [#34]
- When asked how ODOT is succeeding, the white male president of a majority-owned construction business reported, "ODOT's technical improvements and technical reviews are engaging." He went on to add, "The ODOT personnel on subcommittees are very open-minded." [#1]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm commented, "ODOT is doing extremely well in receiving the federal dollars ... greatest congressional liaisons ... contacts ... and [making] sure those dollars come back to Oregon" [#33]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm reported that ODOT is doing great work with small businesses, especially in the areas of education, mentoring, bundling down and making the industry more competitive. [#47]
- When asked what ODOT is doing well, the white male representative of a white woman-owned WBE-certified construction business commented that ODOT is putting smaller jobs on ORPIN, which is very helpful to smaller minority firms. [#50]

Opportunities for improvements. Business owners and representatives reported other insights on ODOT. [e.g., #14, #21]

Some discussed the need for improved planning, and streamlining of processes. Comments from the in-depth interviews include:

- A Native American owner of a construction firm commented, "I think, overall, ODOT has a big challenge on their hands as far as funding." He continued, "It's hard for them to be efficient ... to preplan It's hard for them to attract ... some good people there ... more qualified help." [#26]
- The white male representative of a white women-owned DBE-, WBE- and ESB-certified construction reported that cancelling/changing projects the day before the bid wastes time and demonstrates a need for better project planning. "A better planned project equates to more projects." [#30]

- The male representative of a white woman-owned specialty construction firm suggested that ODOT be a “clearinghouse” for all state opportunities, as it certainly has the manpower to do it. [#13a]
- A public meeting participant reported that he is looking forward to ODOT being online in 2017. He added that the new ODOT online system should include autofill functionality to prevent repetitive input that adds costs.[#PMP38]
- The representative of an MBE-certified engineering consulting firm owned by a Subcontinent Asian American male commented that he would like to see more effort put into the small business contracting program. Although having gone through that process two times, his firm has not received work specifically because of it. [#11]
- A female public meeting participant representing a construction supply firm commented, “... if [ODOT] is working on a workforce that is coming into business ... we’re working on the pretty new DBEs ... what we really need to work hard on ... are those of us who are here ... on the bench and wanting opportunities.” [#PMP28]
- Regarding contracting goals, a public meeting participant representing an engineering services firm commented, “...I personally met with several managers in [ODOT] Region 1, Region 2, and...heard them say...we’re not going to sub that out because we need to keep our own people busy.” [#PMP36]

Some specifically called for improved outreach and communications, particularly when working with minority communities. For example:

- The white female owner of a DBE-, WBE-, WOSB- and ESB-certified construction and specialty firm recommended that ODOT hire outside diversity consultants to keep the bridge between ODOT and small firms “friendly and approachable.” [#36]
- The African American owner of a DBE-, MBE- and ESB-certified specialty construction firm stated that TriMet interacts with the minority community on every project, unlike ODOT. [#6b]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm stated that ODOT should better diversify their staff, better advertise projects, and services should be provided in more than one language to meet the needs of the “Latino community.” [#25]

Some suggested a need for ODOT to improve overall relationship building, and access to relevant bidding information and expanded work opportunities. For example:

- The representative of a majority-owned construction firm commented that ODOT unnecessarily restricts relationships with DBEs, and noted that this impedes any relationship building on jobs. [#19]

- A public meeting participant commented, “[It] seems like the participation of small firms on ODOT work can increase if we [ODOT] can be more nimble on opportunities ... on construction we are nimble; but [the] design side needs to find those opportunities.” [#OPMP19]
- When asked for other insights for ODOT, the representative of a woman-owned professional services firm commented, “The biggest thing is learning about the opportunities, I want to know about what is going on. ORPIN work categories are too broad. Several of the bid opportunities do not apply to me.” [#AI25]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that there is a lack of ODOT accountability when trying to secure work and provide for his family. Despite contacts with primes, the work does not “filter down.”
- The representative of a woman-owned construction business commented, “The ODOT program for woman and minority businesses [is] a joke, and way below the scope of work we usually do. If they want woman- and minority-owned businesses, they need to let them do the work that they are capable of [doing].” [#AI24]

Increasing small business opportunities is an area for improvement, for some. Comments follow:

- A white male owner of a now-closed ESB-certified engineering firm identified a need for a dialogue between ODOT and the small business community that is not currently happening. [#38]
- A Subcontinent Asian American male owner of a DBE-, MBE- and ESB-certified professional services firm indicated that it would benefit his and other small businesses if ODOT offered the small contracts to small businesses instead of larger firms. He added that for agencies ODOT works with, such as “Oregon Watchdog and Caltrans,” there is a need for local advertising of those agencies’ smaller projects. [#47]
- The African American president of a DBE- and MBE-certified construction business suggested that ODOT have more small business contracts and more diverse industry opportunities for DBEs. He explained that he has had difficulty in finding ODOT work; they are “posturing.” [#49]

Specific operations and delivery improvements were top of mind for some. Comments on improving specifications, inspection and other tasks follow:

- Regarding other insights for ODOT, an African American owner of a DBE- and MBE-certified specialty contracting firm reported that the new digital signature program at ODOT took two days to upload, and noted that there has to be an easier process. [#46]

- The white male owner of a specialty contracting firm reported that, as a way to save money and output better quality, ODOT should put together a committee of contractors, including concrete contractors and AGC to review specifications, bidding processes, work execution and other key tasks. [#20]
- When asked for any other insights for ODOT, a Hispanic American owner of a DBE-, MBE- and ESB-certified engineering firm commented that he would like ODOT's projects to go directly through his firm's inspection and testing service area as opposed to going through a separate contractor. [#18a]
- A representative of a minority contractors association recommended that ODOT provide contract terms that incentivize primes to increase their use of certified firms on projects. [#PMP32]

He also provided a written public comment that ODOT provide incentives to minority primes to increase their utilization of minority DBEs. He added that DBE/MBE participation should be encouraged for highly skilled trades, not just for flagging, trucking, and lower skilled industries. [#WPC8]

A number of interviewees had complaints about ODOT's DBE utilization and current goal setting, and gave their arguments for change. A number of examples follow:

- After suggesting that ODOT implement a "vigorous" apprenticeship program that includes women and minorities in all sectors, the African American representative of a workforce organization recommended a need for increased utilization of all sectors of minorities and women. He stated, "I feel like they do a lot more [of] pitting groups against each other." [#TOFG1c]
- The white female owner of a WBE- and ESB-certified specialty construction firm said that she perceives the results as flawed from the previous disparity study because ODOT limited the DBE definitions. She added that it was an insult not to include women, Hispanic Americans and Native Americans in the definition of a DBE. [#35]
- When asked about other insights for ODOT, the white male representative of a white woman-owned WBE-certified construction business stated, "Revisit the goals situation ... open it up to certified folks ... there are probably small firms that are hurt by it." [#50]
- The Native American owner of an MBE-, ESB- and SBA 8(a)-certified specialty construction firm reported, "[The FHWA waiver] seems ridiculous that they would cut out some other minorities ... that just seems foolish ... A lot of contractors are already having a hard enough time to meet the percentage and goal numbers ... Why would you remove those minorities that are ... even at more minority [status] than [African Americans and Subcontinent Asian Americans]?" [#51]

- When asked for any final comments, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male stated that the value of a DBE certification should be consistent for all ethnic groups. She added that all DBE-certified firms should qualify for goals or none at all. [#27]
- The African American representative of a workforce organization stated that the past ODOT disparity study had the option to look at minority groups individually, or to combine minority business groups as a whole. He offered that when assessing minority business groups individually, “You always have this constant battle between this small slice of pie.” He stated, “ODOT has a [past] disparity study and has an inclusion of none.” [#TOFG1c]
- A female public meeting participant representing a construction related firm commented that if ODOT opens the DBE program to all qualified, there would be more competition between DBEs for less available work. [#PMP30]

Other recommendations for improvements were made as well. Interviewees identified a range of areas for improvement, for example:

- When asked for any final comments, the white female representative of a DBE- and MBE-certified specialty construction firm owned by a Hispanic American male stated that ODOT should take expenses and profit into account for the ESB program, not just project sizes. [#27]
- The Hispanic American female owner of a DBE- and MBE-certified specialty contracting firm stated, “[ODOT] should stay away from [the] low-bid scenario ... [use] other alternative methods of bidding ... and also [set] high expectations [and] standards through general contractors to diversify ... and not just on a flagging company or a trucker.” [#25]
- An ODOT representative suggested a database that could provide information whether there are large firms that build relationships with one DBE and “that’s the one they pull around throughout the state regardless [of] geographic area?” [#OPMP1]
- A representative of a minority trade organization provided a written public comment that ODOT increase opportunities for DBEs in Region 1 and Region 2 because most minority DBEs are in that area. [#WPC8]
- A representative of a minority-owned firm provided a written comment that ODOT utilize the Uber model to evaluate large firms’ utilization of smaller or certified firms. He suggested that both parties provide evaluation of each other to ODOT when the work is complete on a project. [#WPC9]

Final comments specific to the 2016 Disparity Study. The study team asked interviewees if they had any final comments to share regarding the disparity study.

A number of interviewees reported their perceptions on this and other past ODOT disparity studies. Comments include:

- The African American representative of a workforce organization warned that the disparity study could pit minority groups and women against one another. [#TOFG1c]
- The Hispanic American owner of a DBE-, MBE-, ESB- and SDVOSB-certified specialty construction firm reported that feedback from disparity studies is important to open the door for ODOT to improve. [#33]
- The Hispanic American female representative of a minority contractors association commented that ODOT's disparity studies have "a very good value." She stated that the disparity study provides a data set that forces accountability, and added that while her minority group is large overall, it is small when it comes to contracting. [#TOFG1b]
- The female representative of a white woman-owned WBE- and SBA 8(a)-certified specialty construction firm commented, "I think the study is really great ... We're interested in tracking it ... being involved ... giving feedback ... we really appreciate the opportunity ... thank you and ODOT." [#54]
- A public meeting participant representing an engineering services firm commented, "When it comes to DBE goals, TriMet is light years ahead of ODOT [regarding opportunities for small engineering and professional service firms] ..." [#PMP26]
- A public meeting participant representing a construction firm commented that systemic problems exist when agency staff and management at construction firms do not represent the communities that work with them. [#PMP29]
- A public meeting participant commented, "We want to see the [ODOT] people...the managers ... that give out these projects, they never see us, they never hear us" He added that it should have been mandatory for ODOT staff to attend the Disparity Study public meetings. [#PMP35]
- The white male owner of a specialty contracting firm commented that this 2016 Disparity Study is an improvement over the ones done in the past, because it digs deeper into the process and what is available. He added that this disparity study report focuses on more facts, which is "what is needed." [#22]