



2020 Disparity Study

Commonwealth of Virginia

FINAL REPORT

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2020 Commonwealth of Virginia Disparity Study

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Department of Small Business and Supplier Diversity

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CHAPTER ES.

Executive Summary

The Commonwealth of Virginia (The Commonwealth) implements the Small, Women, and Minority-owned Business (SWaM) Program to encourage the participation of small businesses and minority- and woman-owned businesses in state contracts and procurements. The SWaM Program comprises various *race- and gender-neutral* measures to meet its objectives. Race- and gender-neutral measures are efforts designed to encourage the participation of all businesses—or all small businesses—in an organization’s contracting and procurement, regardless of the race/ethnicity or gender of business owners (e.g., networking and outreach events or financing and bonding assistance). In contrast, *race- and gender-conscious* measures are measures that are specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting and procurement (e.g., goals for minority- and woman-owned business participation on individual contracts). The Commonwealth does not currently use any race- or gender-conscious measures as part of its contracting and procurement processes.

The Department of Small Business and Supplier Diversity (SBSD), which is responsible for operating the SWaM Program, retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of the program in encouraging the participation of minority- and woman-owned businesses in state contracts and procurements.¹ As part of the study, BBC assessed whether there were any disparities between:

- The percentage of contract and procurement dollars—including subcontract dollars—that Commonwealth agencies and higher education institutions (HEIs) awarded to minority- and woman-owned businesses during the study period, which was defined as July 1, 2014 through June 30, 2019 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of Commonwealth and HEI prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the SWaM Program;
- Local marketplace conditions for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that Commonwealth agencies have in place.

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

The Commonwealth could use information from the study to help refine its implementation of the SWaM Program, including setting an overall aspirational goal for the participation of minority- and woman-owned businesses in state contracting and procurement and determining which program measures to use to encourage the participation of those businesses.

BBC summarizes key information from the 2020 Commonwealth of Virginia Disparity Study in five parts:

- A. Analyses in the disparity study;
- B. Availability analysis results;
- C. Utilization analysis results;
- D. Disparity analysis results; and
- E. Program implementation.

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for minority- and woman-owned businesses and the SWaM Program:

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

² BBC identified the RGMA as the entire state of Virginia.

services, and goods and other services contracts and procurements that the Commonwealth and HEIs awarded during the study period (see Chapter 7 and Appendix F).

- BBC reviewed the measures that the Commonwealth uses to encourage the participation of minority- and woman-owned businesses in state contracts and procurements as well as measures that other organizations in the region use (see Chapter 8).
- BBC provided guidance related to additional program options and potential changes to current contracting practices for the Commonwealth's consideration (see Chapter 9).

B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for Commonwealth and HEI prime contracts and subcontracts, which relied on information from surveys that the study team conducted with potentially available businesses located in the RGMA and information about the contracts and procurements that the Commonwealth and HEIs awarded during the study period. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of relevant Virginia businesses to estimate the availability of minority- and woman-owned businesses for Commonwealth and HEI work. BBC presents availability analysis results for Commonwealth and HEI work overall and, specifically for the Commonwealth, different subsets of contracts and procurements.

1. All contracts and procurements. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for Commonwealth contracts and procurements. Overall, the availability of minority- and woman-owned businesses for Commonwealth work is 32.8 percent, indicating that minority- and woman-owned businesses might be expected to receive 32.8 percent of the contract and procurement dollars that the Commonwealth awards in construction, professional services, and goods and other services.

Figure ES-1.
Overall availability estimates by racial/ethnic and gender group for Commonwealth work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	10.9 %
Asian American-owned	6.6
Black American-owned	7.1
Hispanic American-owned	5.3
Native American-owned	2.9
Total Minority-owned	21.9 %
Total Minority- and Woman-owned	32.8 %

BBC also estimated the availability of minority- and woman-owned businesses for contracts and procurements that Tier II and Tier III HEIs award. Tier II HEIs have a memorandum of understanding with the Commonwealth that allow them some contracting and procurement

autonomy, and Tier III HEIs have complete autonomy in their contracting and procurement.^{3, 4, 5} Figure ES-2 presents availability analysis results for Tier II HEIs considered together and Tier III HEIs considered together. As shown in figure ES-2, the availability of minority- and woman-owned businesses considered together is slightly higher for the contracts and procurements that Tier II HEIs award (30.5%) than ones that Tier III HEIs award (29.4%).

Figure ES-2.
Overall availability estimates by racial/ethnic and gender group for Tier II and Tier III HEIs

Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	HEI tier	
	Tier II	Tier III
Non-Hispanic white woman-owned	11.1 %	11.5 %
Asian American-owned	7.0	6.4
Black American-owned	5.3	7.6
Hispanic American-owned	6.0	3.2
Native American-owned	1.1	0.6
Total Minority-owned	19.4 %	17.9 %
Total Minority- and Woman-owned	30.5 %	29.4 %

2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for Commonwealth prime contracts and subcontracts. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is higher for Commonwealth prime contracts (32.8%) than for subcontracts (31.1%).

Figure ES-3.
Availability estimates by contract role for Commonwealth work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.9 %	12.4 %
Asian American-owned	6.6	5.3
Black American-owned	7.1	4.6
Hispanic American-owned	5.3	7.5
Native American-owned	2.9	1.3
Total Minority-owned	21.9 %	18.7 %
Total Minority- and Woman-owned	32.8 %	31.1 %

³ Tier II HEIs are George Mason University, Longwood University, Old Dominion University, Radford University, and the University of Mary Washington. Three additional HEIs—Christopher Newport University, Richard Bland College, and Virginia Community College System—are also considered Tier II HEIs but only have autonomy for capital outlay and information technology procurements. Their results are presented along with results for the Commonwealth.

⁴ Tier III HEIs are the College of William & Mary, James Madison University, the University of Virginia, Virginia Commonwealth University, and Virginia Tech. James Madison University was a Tier II HEI during the study period.

3. Subcontractor plans. For contracts and procurements worth \$100,000 or more, the Commonwealth’s Executive Order 35 requires that potential prime contractors submit subcontractor plans with their bids in an effort to encourage subcontractor participation in that work. BBC examined the availability of minority- and woman-owned businesses for contracts and procurements worth \$100,000 or more (*subcontractor plan* contracts) and contracts and procurements worth less than \$100,000 (*no subcontractor plan* contracts), because that information could be informative in assessing the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth contracts and procurements. As shown in Figure ES-4, the availability of minority- and woman-owned businesses considered together is higher for subcontractor plan contracts (33.5%) than for no subcontractor plan contracts (29.2%).

Figure ES-4.
Availability estimates for subcontractor plan and no subcontractor plan contracts and procurements

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-12 and F-13 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Subcontractor plans	
	Yes	No
Non-Hispanic white woman-owned	11.0 %	10.4 %
Asian American-owned	6.6	6.6
Black American-owned	6.8	8.5
Hispanic American-owned	5.8	3.3
Native American-owned	3.4	0.4
Total Minority-owned	22.5 %	18.8 %
Total Minority- and Woman-owned	33.5 %	29.2 %

4. Industry. BBC examined availability analysis results separately for Commonwealth construction, professional services, and goods and other services contracts. As shown in Figure ES-5, the availability of minority- and woman-owned businesses considered together is highest for Commonwealth professional services contracts (50.3%) and lowest for construction contracts (23.9%).

Figure ES-5.
Availability estimates by industry for Commonwealth work

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	5.8 %	17.4 %	11.1 %
Asian American-owned	5.5	11.2	2.7
Black American-owned	8.8	8.5	2.6
Hispanic American-owned	3.8	5.4	7.8
Native American-owned	0.1	7.8	1.4
Total Minority-owned	18.1 %	32.9 %	14.4 %
Total Minority- and Woman-owned	23.9 %	50.3 %	25.5 %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail and results by group, see Figures F-5, F-6, and F-7 in Appendix F.

Source: BBC Research & Consulting availability analysis.

C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in Commonwealth and HEI contracts and procurements in terms of *utilization*—the percentage of dollars that those businesses were awarded on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority- and woman-owned businesses in Commonwealth and HEI work regardless of whether they were certified as minority-owned or woman-owned businesses by SBSD.

1. All contracts and procurements. Figure ES-6 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, professional services, and goods and other services prime contracts and subcontracts that the Commonwealth awarded during the study period. As shown in Figure ES-6, minority- and woman-owned businesses considered together received 13.4 percent of the relevant contract and procurement dollars that the Commonwealth awarded during the study period.

Figure ES-6.
Utilization results for Commonwealth contracts and procurements

Note:

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

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

Source:

BBC utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	5.5 %
Asian American-owned	1.1
Black American-owned	3.4
Hispanic American-owned	3.3
Native American-owned	0.1
Total Minority-owned	8.0 %
Total Minority- and Woman-owned	13.4 %

BBC also calculated the participation of minority- and woman-owned businesses in contracts and procurements that Tier II and Tier III HEIs awarded during the study period. As shown in Figure ES-7, the participation of minority- and woman-owned businesses was higher in contracts and procurements that Tier II HEIs awarded (11.1%) than in ones that Tier III HEIs awarded (8.0%).

Figure ES-7.
Utilization results for Tier II and Tier III HEIs

Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	HEI tier	
	Tier II	Tier III
Non-Hispanic white woman-owned	7.4 %	6.1 %
Asian American-owned	2.5	0.3
Black American-owned	0.3	1.2
Hispanic American-owned	0.6	0.2
Native American-owned	0.3	0.1
Total Minority-owned	3.7 %	1.9 %
Total Minority- and Woman-owned	11.1 %	8.0 %

2. Contract role. Figure ES-8 presents utilization analysis results separately for prime contracts and subcontracts that the Commonwealth awarded during the study period. As shown in Figure ES-3, the participation of minority- and woman-owned businesses considered together was higher in subcontracts (20.9%) than in prime contracts (13.3%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to minority- and woman-owned businesses.

Figure ES-8.
Utilization analysis
results by contract role

Note:

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

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

Source:

BBC utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	5.4 %	10.1 %
Asian American-owned	1.1	4.4
Black American-owned	3.5	0.4
Hispanic American-owned	3.2	6.0
Native American-owned	0.1	0.0
Total Minority-owned	7.9 %	10.8 %
Total Minority- and Woman-owned	13.3 %	20.9 %

3. Subcontractor plans. BBC also examined the participation of minority- and woman-owned businesses in subcontractor plan contracts and no subcontractor plan contracts. because that information is informative about the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth work. As shown in Figure ES-9, the participation of minority- and woman-owned businesses was very similar in subcontractor plan (13.4%) and no subcontractor plan (13.5%) contracts, potentially indicating that requesting subcontractor plans from prime contractors at the time of bid might not be particularly effective in encouraging the participation of minority- and woman-owned businesses in Commonwealth contracts and procurements.

Figure ES-9.
Utilization results for
subcontractor plan and non-
subcontractor plan contracts
and procurements

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Subcontractor plans	
	Yes	No
Non-Hispanic white woman-owned	5.2 %	6.6 %
Asian American-owned	1.1	1.3
Black American-owned	3.4	3.7
Hispanic American-owned	3.6	1.5
Native American-owned	0.1	0.5
Total Minority-owned	8.2 %	6.9 %
Total Minority- and Woman-owned	13.4 %	13.5 %

4. Industry. BBC also examined utilization analysis results separately for the Commonwealth's construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses differs by industry. As shown in Figure ES-10, the participation of minority- and woman-owned businesses

considered together was highest for the goods and other services contracts and procurements that the Commonwealth awarded during the study period (15.1%) and lowest for professional services contracts and procurements (11.2%).

Figure ES-10.
Utilization analysis results by industry

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	6.9 %	2.0 %	7.4 %
Asian American-owned	0.3	2.0	1.3
Black American-owned	1.3	4.3	5.6
Hispanic American-owned	5.4	2.7	0.8
Native American-owned	0.2	0.2	0.0
Total Minority-owned	7.2 %	9.2 %	7.7 %
Total Minority- and Woman-owned	14.1 %	11.2 %	15.1 %

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

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

Source: BBC utilization analysis.

D. Disparity Analysis Results

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

1. All contracts and procurements. Figure ES-11 presents disparity indices for all relevant prime contracts and subcontracts that the Commonwealth awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. A line is also drawn at a disparity index level of 80, which indicates a substantial disparity. As shown in Figure ES-11, minority- and woman-owned businesses considered together exhibited a disparity index of 41 for contracts and procurements that the Commonwealth awarded during the study period, indicated substantial underutilization. Moreover, all individual racial/ethnic and gender groups showed substantial disparities on that work.

Figure ES-11.
Disparity analysis
results for relevant
Commonwealth
contracts and procurements

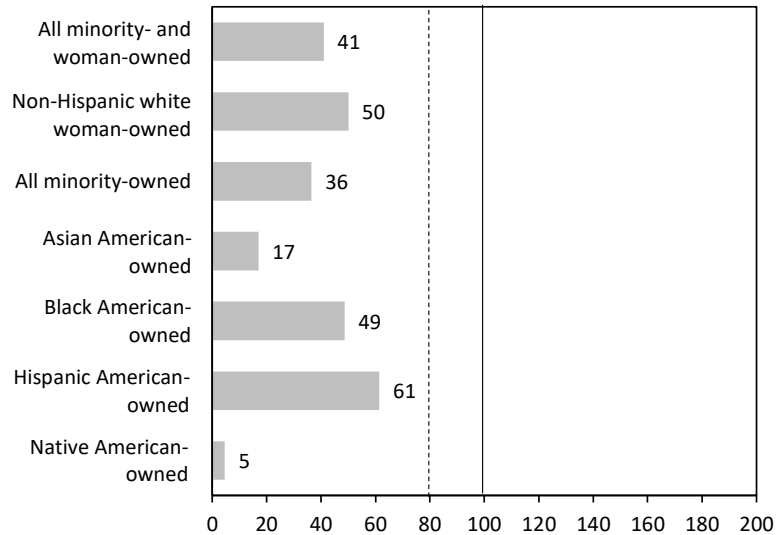
Note:

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

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

Source:

BBC disparity analysis



BBC also assessed disparities between participation and availability for contracts and procurements that Tier II and Tier III HEIs awarded during the study period. As shown in figure ES-12, minority- and woman-owned businesses considered together exhibited substantial disparities for contracts and procurements that Tier II HEIs (disparity index of 37) and Tier III HEIs (disparity index of 27) awarded during the study period. All individual business groups showed substantial disparities for both Tier II and Tier III contracts and procurements.

Figure ES-12.
Disparity analysis
results for Tier II and
Tier III HEIs

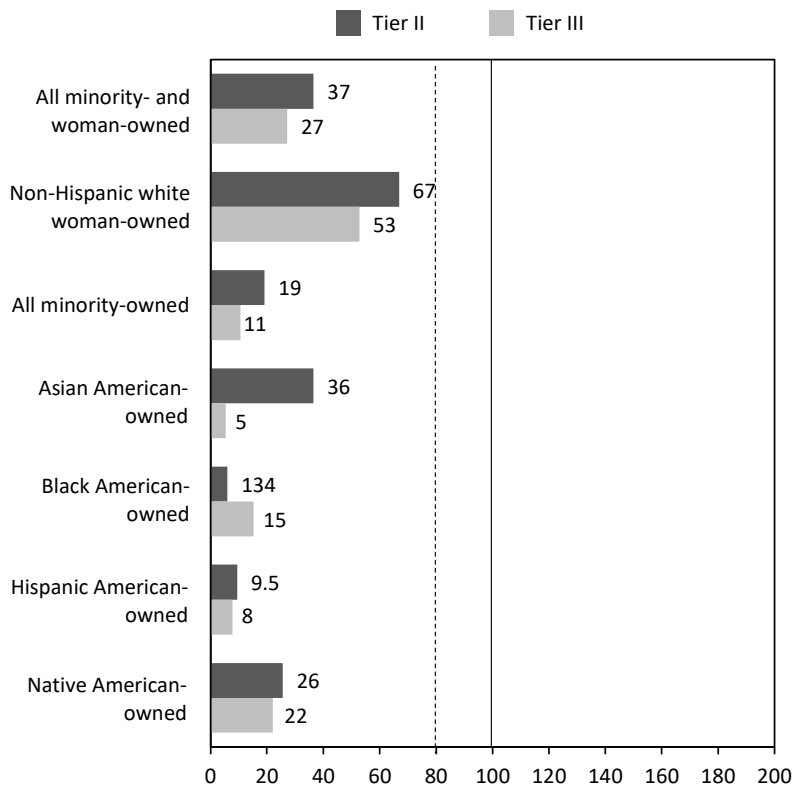
Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. As shown in Figure ES-13, minority- and woman-owned businesses considered together showed a substantial disparity for both Commonwealth prime contracts (disparity index of 41) and subcontracts (disparity index of 67). All individual business groups showed substantial disparities for both prime contracts and subcontracts except for non-Hispanic white woman-owned businesses (disparity index of 81) and Asian American-owned businesses (disparity index of 82) on subcontracts.

Figure ES-13.
Disparity analysis
results by contract role

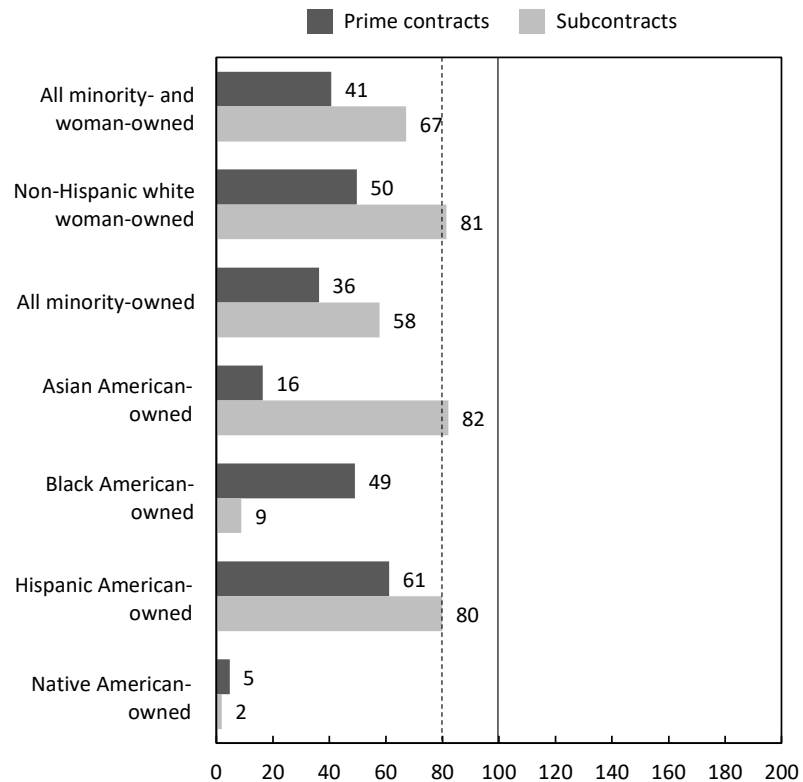
Note:

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

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

Source:

BBC disparity analysis.



3. Subcontractor plans. BBC assessed disparities for minority- and woman-owned businesses for subcontractor plan contracts and no subcontractor plan contracts to assess the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth work. As shown in Figure ES-14, subcontract plans do not appear to improve outcomes for minority- and woman-owned businesses on Commonwealth contracts and procurements. Minority- and woman-owned businesses considered together exhibited substantial disparities on both subcontract plan contracts (disparity index of 40) and no subcontract plan contracts (disparity index of 46). All individual business groups showed substantial disparities for both contract sets except for Native American-owned businesses on no subcontractor plan contracts (disparity index of 140).

Figure ES-14.
Disparity analysis
results for subcontractor
plan and no subcontractor
plan contracts and
procurements

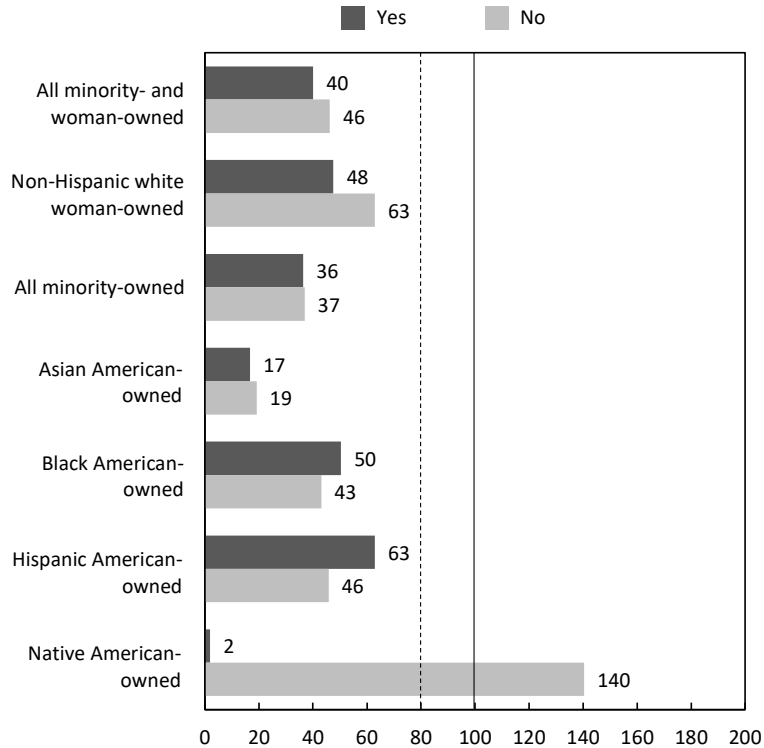
Note:

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

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

Source:

BBC disparity analysis.



4. Industry. BBC also examined disparity analysis results separately for the Commonwealth's construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure ES-15, minority- and woman-owned businesses considered together exhibited substantial disparities for the Commonwealth's construction (disparity index of 59), professional services (disparity index of 22), and goods and other services (disparity index of 59) contracts and procurements. Although most individual business groups showed substantial disparities for most industries, there were some exceptions:

- Non-Hispanic white woman-owned businesses (disparity index of 120), Hispanic American-owned businesses (disparity index of 144), and Native American-owned businesses (disparity index of 200+) did not exhibit disparities on construction contracts; and
- Black American-owned businesses did not exhibit a disparity on goods and other services procurements (disparity index of 200+).

E. Program Implementation

The Commonwealth should review study results and other relevant information in connection with making decisions concerning its implementation of the SWaM Program. Key considerations in making any refinements are discussed below. When making those considerations, the Commonwealth should also assess whether additional resources, changes in internal policy, or changes in state law may be required. For additional details about program implementation, see Chapter 9.

Figure ES-15.
Disparity analysis
results by industry

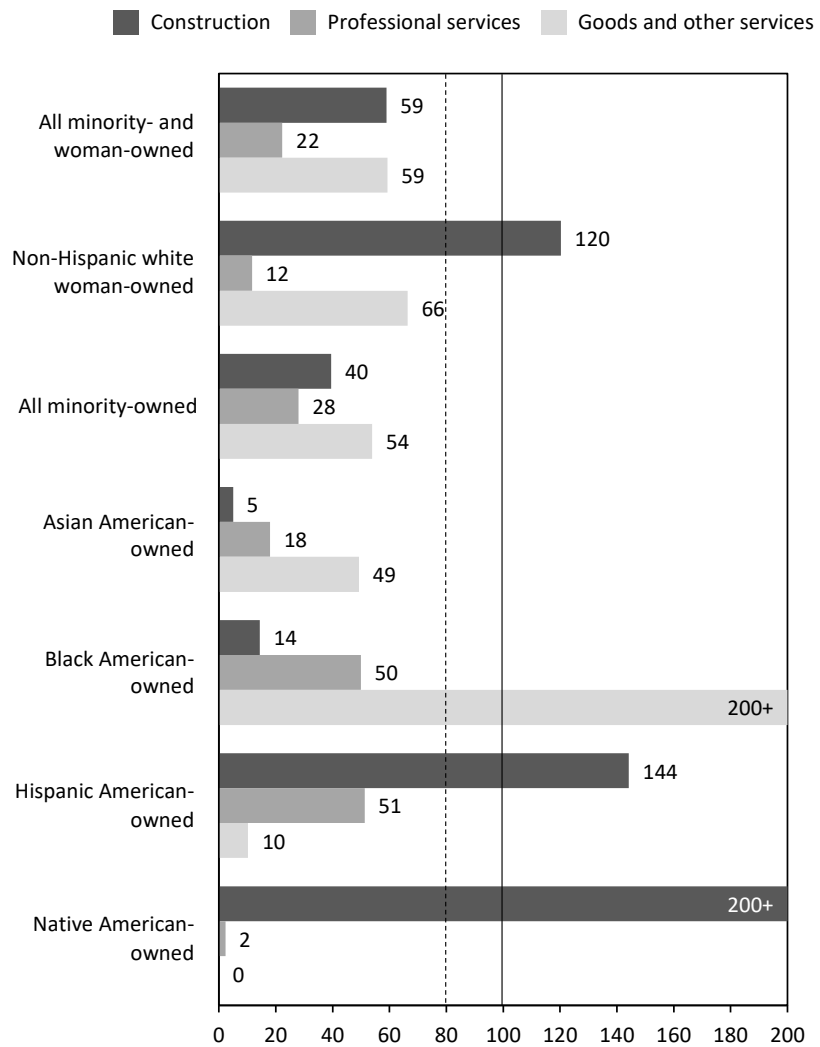
Note:

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

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

Source:

BBC disparity analysis.



1. Overall aspirational goal. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the Commonwealth in establishing an overall aspirational goal for the participation of minority- and woman-owned business in its contracting and procurement. The availability analysis indicated that minority- and woman-owned businesses might be expected to receive 32.8 percent of Commonwealth contract and procurement dollars, which the Commonwealth could consider as its *base figure* of its overall aspirational goal. In addition, the disparity study provides information about factors that the Commonwealth should review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of Commonwealth work in which minority- and woman-owned businesses have participated in the past; barriers in Virginia related to employment, self-employment, education, training, and unions; barriers in Virginia related to financing, bonding, and insurance; and other relevant information.

2. Contract-specific goals. Disparity analysis results indicate that all relevant racial/ethnic and gender groups showed substantial disparities on key sets of contracts and procurements that the Commonwealth and HEIs awarded during the study period. Because the Commonwealth

uses myriad race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses in its contracting, and because those measures have not sufficiently addressed disparities for those businesses, it might consider using minority- and woman-owned business goals to award individual contracts. To do so, the Commonwealth would set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project as well as on current marketplace conditions, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so. Because the use of such goals would be considered a race- and gender-conscious measure, the Commonwealth will need to ensure that the use of those measures meets the *strict scrutiny standard* of constitutional review.

3. Small business set asides. Disparity analysis results indicated substantial disparities for all relevant racial/ethnic and gender groups on prime contracts that the Commonwealth awarded during the study period. The Commonwealth might consider setting aside select small prime contracts for small business bidding to encourage the participation of small businesses, including many minority- and woman-owned businesses, as prime contractors. The Commonwealth currently has a small business set aside program where it ostensibly sets asides certain, relatively small contracts for small business bidding. However, if a larger business submits a bid that is more than 5 percent less than the lowest bid submitted by a small business, then the Commonwealth awards the contract to the larger business. To ensure that small business set asides are effectively encouraging the participation of small businesses, the Commonwealth should consider truly limiting bidding on eligible contracts to certified small businesses, regardless of whether larger business are able to submit lower bids.

4. Prompt payment. As part of in-depth interviews, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on both private sector and public sector contracts, particularly when they work as subcontractors or on design-build contracts. Many businesses also commented that having capital on hand is crucial to business success and ready access to capital is a challenge for small businesses. The Agency Procurement and Surplus Property Manual requires prime contractors to pay subcontractors within seven days of receiving payment from state agencies. The Commonwealth should consider making efforts to further enforce those requirements. Doing so might help ensure that subcontractors receive payment in a timely manner. It may also help ensure that minority- and woman-owned businesses have enough operating capital to remain competitive and successful.

5. Capacity building. Results from the disparity study indicated that there are many minority- and woman-owned businesses in Virginia but most of them have relatively low capacities for Commonwealth work. The Commonwealth should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large Commonwealth and HEI contracts and procurements. In addition to considering programs that could be open to all small businesses, the Commonwealth could consider implementing a program to assist certain minority- and woman-owned businesses with development and growth. As part of such a program, the

Commonwealth could have an application and interview process to select businesses with which to work closely to provide specific support and resources necessary for growth.

6. Utilization of different businesses. The disparity study indicated that a substantial portion of Commonwealth contract and procurement dollars that were awarded to minority- and woman-owned businesses were largely concentrated with a relatively small number of businesses. The Commonwealth could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, the Commonwealth might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked as part of their bids.

7. Data collection. The Commonwealth and HEIs maintain comprehensive data on the prime contracts they award, and those data are generally well-organized and accessible. However, neither the Commonwealth nor HEIs collect comprehensive data on subcontracts. The Commonwealth should consider collecting comprehensive data on *all* subcontracts, regardless of subcontractors' characteristics or whether they are certified as SWaM businesses, minority-owned businesses, or woman-owned businesses. Collecting data on all subcontracts will help ensure the Commonwealth monitors the participation of minority- and woman-owned businesses in its work accurately and will help identify additional businesses that could become certified. The Commonwealth should consider collecting those data as part of bids but also requiring prime contractors to submit data on subcontracts as part of the invoicing process for all contracts.

8. Growth monitoring. The Commonwealth might consider collecting data on the impact the SWaM Program has on the growth of minority- and woman-owned businesses over time. Doing so would require it to collect baseline information on MBE/WBE-certified businesses—such as revenue, number of locations, number of employees, and employee demographics—and continue to collect that information from each business on an annual or semiannual basis. The Commonwealth could consider collecting those data from businesses as part of certification and renewal processes. Such metrics would allow it to assess whether the program is helping businesses grow and how to tailor the measures it uses as part of the SWaM Program.

9. SBSD. Some of the considerations above might require an expansion of SBSD staff in order to effectively implement refinements to contracting policies and program measures. In particular, if the Commonwealth begins using contract-specific goals to award individual contracts, SBSD might consider hiring additional staff members to help with goal-setting and monitoring prime contractor compliance with those goals in coordination with the Department of General Services (DGS). Those additional staff members would also be able to help SBSD continue operating other aspects of the SWaM Program, including SWaM certification, business development workshops, and outreach efforts. In addition, if the Commonwealth begins using contract-specific goals, SBSD would have to work closely with DGS to ensure that the use of those goals is enforced and there is appropriate monitoring of prime contractor compliance. SBSD and DGS would have to develop a process that is consistent and appropriate across the different contracts to which such goals would apply.

CHAPTER 1.

Introduction

The Virginia Department of General Services (DGS), along with the Virginia Information Technologies Agency (VITA), the Virginia Department of Transportation (VDOT), and higher education institutions (HEIs) with procurement autonomy, have statutory authority for setting and enforcing procurement policy for all Commonwealth of Virginia (Commonwealth) agencies. The Department of Small Business and Supplier Diversity (SBSD) implements the Small, Women-owned, and Minority-owned Business (SWaM) Program to encourage the participation of small businesses and minority- and woman-owned businesses in those contracts and procurements. SBSD retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of the SWaM Program in encouraging the participation of minority- and woman-owned businesses in Commonwealth and HEI work.¹ As part of the disparity study, BBC examined whether there are any disparities, or differences, between:

- The percentage of contract and procurement dollars—including subcontract dollars—that Commonwealth and HEIs awarded to minority- and woman-owned businesses during the study period, which was defined as July 1, 2014 through June 30, 2019 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of Commonwealth and HEI prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the SWaM Program;
- Local marketplace conditions for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that the Commonwealth and HEIs have in place.

There are several reasons why information from the disparity study is potentially useful to the Commonwealth and SBSD:

- The disparity study provides information about how well minority- and woman-owned businesses fare in Commonwealth and HEI contracting and procurement relative to their availability for that work.
- The disparity study provides an evaluation of how effective the SWaM Program is in improving outcomes for minority- and woman-owned businesses in Commonwealth and HEI contracting and procurement.

¹ BBC considered a contract or procurement to be a Commonwealth *contract or procurement* if it only included state and local funds and did not include any federal funds.

- The disparity study identifies barriers that minorities, women, and minority- and woman-owned businesses face in the local marketplace that might affect their ability to compete for Commonwealth and HEI contracts and procurements.
- The disparity study provides insights into how to refine contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in Commonwealth and HEI contracting and procurement and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses is valuable to SBSD and external groups that may be monitoring the Commonwealth's and HEIs' contracting practices.
- Government organizations that have successfully defended programs like the SWaM Program in court have typically relied on information from disparity studies.

BBC introduces the 2020 Commonwealth of Virginia Disparity Study in three parts:

- A. Background;
- B. Study scope; and
- C. Study team members.

A. Background

In 2006, then-Governor Tim Kaine established the SWaM Program by executive order to enhance opportunities for small businesses and minority- and woman-owned businesses in Commonwealth contracting. As part of Executive Order 33 (2006), Governor Kaine established various measures to assist small businesses and minority- and woman-owned businesses, including:

- Setting an overall annual goal of 40 percent for the participation of small businesses in Commonwealth contracts and procurements;
- Requiring prime contractors to include SWaM participation plans as part of their bids or proposals for Commonwealth contracts and procurements;
- Requiring Commonwealth agencies to develop processes to track the participation of SWaM-certified businesses in their contracts and procurements;
- Requiring DGS to create a small business set-aside program and implement other efforts to enhance small business participation in Commonwealth contracts and procurements;
- Requiring Commonwealth agencies to submit SWaM plans that include information about their implementations of the SWaM Program to SBSD on an annual basis;
- Requiring Commonwealth agencies to actively recruit small businesses to bid or propose on their contract and procurement opportunities; and

- Requiring Commonwealth agencies' purchasing manuals, regulations, and guidelines to include SWaM purchasing regulations and guidelines.²

The SWaM program comprises various *race- and gender-neutral* measures to meet its objectives. Race- and gender-neutral measures are measures designed to encourage the participation of all businesses—or all small businesses—in an organization's contracting, regardless of the race/ethnicity or gender of business owners. The types of race- and gender-neutral measures that make up the SWaM Program include:

- Networking and outreach events;
- Training seminars and workshops;
- Financing and bonding assistance;
- Mentorship;
- Monitoring and reporting; and
- SWaM participation goals.

In contrast to race- and gender-neutral measures, *race- and gender-conscious* measures are measures specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting (e.g., goals for minority- and woman-owned business participation on individual contracts or procurements). The Commonwealth does not currently use any race- or gender-conscious measures.

B. Study Scope

BBC conducted a disparity study based on contracts and procurements that Commonwealth executive branch agencies and HEIs awarded between July 1, 2014 and June 30, 2019 (i.e., the *study period*). Figure 1-1 presents a list of all agencies whose contract and procurement data were included in the study. The crux of the disparity study was to examine whether there are any disparities between the participation and availability of minority- and woman-owned businesses on Commonwealth and HEI contracts and procurements. The study focused on construction, professional services, and goods and other services contracts and procurements that the Commonwealth and HEIs awarded during the study period. Information from the disparity study will help participating agencies continue to encourage the participation of small businesses and minority- and woman-owned businesses in their contracts and procurements effectively and in a legally defensible manner.

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

² http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder_id=0&dvs=1608248864548~628

Figure 1-1.
Agencies participating in the disparity study

Agency			
State Educational Institutions			
Christopher Newport University	Longwood University	Richard Bland College	Virginia Community College System
College of William & Mary	Norfolk State University	University of Mary Washington	Virginia Military Institute
George Mason University	Old Dominion University	University of Virginia	Virginia Polytechnic Institute and State University
James Madison University	Radford University	Virginia Commonwealth University	Virginia State University
Executive Branch Agencies			
Augusta Correctional Center	Department of General Services	Jamestown-Yorktown Foundation	Sussex Correctional Center I
Bland Correctional Center	Department of Health Professions	Keen Mountain Correctional Center	Sussex State Prison II
Board of Accountancy	Department of Historic Resources	Library of Virginia	Tobacco Region Revitalization Commission
Buckingham Correctional Center	Department of Housing and Community Development	Lunenburg Correctional Center	VA Center for Behavioral Rehabilitation
Catawba Hospital	Department of Human Resource Management	Marine Resources Commission	Virginia Alcoholic Beverage Control Authority
Central State Hospital	Department of Juvenile Justice	Marion Correctional Treatment Center	Virginia Board for People with Disabilities
Central Virginia Training Center	Department of Labor and Industry	Northern Virginia Mental Health Institute	Virginia Correctional Center for Women
Coffeewood Correctional Center	Department of Medical Assistance Services	Northern Virginia Training Center	Virginia Correctional Enterprises
Commission for the Arts	Department of Military Affairs	Nottoway Correctional Center	Virginia Department for the Deaf and Hard-of-Hearing
Commission on Virginia Alcohol Safety Action Program	Department of Mines Minerals and Energy	Office of the Attorney General	Virginia Department for Veterans Services
Commonwealth's Attorneys' Services Council	Department of Motor Vehicles	Office of the State Inspector General	Virginia Department of Agriculture and Consumer Services
Culpeper Correctional Facility for Women	Department of Planning and Budget	Piedmont Geriatric Hospital	Virginia Department of Emergency Management
Deep Meadow Correctional Center	Department of Rail and Public Transportation	Pocahontas State Correctional Center	Virginia Department of Health
Deerfield Correctional Center	Department of Small Business and Supplier Diversity	Powhatan Correctional Center	Virginia Department of Transportation
Department for Aging and Rehabilitative Services	Department of Social Services	Red Onion Correctional Center	Virginia Employment Commission
Department of Accounts	Department of Taxation	River North Correctional Center	Virginia Information Technologies Agency
Department of Alcoholic Beverage Control	Department of Treasury	Science Museum of Virginia	Virginia Museum of Fine Arts
Department of Aviation	Dept of Professional and Occupational Regulation	Secretary of Administration	Virginia Museum of Natural History
Department of Behavioral Health and Developmental Services	Dillwyn Correctional Center	Sitter-Barfoot Veterans Care Center	Virginia Racing Commission
Department of Blind and Vision Impaired	Eastern State Hospital	Southeastern Virginia Training Center	Virginia Rehabilitation Center for the Blind
Department of Conservation and Recreation	Fluvanna Correctional Center	Southern Virginia Higher Education	Virginia Retirement System
Department of Corrections	Frontier Culture Museum	Southern Virginia Mental Health Institute	Virginia School for the Deaf and the Blind
Department of Education	Green Rock Correctional Center	Southside Virginia Training Center	Virginia State Lottery
Department of Elections	Greensville Correctional Center	Southwestern VA Mental Health Institute	Virginia State Police
Department of Environmental Quality	Gunston Hall	Southwestern Virginia Training Center	Virginia State University
Department of Fire Programs	Haynesville Correctional Center	State Compensation Board	Virginia Veterans Care Center
Department of Forensic Science	House of Delegates	State Council of Higher Education	Wallens Ridge Correctional Center
Department of Forestry	Indian Creek Correctional Center	State Farm Correctional Center	Western State Hospital
Department of Game and Inland Fisheries	Indigent Defense Commission	St. Brides Correctional Center	Wilson Workforce and Rehabilitation Center
			Woodrow Wilson Rehabilitation Center

a. Minority-owned businesses. The study team focused its analyses on the following minority-owned business groups: Asian American-, Black American-, Hispanic American-, and Native American-owned businesses. BBC's definition of minority-owned businesses included businesses owned by minority men and minority women. For example, BBC grouped results for businesses owned by Black American men with results for businesses owned by Black American women to present results for Black American-owned businesses. BBC considered businesses to be minority-owned based on the known races/ethnicities of business owners, regardless of whether the businesses were SWaM-certified or held any other types of certification.

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

c. SWaM businesses. In the context of the disparity study, *SWaM businesses* refers specifically to small, minority- and woman-owned businesses that are certified as SWaM businesses by the Commonwealth. (Small businesses that are owned by non-Hispanic white men or service-disabled veterans can also become SWaM-certified, but those businesses are not the focus of the disparity study.) Businesses seeking SWaM certification are required to submit an application to SBSD. The application is available online and requires businesses to submit various information, including business names, contact information, tax information, work specializations, race/ethnicity and gender of the owners, and veteran status of the owners. SBSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

d. Majority-owned businesses. BBC considered businesses to be majority-owned if they are businesses owned by non-Hispanic white men. In certain disparity study analyses, the study team coded each business as minority-, woman-, or majority-owned.

2. Analyses in the disparity study.

The disparity study includes various analyses related to outcomes for minorities, women, and minority- and woman-owned businesses throughout the local marketplace and specifically for Commonwealth and HEI contracts and procurements. Those analyses are presented in this report as follows:

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study and inform the Commonwealth's implementation of the SWaM Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B**.

b. Marketplace conditions. BBC conducted extensive quantitative analyses of conditions and potential barriers in the local marketplace for minorities, women, and minority- and woman-owned businesses. In addition, the study team collected anecdotal evidence about potential barriers that small businesses and minority- and woman-owned businesses face in Virginia

through in-depth interviews, focus groups, and public meetings. Information about marketplace conditions is presented in **Chapter 3**, **Appendix D**, and **Appendix E**.

c. Data collection. BBC examined data from multiple sources to complete the utilization and availability analyses. In addition, the study team conducted telephone and online surveys with thousands of businesses throughout Virginia. The scope of the study team’s data collection as it pertains to the utilization and availability analyses is presented in **Chapter 4**.

d. Availability analysis. BBC analyzed the percentage of contract and procurement dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of Commonwealth and HEI prime contracts and subcontracts. That analysis was based on agency data and surveys that the study team conducted with thousands of Virginia businesses that work in industries related to the types of contracts and procurements that the Commonwealth and HEIs award. Results from the availability analysis are presented in **Chapter 5** and **Appendix C**.

e. Utilization analysis. BBC analyzed contract and procurement dollars that the Commonwealth and HEIs awarded to minority- and woman-businesses during the study period. Those data included information about associated subcontracts.³ Results from the utilization analysis are presented in **Chapter 6**.

f. Disparity analysis. BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on contracts and procurements that the Commonwealth and HEIs awarded during the study period and the availability of those businesses for that work. The study team also assessed whether any observed disparities were statistically significant and potential explanations for those disparities. Results from the disparity analysis are presented in **Chapter 7** and **Appendix F**.

g. Program measures. BBC reviewed the measures that the Commonwealth, HEIs, and other organizations use to encourage the participation of small businesses as well as minority- and woman-owned businesses in their contracting. That information is presented in **Chapter 9**.

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

C. Study Team Members

The BBC study team comprised five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with disadvantaged business programs.

³ Prime contractors—not the Commonwealth or HEIs—award subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to the Commonwealth and HEIs as *awarding* subcontracts.

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

2. Exstare Federal Services Group (Exstare). Exstare is a SWaM-certified Black American woman-owned diversity program development and implementation firm based in Alexandria, Virginia. The firm conducted in-depth interviews and focus groups with business owners and trade association representatives and consulted on policy review and recommendations.

3. The Miles Agency. The Miles agency is a SWaM-certified, Black American woman-owned marketing and public relations firm based in Virginia Beach, Virginia. The firm conducted in-depth interviews with business owners and trade association representatives and consulted on community engagement efforts.

4. TMI Consulting. TMI Consulting is a SWaM-certified, Black American woman-owned diversity and inclusion strategy consulting firm based in Richmond, Virginia. The firm conducted in-depth interviews with business owners and trade association representatives and consulted on community engagement efforts.

5. Davis Research. Davis Research is a survey fieldwork firm based in Calabasas, California. The firm conducted telephone and online surveys with thousands of Virginia businesses in connection with the availability and utilization analyses.

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

CHAPTER 2.

Legal Analysis

As part of the Small, Women-owned, and Minority-owned Business (SWaM) Program, the Commonwealth of Virginia (the Commonwealth) uses various *race- and gender-neutral* efforts to encourage the participation of small businesses, including many minority- and woman-owned businesses, in contracts and procurements that state agencies award. Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in an organization's contracting regardless of the race/ethnicity or gender of businesses' owners. In contrast, *race- and gender-conscious* measures are measures designed specifically to encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts or procurements).

Although the Commonwealth does not currently use any race- or gender-conscious measures, it is instructive to review legal standards surrounding their use in case the Commonwealth determines that using such measures is appropriate in the future. Any use of race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review, because it potentially impinges on the civil rights of businesses that are not minority- or woman-owned.¹ The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a government organization must:

- Have a *compelling governmental interest* in remedying past identified discrimination or its present effects; and
- Establish that the use of any such measure is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

A government organization's use of race- and gender-conscious measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional.

BBC Research & Consulting (BBC) summarizes the elements of the SWaM Program as well as the legal standards to which the Commonwealth must adhere in implementing the program. BBC presents that information in two parts:

- A. Program overview; and
- B. Legal standards.

¹ Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the strict scrutiny and intermediate scrutiny standards in detail.

A. Program Overview

The SWaM Program was established in 2006 to encourage the participation of small businesses and minority- and woman-owned businesses in Commonwealth contracting and procurement. The Department of Small Business and Supplier Diversity (SBSD) is responsible for implementing the program, which comprises various race- and gender-neutral measures to meet its objectives, including networking and outreach events, training seminars and workshops, financing and bonding assistance, mentorship, monitoring and reporting, and SWaM participation goals.

1. Definitions of SWaM businesses. Different types of small businesses can become certified as SWaM businesses, including businesses owned by minorities and women:

- **Microbusinesses:** Businesses with 25 employees or fewer, whose average annual revenues over the three-year period prior to certification are \$3 million or less and that are owned by United States citizens or legal residents;
- **Small businesses:** Businesses with 250 employees or fewer or whose average annual revenues over the three-year period prior to certification are \$10 million or less and that are owned by United States citizens or legal residents;
- **Minority-owned businesses:** Businesses that are at least 51 percent owned by one or more individuals who identify as racial or ethnic minorities who are United States citizens or legal residents and whose management and control are by one or more minorities;
- **Woman-owned businesses:** Businesses that are at least 51 percent owned by one or more women who are United States citizens or legal residents and whose management and control are by one or more women; and
- **Service-disabled veteran-owned businesses:** Micro businesses, small businesses, woman-owned businesses, or minority-owned businesses whose owners are certified as service-disabled veterans by the Virginia Department of Veterans Services.

Although businesses that are owned by non-Hispanic white men or service-disabled veterans can become SWaM-certified, those businesses are not the focus of the disparity study. Key analyses in the disparity study focus primarily on minority- and woman-owned businesses.

2. Certification requirements. Businesses seeking SWaM certification are required to submit an application to SBSD. The application is available online and requires businesses to submit various information, including business names, contact information, tax information, work specializations, race/ethnicity and gender of the owners, and veteran status of the owners. SBSD reviews each application for approval.

3. SWaM goals. The Commonwealth has established an overall annual aspirational goal for the participation of small businesses in its contracts and procurements of 42 percent, with a 50 percent goal for construction. Commonwealth agencies use various measures to try to meet that goal each year, including a small business set-aside program that DGS manages and attending networking events. Another measure that the Commonwealth uses to encourage the participation of small businesses, including many minority- and woman-owned businesses, in its contracts and procurements is requiring prime contractors submit *subcontracting plans* as part

of their bids, quotes, or proposals for all contracts and procurements worth more than \$100,000. The subcontractor plans indicate which subcontractors prime contractors plan on using as part of the work and which of those subcontractors are certified as SWaM businesses. SBSB reviews subcontractor plans during contract and procurement award processes.

B. Legal Standards

There are different legal standards for determining the constitutionality of contracting programs, depending on whether they rely only on race- and gender-neutral measures or if they also include race- and gender-conscious programs. BBC briefly summarizes legal standards for both types of programs below.

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

2. Programs that include race- and gender-conscious measures. The United States Supreme Court has established that contracting programs that include both race- and gender-neutral and race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.² If the Commonwealth determines that using race- and gender-conscious measures as part of the SWaM Program is appropriate in the future, then its use of those measures would have to meet the strict scrutiny standard. In contrast to a rational basis, the strict scrutiny standard presents the highest threshold for evaluating the legality of government programs that could impinge on the rights of others short of prohibiting them altogether. The two key United States Supreme Court cases that established the strict scrutiny standard for such programs 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;³ and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.⁴

² Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

³ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Under the strict scrutiny standard, a government organization must show a *compelling governmental interest* to use race- and gender-conscious measures and ensure that its use of such measures is *narrowly tailored*.

a. Compelling governmental interest. An organization that uses race- or gender-conscious measures as part of a business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Organizations cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.⁵ It is not necessary for a government organization itself to have discriminated against minority- or woman-owned businesses for it to take remedial action. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the organization] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

b. Narrow tailoring. In addition to demonstrating a compelling governmental interest, a government agency must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*. There are a number of factors that a court considers when determining whether the use of such measures is narrowly tailored including:

- The necessity of such measures and the efficacy of alternative race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁶

c. Meeting the strict scrutiny standard. Many government organizations have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring that their use of race- and gender-conscious measures is narrowly tailored. Specifically, organizations have assessed evidence of any disparities between the participation and availability of minority- and woman-owned businesses for their contracts and procurements. In *City of Richmond v. J.A. Croson Company*, the United States Supreme 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,

⁵ See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

⁶ 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).

an inference of discriminatory exclusion could arise.” Lower court decisions since *City of Richmond v. J.A. Croson Company* have held that a compelling governmental interest must be established for each racial/ethnic and gender group to which race- and gender-conscious measures apply.

Several programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of the case law related to those programs.

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination have produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers have limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Minority groups and women in Virginia have faced similar barriers. Black Americans were forced to live in racially-segregated neighborhoods and send their children to segregated schools. In the early 20th century, Black American men in Virginia were barred from voting. Black Americans were also forced to use separate facilities at area restaurants, public buildings, and cultural institutions.⁶ Several of the most well-documented examples of redlining—where Black Americans were systematically denied access to banking and mortgage services because they were deemed to live in higher-risk, “undesirable” neighborhoods—occurred in Richmond and Norfolk, Virginia.^{7, 8} Disparate treatment also extended into the labor market. Black Americans were concentrated in low wage work in agriculture and other industries with few opportunities for advancement.^{9, 10}

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.¹¹ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{12, 13, 14, 15} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{16, 17, 18, 19}

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

discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{23, 24, 25}

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Virginia construction, professional services, and goods and other services industries. The study team also examined the potential effects that any such barriers have on the formation and success of businesses and on their participation in, and availability for, contracts that Commonwealth of Virginia executive branch agencies and higher education institutions award. The study team examined local marketplace conditions in four primary areas:

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

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

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Human capital factors such as education, business experience, and managerial experience have been shown to be related to business success.^{26, 27, 28, 29} Any barriers in those areas may make it more difficult for minorities and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

1. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least four-year college degrees. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{30, 31} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.^{32, 33} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³⁴ In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³⁵ For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college, enroll at highly- or moderately selective four-year institutions, or earn college degrees.³⁶

Educational outcomes for minorities in Virginia are similar to those for minorities nationwide. The study team’s analyses of the Virginia labor force indicate that certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Virginia workers that have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers are substantially less likely than non-Hispanic white workers to have four-year college degrees.

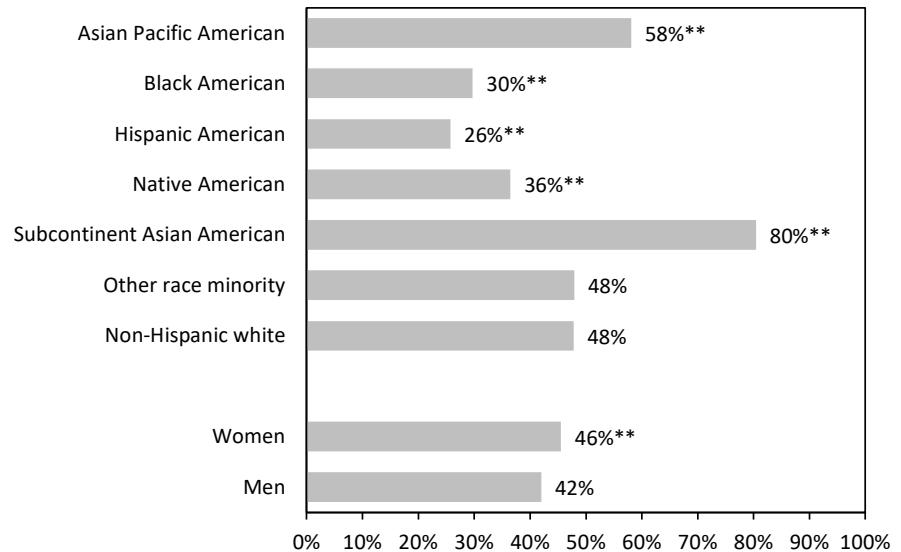
Figure 3-1.
Percentage of Virginia
workers 25 and older
with at least a four-year
college degree

Note:

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

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

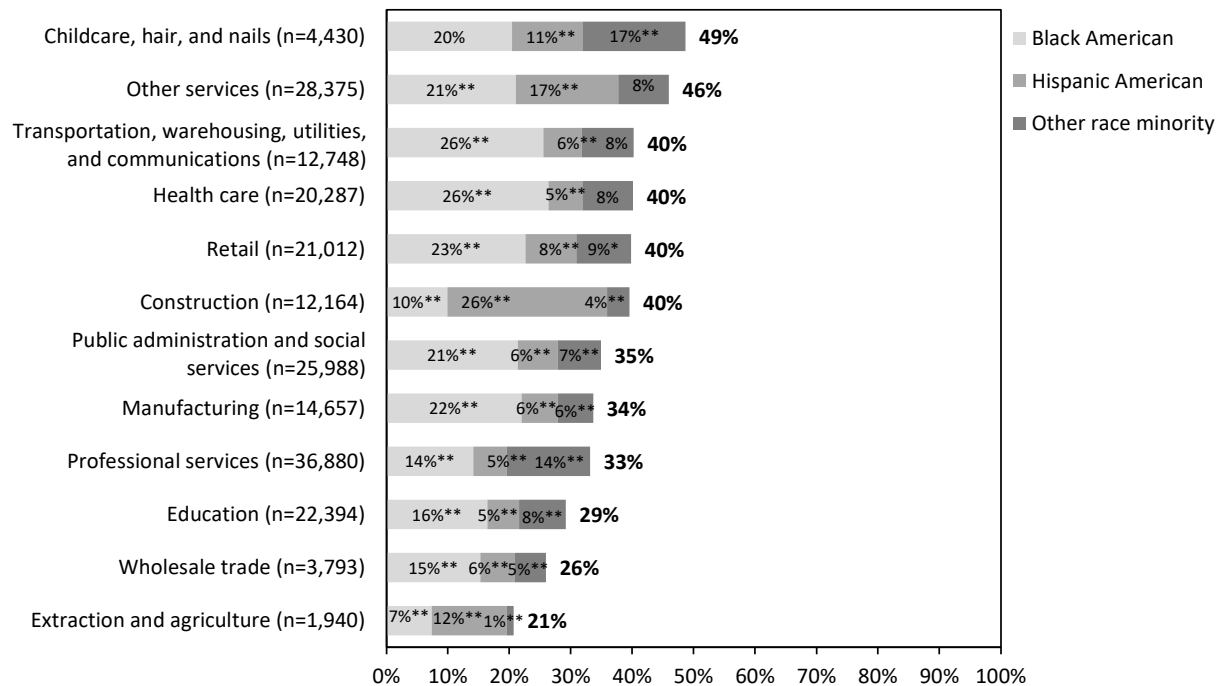


2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the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

a. Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{37, 38, 39} When employed, they are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.^{40, 41, 42, 43, 44} In addition, Black Americans are incarcerated at a higher rate than non-Hispanic whites in Virginia and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.^{45, 46, 47, 48, 49}

The study team’s analyses of the labor force in Virginia are largely consistent with nationwide findings. Figures 3-2 presents the representation of minority workers in various Virginia industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are childcare, hair, and nails; other services; and transportation, warehousing, utilities, and communications. The Virginia industries with the lowest representations of minority workers are education, wholesale trade, and extraction and agriculture.

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



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

The representation of minorities among all Virginia workers is 19% for Black Americans, 9% for Hispanic Americans, 8% for Other minorities and 36% for all minorities considered together.

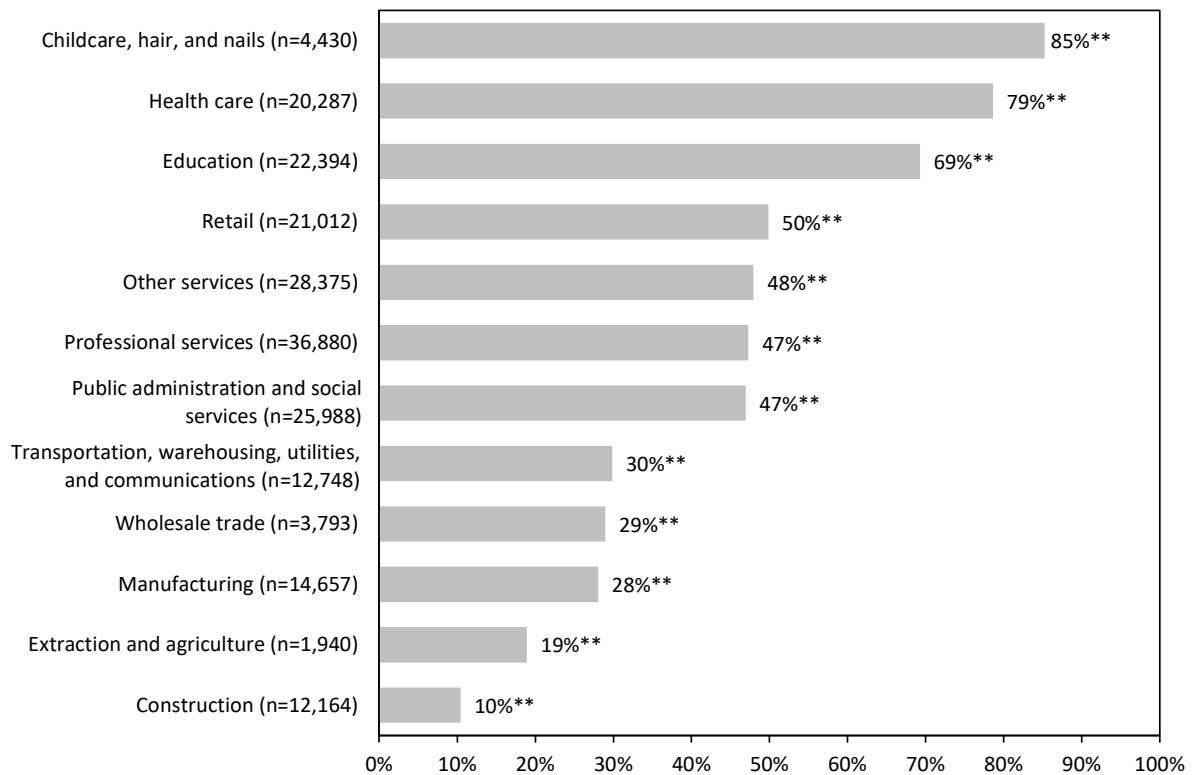
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, and other races.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figures 3-3 indicates that the Virginia industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

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



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

The representation of women among all Virginia workers is 47%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

b. Management experience. Managerial experience is an essential predictor of business success, but discrimination remains a persistent obstacle to greater diversity in management positions.^{50, 51, 52} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{53, 54} Similar outcomes appear to exist for minorities and women in Virginia. The study team examined the concentration of minorities and women in management positions in the Virginia construction, professional services, and goods and other services industries. As shown in Figure 3-4:

- Smaller percentages of Black Americans and Hispanic Americans work as managers in the construction industry than non-Hispanic whites.
- Smaller percentages of Asian Pacific Americans, Black Americans, Native Americans, and Subcontinent Asian Americans work as managers in the professional services industry than non-Hispanic whites. In addition, a smaller percentage of women than men work as managers in the professional services industry.

- A smaller percentage of Black Americans, Hispanic Americans, and Native Americans work as managers in the goods and other services industry than non-Hispanic whites. In addition, a smaller percentage of women than men work as managers in the goods and other services industries.

Figure 3-4
Percentage of workers who worked as a manager in study-related industries in Virginia

Note:

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

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

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	9.5 %	5.0 % **	3.5 %
Black American	4.4 % **	4.4 % **	0.9 % **
Hispanic American	2.6 % **	6.2 %	0.4 % **
Native American	12.8 %	4.0 % *	0.6 % **
Subcontinent Asian American	19.2 %	9.7 % **	1.5 %
Other race minority	0.0 % †	6.0 %	0.0 %
Non-Hispanic white	11.6 %	7.3 %	2.8 %
Gender			
Women	7.8 %	5.5 % **	1.3 % **
Men	8.6 %	7.7 %	2.5 %
All individuals	8.5 %	6.8 %	2.0 %

3. Intergenerational business experience. Having family members who own and work in businesses is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping to run businesses. However, nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.^{55, 56} That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{57, 58, 59} Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and financing. If discrimination exists in financial capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various personal factors that are ostensibly unrelated to race and gender.^{60, 61, 62} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{63, 64} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median

hourly wage of men.⁶⁵ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

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

- All relevant groups of racial/ethnic minorities in Virginia earn substantially less than non-Hispanic whites; and
- Women earn substantially less than men.

Figure 3-5.
Mean annual wages
in Virginia

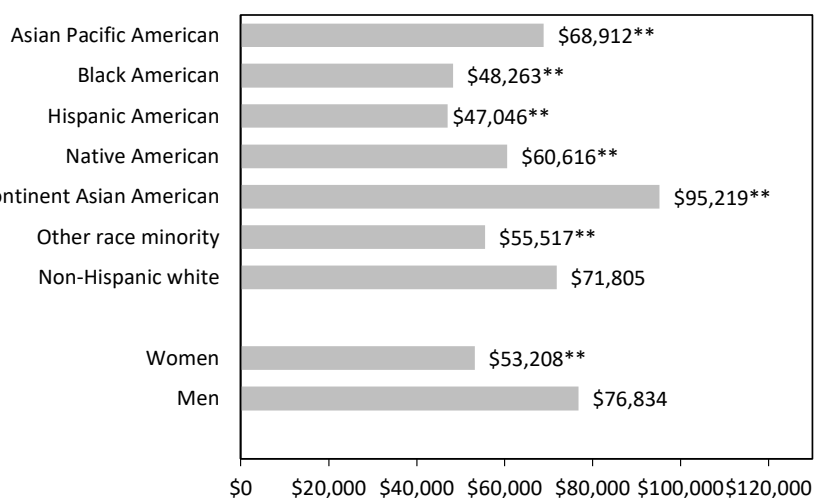
Note:

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

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

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Asian Pacific American, Black American, Hispanic American, Subcontinent Asian American, or other race minority was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man (for details, see Figure C-9 in Appendix C).

2. Personal wealth. Another important source of business capital is personal wealth. As with wages and income, there are substantial disparities between racial/ethnic minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{66, 67} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In addition, approximately one-out-of-five Black Americans and Hispanic Americans in the United States are living in poverty, about double the comparable rate for non-Hispanic whites.⁶⁸ Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁶⁹

3. Homeownership. Homeownership and home equity have been shown to be key sources of business capital.^{70, 71} However, racial/ethnic minorities appear to face substantial barriers

nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.⁷² Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.^{73, 74} Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.^{75, 76} Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.^{77, 78}

Racial/ethnic minorities appear to face homeownership barriers in Virginia that are similar to those observed nationally. BBC examined homeownership rates in Virginia for relevant racial/ethnic groups. As shown in Figure 3-6, all relevant groups of racial/ethnic minorities in Virginia exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure 3-6.
Home ownership
rates in Virginia

Note:

The sample universe is all households.

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

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

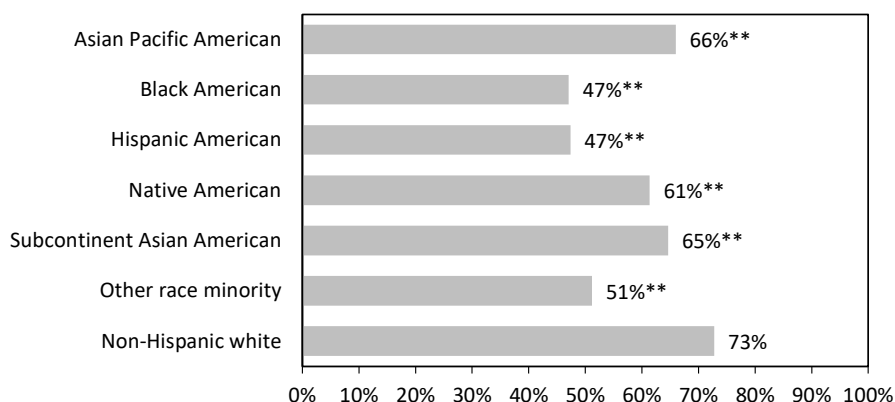


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Virginia. Consistent with national trends, homeowners that identify with certain minority groups—Black Americans and Native Americans—own homes that, on average, are worth less than those of non-Hispanic whites.

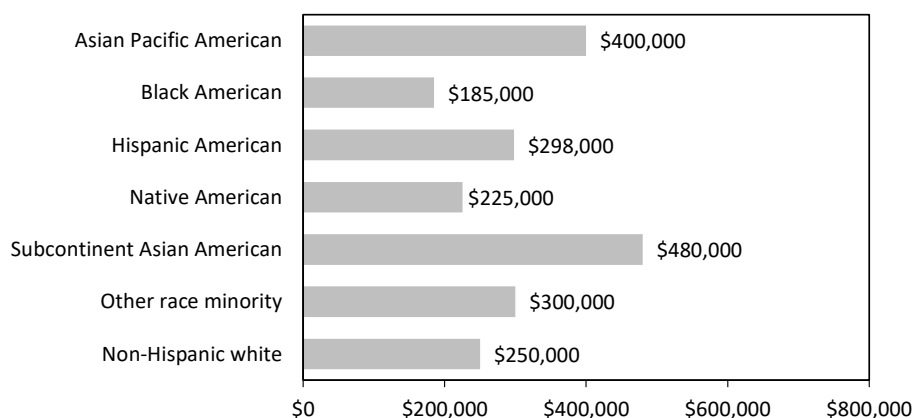
Figure 3-7.
Median home
values in Virginia

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



4. Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{79, 80, 81, 82, 83, 84} The study team assessed difficulties that minorities and women face in home credit and business credit markets in Virginia and nationwide.

a. Home credit. Racial/ethnic minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during pre-application and disproportionate targeting of minority and women borrowers for subprime home loans.^{85, 86, 87, 88, 89} Race- and gender-based barriers in home credit markets, as well as the foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{90, 91, 92, 93} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Virginia and the United States as a whole. As shown in Figure 3-8, Black Americans, Hispanic Americans, and Native Americans or Other Pacific Islanders in Virginia were denied home loans at higher rates than non-Hispanic whites. In addition, the study team's analyses indicate that certain minority groups in Virginia are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

Figure 3-8.

Denial rates of conventional purchase loans for high-income households in Virginia

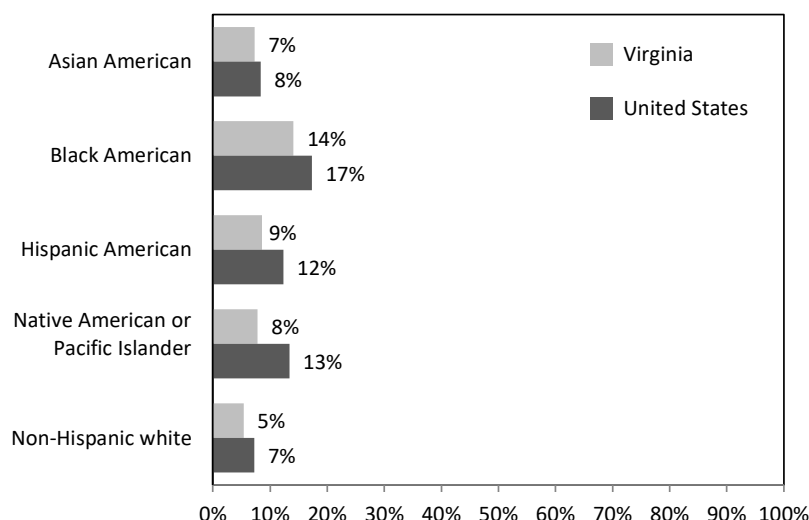
Note:

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

Native Americans are combined with Pacific Islanders due to small samples.

Source:

FFIEC HMDA data 2017. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.



b. Business credit. Minority- and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.⁹⁴ Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.^{95, 96, 97} In addition, women are less likely to apply for credit and receive loans of less value when they do.^{98, 99} Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.^{100, 101, 102, 103}

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, Black American-owned businesses increased by 35 percent, and Hispanic American-owned businesses increased by 46 percent.¹⁰⁴ Despite the progress that racial/ethnic minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.^{105, 106, 107, 108} In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of minorities and women.^{109, 110, 111} The study team examined rates of business ownership in the Virginia construction, professional services, and goods and other services industries by race/ethnicity and gender. As shown in Figure 3-9:

- Black Americans, and Hispanic Americans own construction businesses at lower rates than non-Hispanic whites and women own construction businesses at a lower rate than men; and
- Asian Pacific Americans, Black Americans, Hispanic Americans, and Subcontinent Asian Americans own professional services businesses at lower rates than non-Hispanic whites;

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

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	30.5 % **	8.1 % **	13.9 % **
Black American	13.4 % **	6.3 % **	8.9 %
Hispanic American	14.2 % **	6.7 % **	9.4 %
Native American	22.3 %	8.4 %	10.1 %
Subcontinent Asian American	19.7 %	10.3 % **	27.2 % **
Other minority group	22.9 % †	11.9 %	20.0 %
Non-Hispanic white	22.8 %	12.9 %	8.5 %
Gender			
Women	14.3 % **	11.1 %	7.6 % **
Men	20.4 %	11.2 %	10.6 %
All individuals	19.8 %	11.1 %	9.4 %

Note: For each industry and group, business ownership rates were calculated by determining the proportion of total workers in the labor force and the number that are self-employed as either an incorporated or non-incorporated business. As shown in the figure, the business ownership rate for Black Americans in the professional services industry is 6.3%, meaning that of all the Black Americans in the labor force in the Virginia professional services industry, 6.3% own their businesses.

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

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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

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

- Being Black American is associated with a lower likelihood of owning a construction business relative to being non-Hispanic white, and being a woman is associated with a lower likelihood of owning a construction business compared to being a man.
- Being Asian Pacific American, Black American, or Hispanic American is associated with a lower likelihood of owning a professional services business relative to being non-Hispanic white.
- Being a woman is associated with a lower likelihood of owning a goods and other services business compared to being a man.

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

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, and men for the gender variable.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Industry and group	Coefficient
Construction	
Black American	-0.2841
Women	-0.3750
Professional services	
Asian Pacific American	-0.2455
Black American	-0.2737
Hispanic American	-0.2885
Goods and ther services	
Women	-0.1717

D. Business Success

A great deal of research indicates that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, based on a number of different indicators such as profits and business size (but also see Robb and Watson 2012).^{112, 113, 114} The study team examined data on business closure, business receipts, and business owner earnings to further explore business success in Virginia.

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

Figure 3-11.
Rates of business closure in Virginia

Note:

Data include only to non-publicly held businesses.

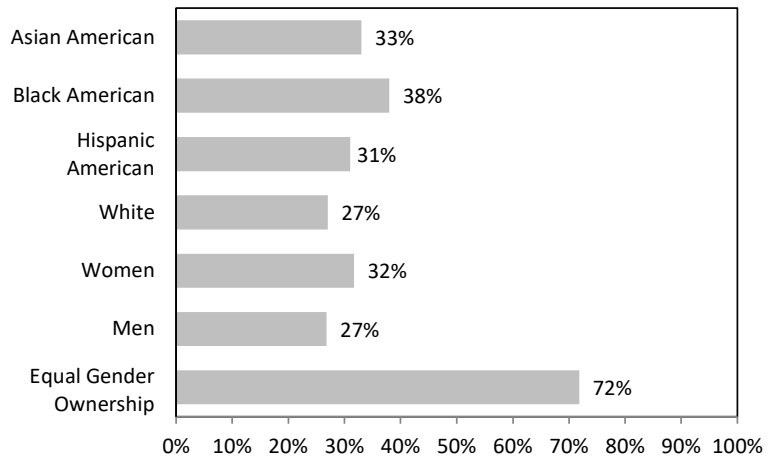
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

Source:

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

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



2. Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Virginia earn as much as businesses owned by whites or men, respectively. Figure 3-12 shows mean annual receipts for businesses in Virginia by the race/ethnicity and gender of owners. Those results indicate that, in 2012, all relevant minority groups in Virginia showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses showed lower mean annual business receipts than businesses owned by men.

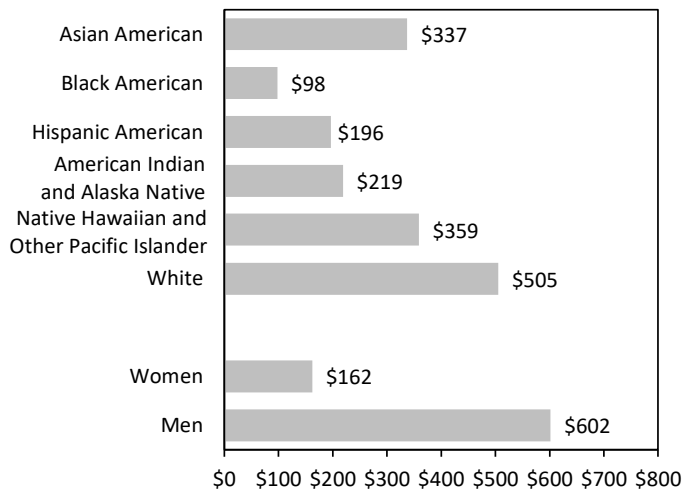
Figure 3-12.
Mean annual business receipts (in thousands) in Virginia

Note:

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

Source:

2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.



3. Business owner earnings. The study team analyzed business owner earnings to assess whether minorities and women in Virginia earn as much from the businesses they own as non-Hispanic whites and men, respectively. As shown in Figure 3-13:

- Black Americans, Hispanic Americans, and Native Americans earned less on average from their businesses than non-Hispanic whites earned from their businesses; and
- Women earned less from their businesses than men earned from their businesses.

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

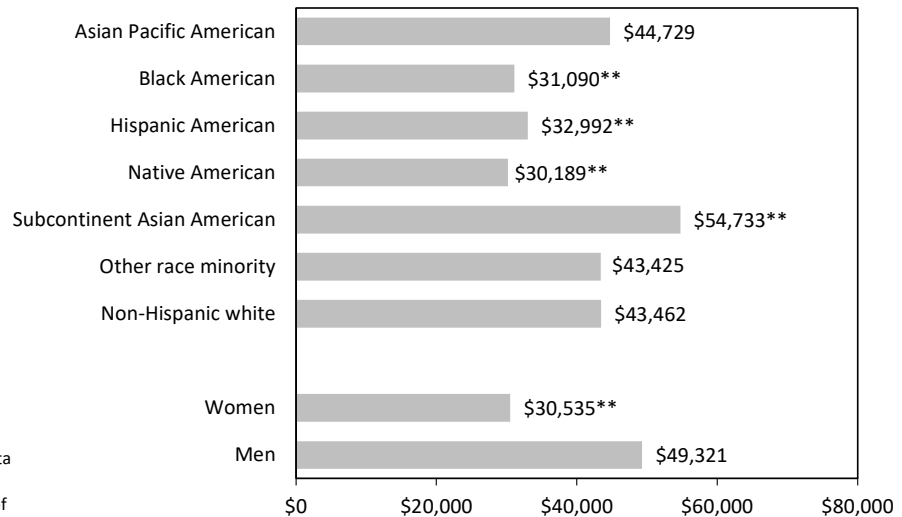
Note:

The sample universe is business owners age 16 and older who reported positive earnings. All amounts in 2016 dollars.

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

Source:

BBC Research & Consulting from 2014 -2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Black American was associated with substantially lower business owner earnings. Similarly, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-27 in Appendix C).

E. Summary

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

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

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CHAPTER 4.

Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the Commonwealth of Virginia (the Commonwealth) and higher education institutions (HEIs) use to award contracts and procurements; the contracts and procurements that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract, procurement, and subcontract data for the disparity study. Chapter 4 is organized into six parts:

- A. Overview of contracting and procurement policies;
- B. Collection and analysis of contract and procurement data;
- C. Collection of vendor data;
- D. Relevant geographic market area (RGMA);
- E. Relevant types of work; and
- F. Agency review process.

A. Overview of Contracting and Procurement Policies

The Virginia Department of General Services (DGS), along with the Virginia Information Technologies Agency (VITA), the Virginia Department of Transportation (VDOT), and higher education institutions (HEIs) with procurement autonomy have statutory authority for setting and enforcing procurement policy for all Commonwealth of Virginia (Commonwealth) agencies. The DGS Division of Purchases and Supply (DPS) sets policy for non-technology goods and services, and the Division of Engineering and Buildings sets policy for construction and construction-related professional services. VITA sets policies for technology goods and services, VDOT sets policies for road and bridges, and HEIs with procurement autonomy have statutory authority for setting their own policies for all construction, goods, and services purchases.

1. Purchasing policies. The Commonwealth uses different purchasing methods depending on the estimated cost of the purchase, the required goods or services, and the needs of the using agency. In general, the Commonwealth's purchasing methods can be categorized into three types: small purchases, competitive sealed bids, and competitive negotiation. Most Commonwealth purchases are procured using one of those three processes. Thresholds and requirements differ for select HEIs with procurement autonomy.

a. Small purchases. The Commonwealth follows small purchase procedures for goods, non-professional services, and construction contracts worth less than \$100,000. Purchasing requirements for small purchases differ depending on contract or procurement size.

i. Single quotes (\$10,000 or less). The Commonwealth often procures goods and services worth \$10,000 or less from mandatory or non-mandatory sources or existing statewide contracts.¹ When it cannot use one of those sources, the Commonwealth procures goods or services of that size using single quotes procedures. Under single quote procedures, the Commonwealth must solicit at least one quote from a business that has been certified as a *microbusiness* under the Small, Women-owned, and Minority-owned (SWaM) Program. The Commonwealth can award contracts or procurements to certified microbusinesses if their bid prices are no more than 5 percent higher than that of the lowest responsive and responsible non-certified bidders. In addition, if no certified microbusinesses bid on a particular solicitation, the contract can be awarded to a non-certified businesses. The Commonwealth also sets aside construction contracts worth \$10,000 or less for certified microbusinesses and requires informal solicitations from at least two such businesses. If no microbusinesses bid on a solicitation, then the contract or procurement is awarded through written quotes processes.

ii. Quick quotes (between \$10,000 and \$100,000). The Commonwealth can also procure goods and services contracts worth between \$10,000 and \$100,000 from mandatory or non-mandatory sources or existing statewide contracts. When one of those sources cannot be used, the Commonwealth procures purchases of that size using competitive quick quotes procedures. As outlined in the DPS Agency Procurement and Surplus Property Manual, the Commonwealth must post quick quote solicitations in eVA—its web-based procurement system—and must keep them open for at least three business days.² The Commonwealth must solicit at least four SWaM businesses for quotes. Once opened, the agency evaluates all quotes and then awards contracts to the lowest responsive and responsible SWaM businesses if their bid prices are no more than 5 percent higher than that of the lowest responsive and responsible non-certified bidders. If no SWaM businesses bid on a solicitation, DPS can award the contract to a non-certified business.

The Commonwealth also sets aside construction contracts worth between \$10,000 and \$100,000 for certified SWaM businesses.³ The Commonwealth must solicit at least four SWaM businesses for written bids, including from at least one certified microbusiness unless no microbusinesses are available for the work. If none of the solicited bids are found to be fair and reasonable, non-certified businesses may also be invited to submit written bids.

b. Competitive bids. As required by Code of Virginia, the Commonwealth follows competitive bidding procedures to award goods and services contracts worth \$100,000 or more.⁴ Under public bidding procedures, solicitations must be advertised on eVA VBO at least 10 days prior to their bid opening dates. Solicitations must include descriptions of the required goods or services, details about how bids will be evaluated, contractual terms and conditions, times and locations for bid openings, and other relevant information. Unless waived, the Commonwealth also holds

¹ Mandatory sources include DGS/DPS established term contracts, Virginia Correctional Enterprises, Department for the Blind and Vision Impaired, Virginia Distribution Center, DGS/DPS Office of Graphic Communications, Virginia Information Technologies Agency, and DGS/Office of Fleet Management. Nonmandatory sources include optional use term contracts, surplus property, and Employment Services Organization. (Agency Procurement and Surplus Property Manual 2.1-2).

² Code of Virginia § 2.2-1110.

³ Code of Virginia § 2.2-4310(C).

⁴ Code of Virginia § 2.2-4303.

pre-bid or pre-proposal conferences after solicitations have been made public. The Commonwealth also requires that bidders submit SWaM Subcontracting Plans with their bids unless no subcontractor opportunities exist. DPS must open bids publicly at the times and locations designated in solicitations. DPS and using agencies evaluate bids for responsiveness and completeness and then award them to the lowest responsive and responsible bidders.

For Design-Build contracts of any value and for other contracts worth \$100,000 or more, as deemed necessary (e.g., when precise specifications or definitive scopes of work cannot be determined), the Commonwealth follows two-step competitive sealed bidding procedures. Per those procedures, IFBs must be advertised in the same fashion as competitive public bids. DPS and using agencies then evaluate bids and ask qualified bidders to submit price quotes. Although price quotes are considered as part of evaluations, they are not the sole or primary determining factor for competitive bidding. Using agencies can select bidders that, at their discretion, have submitted the best proposals and provide the best value. In instances when competitive bidding is neither practical nor fiscally advantageous, construction and capital outlay services worth more than \$100,000 can be procured through competitive negotiations.^{5, 6}

c. Competitive negotiation. The Commonwealth requires the use of competitive negotiation for the procurement of professional services, and it may also be used for goods and nonprofessional services when it is not practicable or fiscally advantageous to use competitive sealed bidding. Competitive negotiation requires the issuance of a Request For Proposal (RFP) that describes, in general terms, the requirements, the factors that will be used to evaluate proposals, the Commonwealth's General Terms and Conditions, as well as any special conditions including unique capabilities or qualifications that will be required. In sealed bidding, all responses must be held unopened until the date and time specified for their receipt. Solicitations for professional services worth \$30,000 or more must be advertised on eVA VBO for at least 10 days prior to proposal deadlines. Solicitations for architecture and engineering (A/E) services for capital projects and term A/E contracts of any size must be advertised at least 21 days prior to proposal deadlines. Commonwealth agencies have the authority to use competitive negotiation to determine acceptable prices for professional services.

The Commonwealth sets aside professional services contracts worth \$10,000 or less for certified microbusinesses and solicits at least two microbusinesses for proposals. It also sets aside professional services contracts worth between \$10,000 and \$80,000 for SWaM businesses.⁷ For small business set asides, the Commonwealth must solicit at least four SWaM businesses for proposals, including one certified microbusiness unless no such businesses are available for the work. Under set-aside procedures, if none of the proposals are found to be fair and reasonable, non-certified businesses may also be invited to submit proposals.

⁵ Capital Outlay Projects are those that involve the acquisition, and any improvements thereto, a new construction project or improvements to state-owned property, or renovation/repair/maintenance to any state-leased property.

⁶ Code of Virginia § 2.2 Chapter 43.

⁷ Code of Virginia § 2.2-4310(C).

2. Information technology. The Virginia Information Technologies Agency (VITA) is responsible for procuring all information technology (IT) goods and services for Commonwealth state agencies and HEIs and is responsible for planning all Commonwealth connectivity, compatibility, IT integration, and telecommunications activities.⁸ Select HEIs have autonomy over their own IT purchases.

3. Prequalification. Per Code of Virginia, the Commonwealth prequalifies contractors for particular construction projects and limits consideration of associated bids and proposals to only those contractors.⁹ The Commonwealth must provide sufficient time for prequalification before the bid or proposal deadline. Prequalification is determined through an application process which sets forth the required qualifications necessary for evaluation of all prospective contractors. If prequalification is required for a contract, the solicitation must be advertised for at least 30 days before the bid or proposal deadline.

B. Collection and Analysis of Contract Data and Procurement Data

BBC Research & Consulting (BBC) collected contracting and vendor data from the eVa data system to serve as the basis for key disparity study analyses including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data that were available on prime contracts and subcontracts that the Commonwealth and HEIs awarded between July 1, 2014 and June 30, 2019.¹⁰ BBC sought data on prime contracts and subcontracts regardless of the race/ethnicity and gender of the owners of the businesses that performed the work or their statuses as certified SWaM businesses, minority-owned business enterprises, or woman-owned business enterprises. The study team collected data on construction, professional services, and goods and other services prime contracts and subcontracts.

1. Prime contract data collection. The Commonwealth and HEIs provided BBC with electronic data on relevant prime contracts that they awarded during the study period.¹¹ As available, BBC collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Prime contractor name;
- Prime contractor identification number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date;

⁸ Code of Virginia § 2.2-2007, except those HEIs that have been exempted.

⁹ Code of Virginia § 2.2-4317.

¹⁰ The study included contracts and procurements worth \$5,000 or more.

¹¹ As necessary, BBC worked with individual HEIs to collect additional contract and procurement data.

- Whether a Subcontracting Plan was requested (Commonwealth contracts only); and
- Funding source (federal, state, or local funding).

As available, the Commonwealth and HEIs also provided BBC with information about payments that they made during the study period toward contracts and procurements. The Commonwealth and HEIs advised the study team on how to interpret provided data, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, BBC aggregated individual payments or purchase order line items into contract or purchase order elements. In instances where payments or line items could not be aggregated, the study team treated payment and line-item records as individual contract elements.

2. Subcontract data collection. The Commonwealth and HEIs also provided the study team with electronic data on subcontracts related to the prime contracts that they awarded during the study period, as it was available. The Commonwealth and HEIs provided subcontract data for 306 prime contracts, which accounted for \$108 million of the contract dollars that they awarded during the study period. In order to gather additional data about relevant subcontracts, BBC conducted surveys with prime contractors to collect information on subcontracts that were associated with construction and professional services contracts on which they worked during the study period. The study team sent out surveys to request subcontract data associated with an additional 6,713 prime contracts that the Commonwealth and HEIs awarded during the study period. BBC asked prime contractors to provide the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of June 30, 2020;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

After the first round of surveys, BBC sent reminder letters to unresponsive prime contractors and worked with the Commonwealth and HEIs to contact them and encourage their participation. Through the survey effort, BBC collected subcontract data associated with more than \$1.1 billion of contracting the Commonwealth and HEIs awarded during the study period.

3. Contracts included in study analyses. The study team collected information on 89,087 relevant contracts—87,197 prime contracts and 1,890 subcontracts—that the Commonwealth and HEIs awarded during the study period, representing approximately \$16 billion. Figure 4-1 presents the number of contract elements and dollars by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

4. Prime contract and subcontract amounts. For each contract element included in the analyses, BBC examined the dollars that the Commonwealth and HEIs awarded or paid to each prime contractor and the dollars that the prime contractor paid to any subcontractors. If a

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

Figure 4-1.
Number of
Commonwealth/HEI
contracts included in the
study

Source:

BBC Research & Consulting from
Commonwealth and HEI contract data.

Contract type	Number	Dollars
Construction	28,914	\$7,189,941,622
Professional services	18,643	\$4,725,147,671
Good and other services	41,530	\$3,959,522,021
Total	89,087	\$15,874,611,313

C. Collection of Vendor Data

The study team compiled the following information on businesses that participated in relevant Commonwealth and HEI prime contracts and subcontracts during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);
- SWaM certification status;
- Primary lines of work;
- Business size; and
- Year of establishment.

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

- Commonwealth and HEI contract and vendor data;
- Commonwealth vendor registration list;
- Commonwealth SWaM certification directory;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Surveys that the study team conducted with business owners and managers; and
- Business websites.

D. RGMA

The study team used Commonwealth and HEI data to help determine the *RGMA*—the geographical area in which the organizations spend the substantial majority of their contracting

dollars—for the study. The study team’s analysis showed that 86 percent of relevant contracting dollars during the study period went to businesses with locations in Virginia—indicating that the entire state should be considered the RGMA for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Virginia.

E. Relevant Types of Work

For each prime contract and subcontract element, BBC determined the *subindustry* that best characterized the business’s primary line of work (e.g., heavy construction). BBC identified subindustries based on Commonwealth and HEI contract and vendor data, surveys that the study team conducted with prime contractors and subcontractors, business certification lists, D&B business listings, and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 presents the dollars that the study team examined in the various construction, professional services, and goods and other services subindustries that were included in the analyses.

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into four “other” subindustries: “other construction services,” “other construction materials,” “other goods,” and “other services.” For example, the contracting dollars that the Commonwealth awarded to contractors for “welding repair” represented less than 1 percent of total Commonwealth dollars that BBC examined in the study. BBC combined “welding repair” with other construction services subindustries that also accounted for relatively small percentages of total dollars and that were relatively dissimilar to other subindustries into the “other construction services” subindustry.

There were also contracts that were categorized in various subindustries that BBC did not include as part of its analyses, because they are not typically analyzed as part of disparity studies. The study team did not include contracts in its analyses that:

- The Commonwealth and HEIs awarded to universities, government agencies, utility providers, hospitals, or nonprofit organizations (\$18 billion);
- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or subindustries for which the Commonwealth and HEIs awarded the majority of contracting dollars to businesses located outside the relevant geographic market area (\$2 billion);¹²
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$28 billion); or
- Were classified in subindustries not typically included in a disparity study and account for small proportions of Commonwealth contracting dollars (\$374 million).¹³

¹² Examples of such industries include computers, software, and specialized medical equipment.

¹³ Examples of industries not typically included in a disparity study include subscription services and lodging.

Figure 4-2.
Commonwealth and
HEI contract and
procurement dollars
by subindustry

Note:

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

Source:

BBC Research & Consulting from
Commonwealth and HEI contract
data.

Industry	Total
Construction	
Building construction	\$ 2,517,241,694
Highway, street, and bridge construction	\$ 1,388,303,789
Excavation, drilling, wrecking, and demolition	\$ 363,397,263
Electrical work	\$ 339,989,454
Plumbing and HVAC	\$ 293,493,558
Concrete work	\$ 276,340,135
Landscape services	\$ 246,581,641
Trucking, hauling and storage	\$ 223,329,081
Plumbing and HVAC supplies	\$ 187,278,974
Electrical equipment and supplies	\$ 166,255,449
Concrete, asphalt, sand, and gravel products	\$ 137,026,080
Other construction materials	\$ 122,852,676
Heavy construction equipment rental	\$ 118,129,716
Other construction services	\$ 108,699,354
Roofing, siding, and flooring contractors	\$ 106,676,887
Water, sewer, and utility lines	\$ 105,138,945
Insulation, drywall, masonry, and weatherproofing	\$ 97,954,540
Traffic control and safety	\$ 70,676,856
Windows and doors	\$ 70,633,675
Painting, striping, and marking	\$ 68,952,797
Fencing, guardrails, barriers, and signs	\$ 60,303,188
Remediation and cleaning	\$ 55,386,979
Rebar and reinforcing steel	\$ 49,000,853
Dam and marine construction	\$ 16,298,038
Total construction	\$ 7,189,941,622
Professional services	
IT and data services	\$ 1,458,048,289
Construction management	\$ 956,035,496
Architecture and design services	\$ 484,004,851
Human resources and job training services	\$ 451,392,726
Business services and consulting	\$ 325,922,639
Engineering	\$ 316,093,607
Finance and accounting	\$ 197,074,816
Advertising, marketing and public relations	\$ 165,979,345
Other professional services	\$ 153,709,296
Environmental services	\$ 103,790,736
Transportation and urban planning	\$ 92,034,027
Market research	\$ 21,061,842
Surveying and mapmaking	\$ 16,705,493
Total professional services	\$ 4,725,147,671

**Figure 4-2 (continued).
Commonwealth and
HEI contract and
procurement dollars
by subindustry**

Note:

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

Source:

BBC Research & Consulting from
Commonwealth and HEI contract
data.

Industry	Total
Goods and services	
Transit services	\$ 497,200,274
Scientific and medical equipment	\$ 437,914,557
Office equipment	\$ 366,616,703
Automobiles	\$ 257,297,205
Food products, wholesale and retail	\$ 247,089,109
Cleaning and janitorial services	\$ 209,420,797
Furniture	\$ 173,800,176
Communications equipment	\$ 173,741,125
Petroleum and petroleum products	\$ 169,259,391
Office supplies	\$ 143,374,863
Industrial chemicals	\$ 138,798,554
Other services	\$ 132,548,938
Other goods	\$ 108,843,655
Farm equipment and supplies	\$ 107,610,925
Security guard services	\$ 102,546,736
Industrial equipment and machinery	\$ 91,354,056
Printing, copying, and mailing	\$ 90,743,623
Security systems services	\$ 87,410,085
Facilities management	\$ 65,092,472
Vehicle parts and supplies	\$ 60,132,882
Elevator goods and services	\$ 53,781,888
Uniforms and apparel	\$ 48,130,480
Waste and recycling services	\$ 41,137,528
Safety equipment	\$ 31,183,110
Parking services	\$ 28,987,849
Cleaning and janitorial supplies	\$ 18,952,704
Recreation goods and services	\$ 18,364,487
Sporting goods	\$ 16,865,644
Boats and boat repair	\$ 16,083,583
Advertising goods	\$ 15,277,184
Vehicle repair services	\$ 9,961,435
Total goods and services	\$ 3,959,522,021
GRAND TOTAL	\$ 15,874,611,313

F. Agency Review Process

The Commonwealth and HEIs reviewed contracting and vendor data during the study process. BBC consulted with Commonwealth and HEI staff to review the data collection process, information that the study team gathered, and summary results. BBC incorporated feedback in the final contract and vendor data that the study team used as part of the study.

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are *ready, willing, and able* to perform prime contracts and subcontracts that the Commonwealth of Virginia (the Commonwealth) and higher education institutions (HEIs) award in the areas of construction, professional services, and goods and other services.¹ Chapter 5 describes the availability analysis in five parts:

- A. Purpose of the availability analysis;
- B. Potentially available businesses;
- C. Availability database;
- D. Availability calculations; and
- E. Availability results.

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for Commonwealth and HEI prime contracts and subcontracts to refine the Small, Women-owned, and Minority-owned Business Program and to use as benchmarks against which to compare the actual participation of minority- and woman-owned businesses in Commonwealth and HEI work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were *underutilized* during the study period relative to their availability for Commonwealth and HEI contracts and procurements (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements that the Commonwealth and HEIs awarded during the study period, which served as a proxy for the contracts and procurements participating organizations might award in the future. BBC began the availability analysis by identifying the specific subindustries in which the Commonwealth and HEIs spend the majority of their contracting dollars (for details, see Chapter 4) as well as the geographic areas in which the majority of the businesses with which the Commonwealth and HEIs spend those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*).²

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

² BBC identified the relevant geographic market area for the disparity study as the entire state of Virginia.

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

1. Overview of availability surveys. The study team conducted telephone and online surveys with business owners and managers to identify local businesses that are potentially available for Commonwealth and HEI prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and have a location within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit work specialization codes, as developed by D&B, that were most related to the contracts and procurements that the Commonwealth and HEIs awarded during the study period. BBC obtained listings on 18,345 local businesses that do work related to those work specializations. BBC did not have working phone numbers for 3,320 of those businesses but attempted availability surveys with the remaining 15,025 businesses.

2. Availability survey information. BBC worked with Davis Research to conduct telephone and online surveys with the owners or managers of the identified businesses. Survey questions covered many topics about each business, including:

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

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

- Being a private sector business;
- Having performed work relevant to Commonwealth and HEI construction, professional services, or goods and other services contracting or procurement;

- Having bid on or performed construction, professional services, or goods and other services prime contracts or subcontracts in either the public or private sector in the RGMA in the past five years; and
- Being interested in work for state or other government organizations.³

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that the Commonwealth and HEIs award:

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

C. Businesses in the Availability Database

After conducting availability surveys with Virginia businesses, BBC developed a database of information about businesses that are potentially available for relevant Commonwealth and HEI contracts and procurements. Information from the database allowed BBC to identify businesses that are ready, willing, and able to perform work for participating organizations. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The analysis included 1,877 businesses that are potentially available for specific construction, professional services, and goods and other services contracts and procurements that the Commonwealth and HEIs award, and as shown in Figure 5-1, of those businesses, 38.8 percent were minority- or woman-owned.

Figure 5-1.
Percentage of businesses in the
availability database that were
minority- or woman-owned

Note:

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

Source:

BBC Research & Consulting availability analysis.

Business group	%
Non-Hispanic white woman-owned	15.0 %
Asian American-owned	7.7
Black American-owned	9.4
Hispanic American-owned	5.6
Native American-owned	1.0
Total Minority-owned	23.8 %
Total Minority- and Woman-owned	38.8 %

The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific Commonwealth and HEI contracts. It represents only a first step toward analyzing the availability of minority- and woman-owned businesses for Commonwealth and HEI work. BBC used a *custom census* approach to calculate the availability of minority- and woman-owned businesses, because it accounts for specific business characteristics such as work type, relative business capacity, contractor role, and interest in relevant work. A custom census

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

approach has been accepted in federal court as the preferred methodology for conducting availability analyses.

D. Availability Calculations

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

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

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

BBC repeated those steps for each contract element included in the disparity study, and then multiplied percentage availability for each contract element by the dollars associated with it, added results across all contract elements for a particular organization, and divided by the total dollars for all contract elements for that organization. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses overall and separately for each relevant racial/ethnic and gender group. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that the Commonwealth awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts that the Commonwealth and HEIs awarded between July 1, 2014 through June 30, 2019. A key assumption of the availability analysis is that the contracts and procurements that the Commonwealth and HEIs awarded during the study period are representative of the contracts and procurements that they will award in the future. If the types and sizes of the contracts and procurements that they award in the future differ substantially from the ones they awarded in the past, then they should consider adjusting availability estimates accordingly.

E. Availability Results

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

BBC presents availability analysis results for Commonwealth and HEI work overall and, specifically for the Commonwealth, for different subsets of contracts and procurements.

1. Overall. Figure 5-3 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for Commonwealth contracts and procurements. Overall, the availability of minority- and woman-owned businesses for Commonwealth work is 32.8 percent, indicating that those businesses might be expected to receive 32.8 percent of the dollars that the Commonwealth awards in construction, professional services, and goods and other services. Non-Hispanic white woman-owned businesses (10.9%) and Black American-owned businesses (7.1%) exhibited the highest availability among all relevant groups.

Figure 5-3.
Overall availability estimates by racial/ethnic and gender group for Commonwealth work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Figure 5-2.
Example of an availability calculation for a Commonwealth subcontract

On a contract that the Commonwealth awarded during the study period, the prime contractor awarded a subcontract worth \$49,452 for engineering services. To determine the overall availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

- Indicated that they performed engineering work;
- Reported bidding on work of similar or greater size in the past;
- Can serve customers in the geographical location where the work took place; and
- Reported interest in working as a subcontractor on government contracts or procurements.

BBC found 78 businesses in the availability database that met those criteria. Of those businesses, 24 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 31 percent (i.e., $24/78 \times 100 = 31$).

Business group	Availability %
Non-Hispanic white woman-owned	10.9 %
Asian American-owned	6.6
Black American-owned	7.1
Hispanic American-owned	5.3
Native American-owned	2.9
Total Minority-owned	21.9 %
Total Minority- and Woman-owned	32.8 %

BBC also estimated the availability of minority- and woman-owned businesses for contracts and procurements that Tier II and Tier III HEIs award. Tier II HEIs have a memorandum of understanding with the Commonwealth that allow them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology.⁴ Tier III HEIs have complete autonomy in their contracting and procurement.⁵ Figure 5-4 presents availability analysis results for Tier II HEIs considered together and Tier III HEIs considered together. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is slightly higher for the contracts and procurements that Tier II HEIs (30.5%) award than the ones that Tier III HEIs award (29.4%).

Figure 5-4.
Overall availability estimates
by racial/ethnic and gender
group for Tier II and Tier III
HEIs

Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	HEI tier	
	Tier II	Tier III
Non-Hispanic white woman-owned	11.1 %	11.5 %
Asian American-owned	7.0	6.4
Black American-owned	5.3	7.6
Hispanic American-owned	6.0	3.2
Native American-owned	1.1	0.6
Total Minority-owned	19.4 %	17.9 %
Total Minority- and Woman-owned	30.5 %	29.4 %

2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for Commonwealth prime contracts and subcontracts. Figure 5-5 presents those results. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together was actually higher for Commonwealth prime contracts (32.8%) than for subcontracts (31.1%).

⁴ Tier II HEIs are George Mason University, Longwood University, Old Dominion University, Radford University, and the University of Mary Washington. Three additional HEIs—Christopher Newport University, Richard Bland College, and Virginia Community College System—are also considered Tier II HEIs but only have autonomy for capital outlay and information technology procurements. Their results are presented along with results for the Commonwealth.

⁵ Tier III HEIs are the College of William & Mary, James Madison University, the University of Virginia, Virginia Commonwealth University, and Virginia Tech. James Madison University was a Tier II HEI during the study period.

Figure 5-5.
Availability estimates by contract role for Commonwealth work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.9 %	12.4 %
Asian American-owned	6.6	5.3
Black American-owned	7.1	4.6
Hispanic American-owned	5.3	7.5
Native American-owned	2.9	1.3
Total Minority-owned	21.9 %	18.7 %
Total Minority- and Woman-owned	32.8 %	31.1 %

3. Subcontractor plans. For contracts and procurements worth \$100,000 or more, the Commonwealth requires that potential prime contractors submit subcontractor plans with their bids in an effort to encourage subcontractor participation in that work. BBC examined the availability of minority- and woman-owned businesses for contracts and procurements worth \$100,000 or more (*subcontractor plan* contracts) and contracts and procurements worth less than \$100,000 (*no subcontractor plan* contracts), because that information could be informative in assessing the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth contracts and procurements. Those results are presented in Figure 5-6. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is higher for subcontractor plan contracts (33.5%) than for no subcontractor plan contracts (29.2%).

Figure 5-6.
Availability estimates for subcontractor plan and no subcontractor plan contracts and procurements

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Subcontractor plans	
	Yes	No
Non-Hispanic white woman-owned	11.0 %	10.4 %
Asian American-owned	6.6	6.6
Black American-owned	6.8	8.5
Hispanic American-owned	5.8	3.3
Native American-owned	3.4	0.4
Total Minority-owned	22.5 %	18.8 %
Total Minority- and Woman-owned	33.5 %	29.2 %

4. Industry. BBC examined availability analysis results separately for Commonwealth construction, professional services, and goods and other services contracts. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is highest for Commonwealth professional services contracts (50.3%) and lowest for construction contracts (23.9%).⁶

⁶ The relatively high availability of minority- and woman-owned businesses for Commonwealth professional services contracts might help explain why the availability of minority- and woman-owned businesses is higher for prime contracts

Figure 5-7.
Availability estimates by industry for Commonwealth work

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	5.8 %	17.4 %	11.1 %
Asian American-owned	5.5	11.2	2.7
Black American-owned	8.8	8.5	2.6
Hispanic American-owned	3.8	5.4	7.8
Native American-owned	0.1	7.8	1.4
Total Minority-owned	18.1 %	32.9 %	14.4 %
Total Minority- and Woman-owned	23.9 %	50.3 %	25.5 %

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

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

Source: BBC Research & Consulting availability analysis.

5. Geography. BBC also examined availability analysis results separately for contracts and procurements that the Commonwealth awarded in four different geographical regions of the state:

- Northern Virginia, including the areas around Alexandria and Fairfax;
- Central Virginia, including the areas around Richmond and Charlottesville as well as around Lynchburg and Roanoke;
- Eastern Virginia, including the areas around the Hampton Roads region; around Essex, Northumberland, and Lancaster Counties; and around Accomack and Northampton Counties; and
- Western/Southern Virginia, including the areas around Danville and Martinsville as well as around Bristol and Galax.

As shown in Figure 5-8, the availability of minority- and woman-owned businesses considered together was highest for Commonwealth contracts and procurements that originated in Eastern Virginia (44.7%) and lowest for contracts and procurements that originated in Central Virginia (32.8%).

relative to subcontracts. The proportion of prime contracting dollars for which professional services work accounts is much higher than the proportion of subcontracting dollars for which professional services work accounts

Figure 5-8.
Availability estimates by geographical region for Commonwealth work

Business group	Geographical region			
	Northern	Central	Eastern	Western/ Southern
Non-Hispanic white woman-owned	16.9 %	11.0 %	18.7 %	17.0 %
Asian American-owned	7.4	6.6	8.5	8.4
Black American-owned	5.1	6.3	5.2	4.6
Hispanic American-owned	6.7	5.5	6.6	6.0
Native American-owned	5.0	3.4	5.7	5.4
Total Minority-owned	24.3 %	21.8 %	26.0 %	24.4 %
Total Minority- and Woman-owned	41.1 %	32.8 %	44.7 %	41.4 %

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

For more detail and results by group, see Figure F-14 – F-17 in Appendix F.

Source: BBC Research & Consulting availability analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts that the Commonwealth of Virginia (the Commonwealth) and higher education institutions (HEIs) awarded between July 1, 2014 through June 30, 2019 (i.e., the *study period*).¹ BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in Commonwealth and HEI contracting and procurement in terms of *utilization*—the percentage of prime contract and subcontract dollars that participating organizations awarded to those businesses during the study period. For example, if 5 percent of Commonwealth prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, the utilization of woman-owned businesses for that set of contracts and procurements would be 5 percent. BBC measured the participation of minority- and woman-owned businesses in Commonwealth and HEI work regardless of whether they were certified as Small, Women-owned, and Minority-owned (SWaM) businesses by the Commonwealth.

A. All Contracts

Figure 6-1 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, professional services, and goods and other services prime contracts and subcontracts that the Commonwealth awarded during the study period. As shown in Figure 6-1, minority- and woman-owned businesses considered together received 13.4 percent of the relevant contract and procurement dollars that the Commonwealth awarded during the study period. Most of those dollars—9.5 percent—went to minority- and woman-owned businesses that were certified as SWaM businesses. The groups that exhibited the highest levels of participation were woman-owned businesses (5.5%), Black American-owned businesses (3.4%), and Hispanic American-owned businesses (3.3%).

BBC also estimated the participation of minority- and woman-owned businesses in contracts and procurements that Tier II and Tier III HEIs awarded during the study period. Tier II HEIs have a memorandum of understanding with the Commonwealth that allow them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology.² In contrast, Tier III HEIs have complete autonomy in their contracting and procurement.³ As shown in Figure 6-2, the participation of minority- and

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

² Tier II HEIs are George Mason University, Longwood University, Old Dominion University, Radford University, and the University of Mary Washington. Three additional HEIs—Christopher Newport University, Richard Bland College, and Virginia Community College System—are also considered Tier II HEIs but only have autonomy for capital outlay and information technology procurements. Their results are presented along with results for the Commonwealth.

³ Tier III HEIs are the College of William & Mary, James Madison University, the University of Virginia, Virginia Commonwealth University, and Virginia Tech. James Madison University was a Tier II HEI during the study period.

woman-owned businesses was higher in contracts and procurements that Tier II HEIs awarded during the study period than in ones that Tier III HEIs awarded.

Figure 6-1.
Utilization results for Commonwealth contracts and procurements

Note:

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

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

Source:

BBC utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	5.5 %
Asian American-owned	1.1
Black American-owned	3.4
Hispanic American-owned	3.3
Native American-owned	0.1
Total Minority-owned	8.0 %
Total Minority- and Woman-owned	13.4 %
SWaM-certified	
Non-Hispanic white woman-owned	4.7 %
Asian American-owned	0.9
Black American-owned	1.5
Hispanic American-owned	2.2
Native American-owned	0.1
Total Minority-owned (SWaM)	4.8 %
Total Minority- and Woman-owned (SWaM)	9.5 %

Figure 6-2.
Utilization results for Tier II and Tier III HEIs

Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	HEI tier	
	Tier II	Tier III
Non-Hispanic white woman-owned	7.4 %	6.1 %
Asian American-owned	2.5	0.3
Black American-owned	0.3	1.2
Hispanic American-owned	0.6	0.2
Native American-owned	0.3	0.1
Total Minority-owned	3.7 %	1.9 %
Total Minority- and Woman-owned	11.1 %	8.0 %

B. Contract role

Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization analysis results separately for prime contracts and subcontracts. Figure 6-3 presents those results. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was in fact higher in subcontracts that the Commonwealth awarded during the study period (20.9%) than in prime contracts (13.3%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to minority- and woman-owned businesses.

Figure 6-3.
Utilization analysis
results by contract role

Note:

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

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

Source:

BBC utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	5.4 %	10.1 %
Asian American-owned	1.1	4.4
Black American-owned	3.5	0.4
Hispanic American-owned	3.2	6.0
Native American-owned	0.1	0.0
Total Minority-owned	7.9 %	10.8 %
Total Minority- and Woman-owned	13.3 %	20.9 %

C. Subcontractor Plans

For contracts and procurements worth \$100,000 or more, the Commonwealth requires that potential prime contractors submit subcontractor plans with their bids in an effort to encourage subcontractor participation in that work. BBC examined the participation of minority- and woman-owned businesses in contracts and procurements worth \$100,000 or more (*subcontractor plan* contracts) and contracts and procurements worth less than \$100,000 (*no subcontractor plan* contracts), because that information is informative about the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth work. As shown in Figure 6-4, the participation of minority- and woman-owned businesses was very similar in subcontractor plan (13.4%) and no subcontractor plan (13.5%) contracts, potentially indicating that requesting subcontractor plans from prime contractors at the time of bid is not particularly effective in encouraging the participation of minority- and woman-owned businesses in Commonwealth contracts and procurements.

Figure 6-4.
Utilization results for
subcontractor plan and non-
subcontractor plan contracts
and procurements

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Subcontractor plans	
	Yes	No
Non-Hispanic white woman-owned	5.2 %	6.6 %
Asian American-owned	1.1	1.3
Black American-owned	3.4	3.7
Hispanic American-owned	3.6	1.5
Native American-owned	0.1	0.5
Total Minority-owned	8.2 %	6.9 %
Total Minority- and Woman-owned	13.4 %	13.5 %

D. Industry

BBC also examined utilization analysis results separately for the Commonwealth's construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses differs by industry. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was highest for the goods and other services contracts and procurements that the

Commonwealth awarded during the study period (15.1%) and lowest for professional services contracts and procurements (11.2%).

Figure 6-5.
Utilization analysis results by industry

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	6.9 %	2.0 %	7.4 %
Asian American-owned	0.3	2.0	1.3
Black American-owned	1.3	4.3	5.6
Hispanic American-owned	5.4	2.7	0.8
Native American-owned	0.2	0.2	0.0
Total Minority-owned	7.2 %	9.2 %	7.7 %
Total Minority- and Woman-owned	14.1 %	11.2 %	15.1 %

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

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

Source: BBC utilization analysis.

E. Geography

BBC also examined utilization analysis results separately for contracts and procurements that the Commonwealth awarded in four different regions of the state:

- Northern Virginia, including the areas around Alexandria and Fairfax;
- Central Virginia, including the areas around Richmond and Charlottesville as well as around Lynchburg and Roanoke;
- Eastern Virginia, including the areas around the Hampton Roads region; around Essex, Northumberland, and Lancaster Counties; and around Accomack and Northampton Counties; and
- Western/Southern Virginia, including the areas around Danville and Martinsville as well as around Bristol and Galax.

As shown in Figure 6-6, the participation of minority- and woman-owned businesses considered together was highest for Commonwealth contracts and procurements that originated in Northern Virginia (14.5%) and lowest for contracts and procurements that originated in Central Virginia (12.3%).

Figure 6-6.
Utilization results by geographical region

Business group	Geographical region			
	Northern	Central	Eastern	Western/ Southern
Non-Hispanic white woman-owned	5.8 %	4.8 %	7.1 %	7.4 %
Asian American-owned	2.1	0.9	1.4	1.4
Black American-owned	1.2	3.6	1.7	1.4
Hispanic American-owned	5.2	2.9	3.4	3.3
Native American-owned	0.1	0.1	0.1	0.1
Total Minority-owned	8.7 %	7.5 %	6.5 %	6.1 %
Total Minority- and Woman-owned	14.5 %	12.3 %	13.6 %	13.5 %

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

For more detail and results by group, see Figure, F-14 – F-17 in Appendix F.

Source: BBC Research & Consulting availability analysis.

F. Concentration of Dollars

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

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

Figure 6-7 presents those results for each relevant business group. Most notably, although the Commonwealth awarded contract and procurement dollars to 50 different Hispanic American-owned businesses during the study period, three of them (or, 6.0%) accounted for 75 percent of those dollars. One Hispanic American-owned business accounted for 37 percent of all dollars that went to Hispanic American-owned businesses by itself. Similarly, although the Commonwealth awarded contracting dollars to 91 Black American-owned businesses during the study period, eight of them (or, 8.8%) accounted for 75 percent of those dollars. One Black American-owned business accounted for 28 percent of all dollars that went to Black American-owned businesses by itself.

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

Source:
BBC utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	505	68	13.5 %
Asian American-owned	56	10	17.9
Black American-owned	91	8	8.8
Hispanic American-owned	50	3	6.0
Native American-owned	7	1	14.3

CHAPTER 7.

Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in prime contracts and subcontracts that the Commonwealth of Virginia (the Commonwealth) and higher education institutions (HEIs) awarded between July 1, 2014 through June 30, 2019 (i.e., the *study period*) with the percentage of contract dollars that those businesses might be expected to receive based on their *availability* for that work.¹ Results from the disparity analysis will inform the Commonwealth's Small, Women-owned, and Minority-owned Business (SWaM) Program. The analysis focused on construction, professional services, and goods and other services contracts and procurements that participating organizations awarded during the study period. Chapter 7 presents the disparity analysis in three parts:

- A. Overview;
- B. Disparity analysis results; and
- C. Statistical significance.

A. Overview

BBC expressed both participation and availability as percentages of the total dollars associated with a particular set of contracts or procurements and then calculated a *disparity index* to help compare participation and availability results across relevant business groups and contract sets, using the following formula:

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

A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity ratio of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity ratio of less than 80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been *substantially underutilized* relative to its availability. Many courts have considered substantial disparities as *inferences of discrimination* against particular business

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

groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.²

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results that are presented in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure 7-1, which is identical to Figure F-2 in Appendix F, presents disparity analysis results for all Commonwealth contracts and procurements that BBC examined as part of the study considered together. Appendix F includes analogous tables for different subsets of contracts and procurements, including:

- Different participating organizations;
- Construction, professional services, and goods and other services work; and
- Prime contracts and subcontracts.

The heading of each table in Appendix F provides a description of the subset of contracts that BBC analyzed for that particular table.

A review of Figure 7-1 helps to introduce the calculations and format of all of the tables in Appendix F. As shown in Figure 7-1, the disparity analysis tables present information about each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as SWaM businesses by the Commonwealth.
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as SWaM businesses by the Commonwealth.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as SWaM businesses by the Commonwealth.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as SWaM businesses by the Commonwealth.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as SWaM businesses by the Commonwealth.

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

Figure 7-1.
Example of a disparity analysis table from Appendix F (same as Figure F-2 in Appendix F)

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	31,959	\$9,764,318	\$9,764,318				
(2) Minority and woman-owned	7,196	\$1,312,910	\$1,312,910	13.4	32.8	-19.3	41.0
(3) Non-Hispanic white woman-owned	4,250	\$534,165	\$534,165	5.5	10.9	-5.5	50.1
(4) Minority-owned	2,946	\$778,745	\$778,745	8.0	21.9	-13.9	36.5
(5) Asian American-owned	277	\$104,301	\$109,434	1.1	6.6	-5.5	17.1
(6) Black American-owned	1,610	\$320,007	\$335,753	3.4	7.1	-3.6	48.7
(7) Hispanic American-owned	530	\$305,403	\$320,430	3.3	5.3	-2.1	61.5
(8) Native American-owned	111	\$12,512	\$13,128	0.1	2.9	-2.8	4.7
(9) Unknown minority-owned	418	\$36,521					
(10) Minority- and woman-owned (SWaM)	5,551	\$926,591	\$926,591	9.5			
(11) Non-Hispanic white woman-owned (SWaM)	3,617	\$458,977	\$458,977	4.7			
(12) Minority-owned (SWaM)	1,934	\$467,613	\$467,613	4.8			
(13) Asian American-owned (SWaM)	222	\$85,164	\$88,388	0.9			
(14) Black American-owned (SWaM)	865	\$145,480	\$150,988	1.5			
(15) Hispanic American-owned (SWaM)	488	\$207,398	\$215,251	2.2			
(16) Native American-owned (SWaM)	111	\$12,512	\$12,986	0.1			
(17) Unknown minority-owned (SWaM)	248	\$17,060					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting disparity analysis.

1. Utilization analysis results. Each disparity analysis table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 31,959 contract elements that the Commonwealth awarded during the study period. The value presented in column (a) for each business group represents the number of contract elements in which businesses of that particular group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 1,610 prime contracts and subcontracts that the agency awarded during the study period.
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 5-1, BBC examined approximately \$9.8 billion for the entire set of contract elements. The dollar totals include both prime contracts and subcontracts dollars. The value presented in column (b) for each individual business group represents the dollars that businesses of that particular group received on the set of contract elements. For example, as shown in row (6) of column (b), Black American-owned businesses received approximately \$320 million of the prime contracts and subcontracts that the Commonwealth awarded during the study period.
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned but for which specific race/ethnicity information was not available. Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. As shown in row (9) of column (b), \$36.5 million of Commonwealth prime contract and subcontract dollars were awarded to minority-owned businesses with unknown race/ethnicity during the study period. Those dollars were allocated proportionally to each relevant racial/ethnic group and added to the values in column (b) to produce the adjusted dollar values in column (c)
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$335.8 million by \$9.8 billion and multiplied by 100 for a result of 3.4 percent, as shown in row (6) of column (d).

2. Availability results. Column (e) of Figure 7-1 presents the availability of each relevant group for all contract elements that BBC analyzed as part of the contract set. Availability estimates are represented as percentages of the total contracting dollars associated with the set. For example, as shown in row (6) of column (e), the availability of Black American-owned businesses for Commonwealth work is 7.1 percent.

3. Differences between participation and availability. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for Commonwealth work. For example, as presented in row (6)

of column (f) of Figure 7-1, the participation of Black American-owned businesses in Commonwealth contracts and procurements was less than their availability for that work, so the difference is -3.6 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 49, indicating that Black American-owned businesses actually received approximately 49 cents for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that the Commonwealth awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority- and woman-owned businesses for contracts and procurements that the Commonwealth and HEIs awarded during the study period. BBC also presents various breakdowns of disparity analysis results specifically for Commonwealth contracts and procurements.

1. All contracts and procurements. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that the Commonwealth awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). A line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure 7-2, minority- and woman-owned businesses considered together exhibited a disparity index of 41 for contracts and procurements that the Commonwealth awarded during the study period, indicated substantial underutilization. Moreover, all individual racial/ethnic and gender groups showed substantial disparities on that work.

BBC also assessed disparities between participation and availability for contracts and procurements that Tier II and Tier III HEIs awarded during the study period. Tier II HEIs have a memorandum of understanding with the Commonwealth that allow them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology.³ Tier III HEIs have complete autonomy in their contracting and procurement.⁴ As shown in Figure 7-3, minority- and woman-owned businesses considered together exhibited substantial disparities for contracts and procurements that Tier II HEIs (disparity index of 37) and Tier III HEIs (disparity index of 27) awarded during the study period.

³ Tier II HEIs are George Mason University, Longwood University, Old Dominion University, Radford University, and the University of Mary Washington. Three additional HEIs—Christopher Newport University, Richard Bland College, and Virginia Community College System—are also considered Tier II HEIs but only have autonomy for capital outlay and information technology procurements. Their results are presented along with results for the Commonwealth.

⁴ Tier III HEIs are College of William & Mary, James Madison University, the University of Virginia, Virginia Commonwealth University, and Virginia Tech. James Madison University was a Tier II HEI during the study period.

All individual business groups showed substantial disparities for both Tier II and Tier III contracts and procurements.

Figure 7-2.
Disparity analysis
results for relevant
Commonwealth
contracts and procurements

Note:

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

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

Source:

BBC disparity analysis

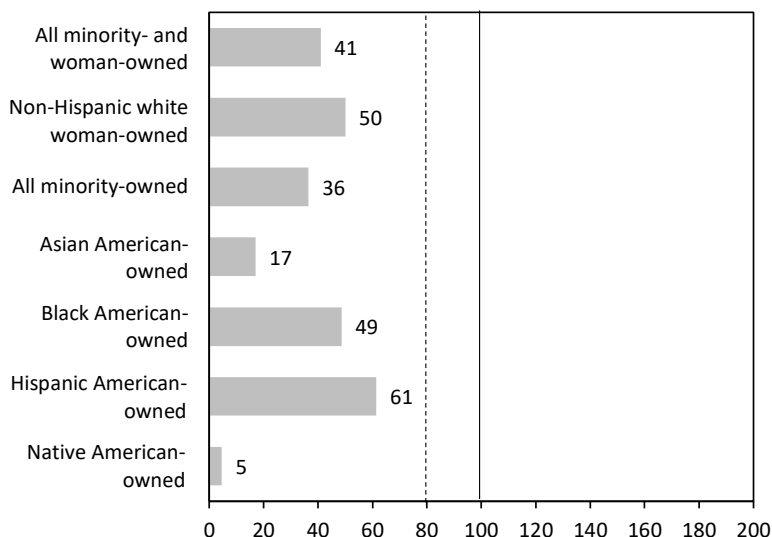


Figure 7-3.
Disparity analysis
results for Tier II and
Tier III HEIs

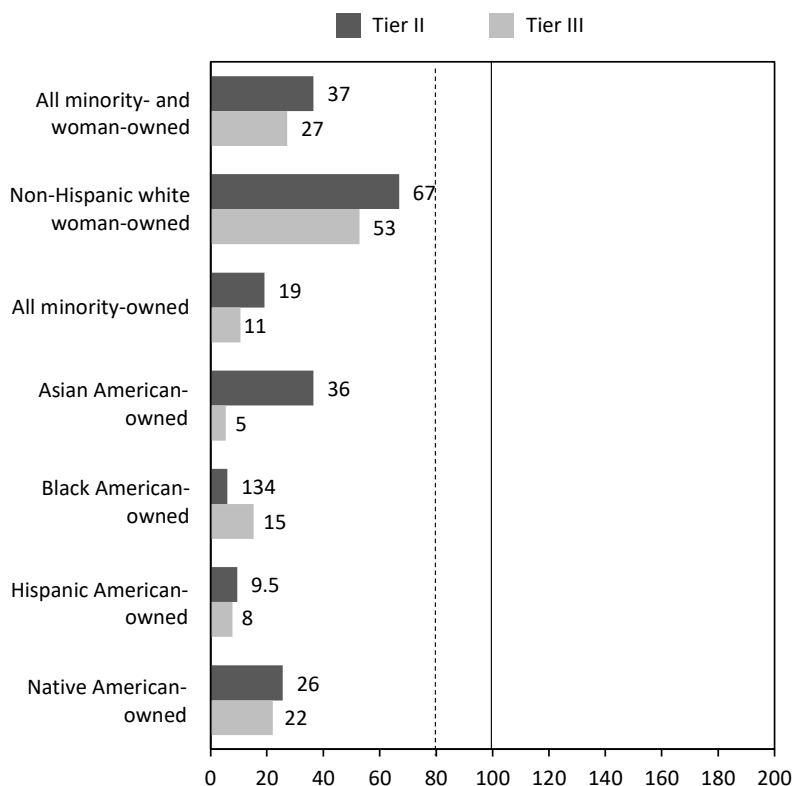
Note:

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

For more detail and results by group, see Figures F-18 and F-19 in Appendix F.

Source:

BBC disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed a substantial disparity for both Commonwealth prime contracts (disparity index of 41) and subcontracts (disparity index of 67). All individual business groups showed substantial disparities for both prime contracts and subcontracts except for non-Hispanic white woman-owned businesses (disparity index of 81) and Asian American-owned businesses (disparity index of 82) on subcontracts.

Figure 7-4.
Disparity analysis
results by contract role

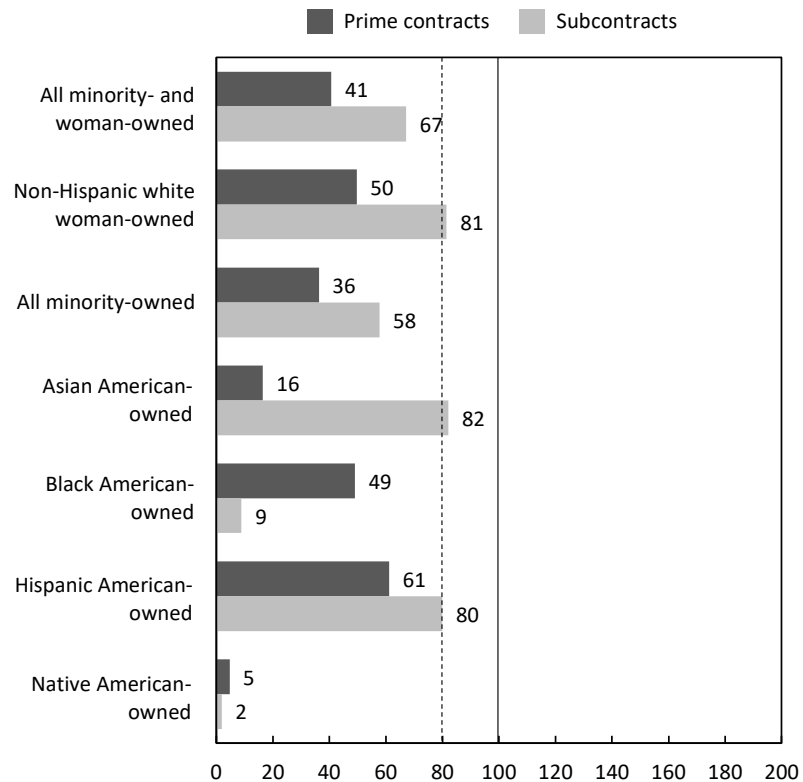
Note:

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

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

Source:

BBC disparity analysis.



3. Subcontractor plans. For contracts and procurements worth \$100,000 or more, the Commonwealth requires that potential prime contractors submit subcontractor plans with their bids in an effort to encourage subcontractor participation in that work. BBC assessed disparities for minority- and woman-owned businesses for contracts and procurements worth \$100,000 or more (*subcontractor plan* contracts) and contracts and procurements worth less than \$100,000 (*no subcontractor plan* contracts) to assess the efficacy of subcontractor plans in encouraging the participation of minority- and woman-owned businesses in Commonwealth work. As shown in Figure 7-5, subcontract plans do not appear to improve outcomes for minority- and woman-owned businesses on Commonwealth contracts and procurements. Minority- and woman-owned businesses considered together exhibited substantial disparities on both subcontract plan contracts (disparity index of 40) and no subcontract plan contracts (disparity index of 46). All individual business groups showed substantial disparities for both contract sets except for Native American-owned businesses on no subcontractor plan contracts (disparity index of 140).

Figure 7-5.
Disparity analysis
results for subcontractor
plan and non-subcontractor
plan contracts and
procurements

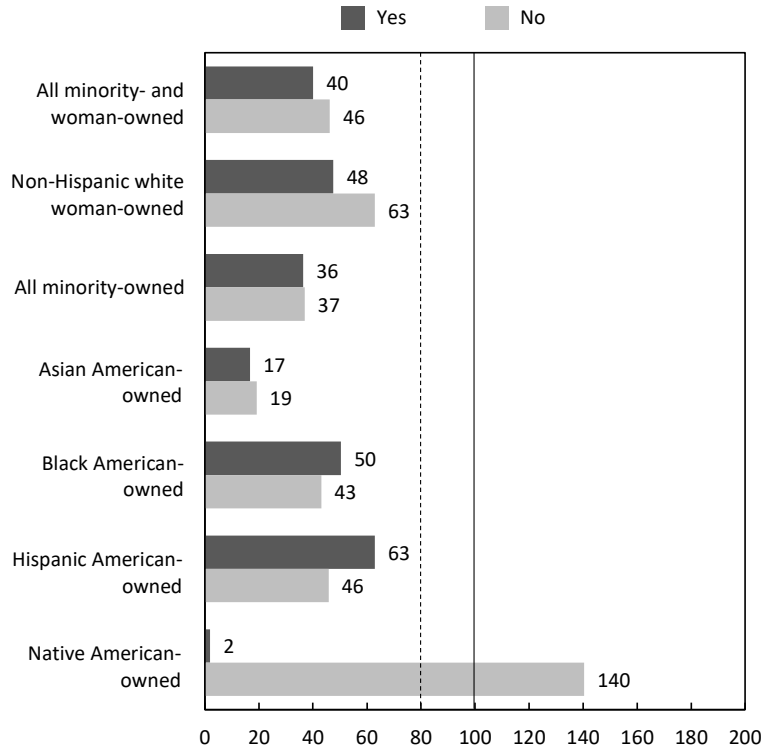
Note:

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

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

Source:

BBC disparity analysis.



4. Industry. BBC also examined disparity analysis results separately for the Commonwealth's construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure 7-6, minority- and woman-owned businesses considered together exhibited substantial disparities for the Commonwealth's construction (disparity index of 59), professional services (disparity index of 22), and goods and other services (disparity index of 59) contracts and procurements. Although most individual business groups showed substantial disparities for most industries, there were some exceptions:

- Non-Hispanic white woman-owned businesses (disparity index of 120), Hispanic American-owned businesses (disparity index of 144), and Native American-owned businesses (disparity index of 200+) did not exhibit disparities on construction contracts; and
- Black American-owned businesses did not exhibit a disparity on goods and other services procurements (disparity index of 200+).

Figure 7-6.
Disparity analysis
results by industry

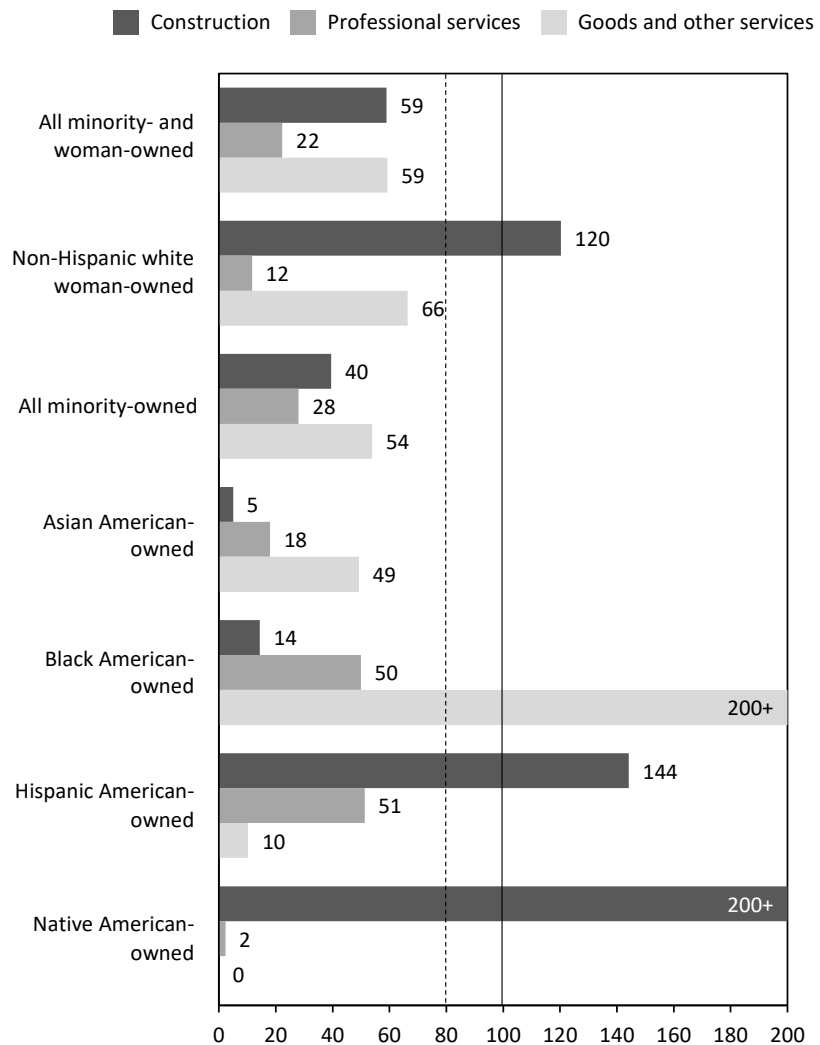
Note:

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

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

Source:

BBC disparity analysis.



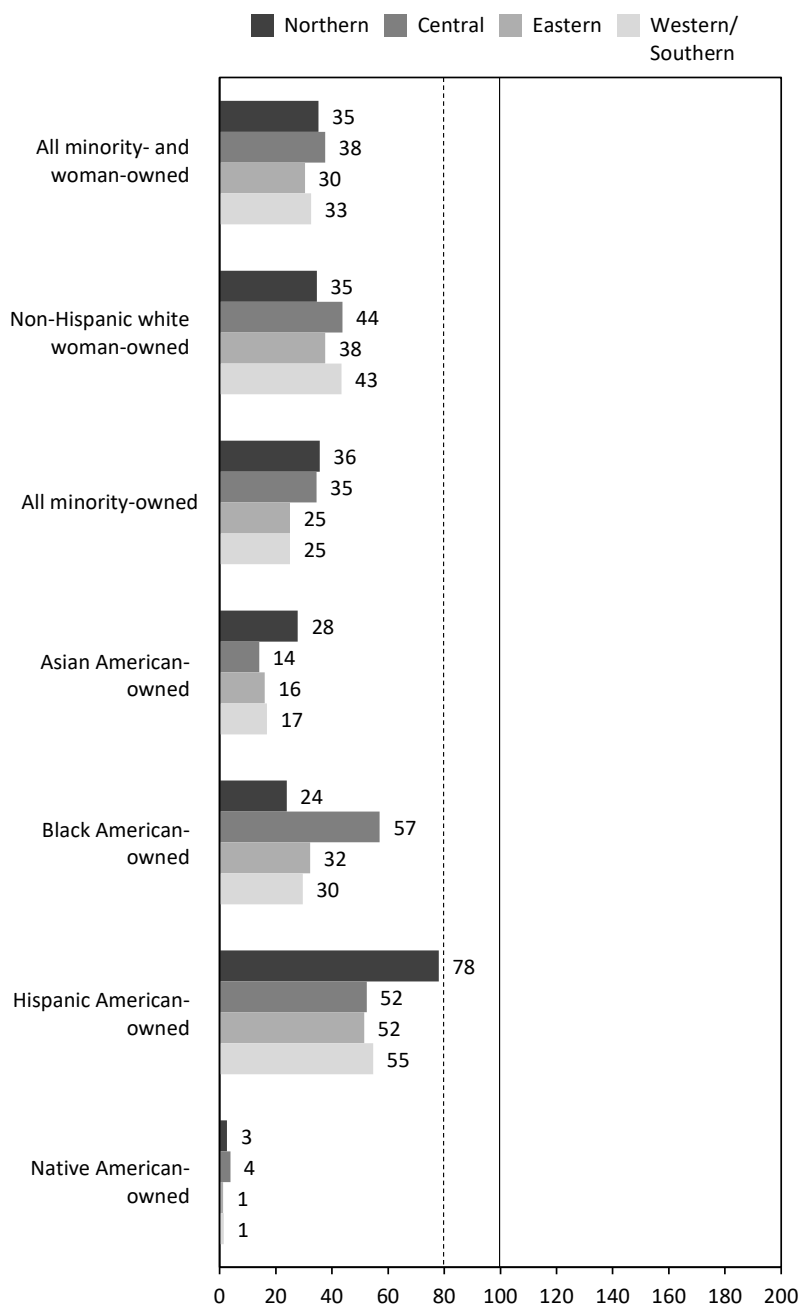
5. Geography. BBC also examined disparity analysis results separately for contracts and procurements that the Commonwealth awarded in four different regions of the state:

- Northern Virginia, including the areas around Alexandria and Fairfax;
- Central Virginia, including the areas around Richmond and Charlottesville as well as around Lynchburg and Roanoke;
- Eastern Virginia, including the areas around the Hampton Roads region; Essex, Northumberland, and Lancaster Counties; and Accomack and Northampton Counties; and
- Western/Southern Virginia, including the areas around Danville and Martinsville as well as around Bristol and Galax.

As shown in Figure 7-7, minority- and woman-owned businesses considered together exhibited substantial disparities for Commonwealth contracts and procurements that originated in Northern Virginia (disparity index of 35), Central Virginia (disparity index of 38), Eastern

Virginia (disparity index of 30), and Western/Southern Virginia (disparity index of 33). All individual business groups exhibited substantial disparities for contracts and procurements originating in all four geographical regions.

Figure 7-7.
Disparity analysis results by geographical region



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

For more detail and results by group, see Figure, F-14 – F-17 in Appendix F.

Source: BBC Research & Consulting disparity analysis.

C. Statistical Significance

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

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

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

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

2. Results. BBC ran Monte Carlo simulations on all Commonwealth contracts and procurements considered together to assess whether the substantial disparities that all relevant business groups exhibited for that work were statistically significant. As shown in Figure 7-8, results from the Monte Carlo analysis indicated that the disparities that minority- and woman-owned businesses exhibited for Commonwealth contracts and procurements were statistically significant for all relevant business groups at the 95 percent confidence level.

Figure 7-8
Monte Carlo simulation results for all Commonwealth
contracts and procurements considered together

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Minority-owned and woman-owned	41	0	<0.1 %
Non-Hispanic white woman-owned	50	0	<0.1 %
Minority-owned	36	0	<0.1 %
Asian American-owned	17	0	<0.1 %
Black American-owned	49	0	<0.1 %
Hispanic American-owned	61	3,414	<0.1 %
Native American-owned	5	20	<0.1 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Program Measures

As part of the Commonwealth of Virginia's (the Commonwealth's) Small, Women-owned, and Minority-owned Business (SWaM) Program, the Commonwealth uses various *race- and gender-neutral* measures to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. Race- and gender-neutral measures are measures designed to encourage the participation of all small businesses in an organization's contracting, regardless of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are measures designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting. The Commonwealth does not currently use any race- or gender-conscious measures. As part of meeting *the strict scrutiny standard* of constitutional review, organizations that implement minority- and woman-owned business programs must maximize their use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B). If the use of race- and gender-neutral measures alone is not sufficient to address barriers for minority- and woman-owned businesses, then organizations can also consider using race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures that the Commonwealth currently uses to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. In addition, BBC reviewed race- and gender-neutral measures that other organizations in Virginia use. That information is instructive, because it allows an assessment of the measures that the Commonwealth is currently using and additional measures that it could consider using in the future. BBC reviews program measures in three parts:

- A. Program overview;
- B. Race- and gender-neutral measures; and
- C. Other organizations' program measures.

A. Program Overview

The Commonwealth implements the SWaM Program to encourage the participation of small, minority-, woman-, and veteran-owned businesses in its contracts and procurements. To be eligible for SWaM certification, businesses must be:

- **Microbusinesses:** Businesses with 25 employees or fewer, whose average annual revenues over the three-year period prior to certification are \$3 million or less and that are owned by United States citizens or legal residents;
- **Small businesses:** Businesses with 250 employees or fewer or whose average annual revenues over the three-year period prior to certification are \$10 million or less and that are owned by United States citizens or legal residents;

- **Minority-owned businesses:** Businesses that are at least 51 percent owned by one or more individuals who identify as racial or ethnic minorities who are United States citizens or legal residents and whose management and control are by one or more minorities;
- **Woman-owned businesses:** Businesses that are at least 51 percent owned by one or more women who are United States citizens or legal residents and whose management and control are by one or more women; and
- **Service-disabled veteran-owned businesses:** Micro businesses, small businesses, woman-owned businesses, or minority-owned businesses whose owners are certified as service-disabled veterans by the Virginia Department of Veterans Services.

The Commonwealth's Department of General Services (DGS), along with the Virginia Information Technologies Agency, the Virginia Department of Transportation, and higher education institutions with procurement autonomy are responsible for all procurement-related aspects of the SWaM Program, including monitoring progress related to the participation of SWaM certified businesses, and the Department of Small Business and Supplier Diversity (SBSD) is responsible for implementing programs designed to increase the participation of minority- and woman-owned businesses in Commonwealth contracts and procurements.

B. Race- and Gender-Neutral Measures

The Commonwealth uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its contracting and procurement. Those measures can be classified into the following types:

- SWaM participation goals;
- Small and micro-business set-asides;
- Access to capital;
- Business development workshops;
- Partnerships; and
- Outreach efforts.

1. SWaM participation goals. The Governor sets an overall aspirational goal for the participation of SWaM businesses in Commonwealth contracts and procurements, which is currently set at 42 percent for most Commonwealth work and 50 percent for construction work. Each state agency is expected to meet the goal each year through the use of race- and gender-neutral measures. The participation of different SWaM business groups—that is, minority-owned businesses, woman-owned businesses, small businesses, micro-businesses, and veteran-owned businesses—counts equally toward meeting the overall aspirational goals. Despite the fact that, at least anecdotally, prime contractors cite the Commonwealth's overall aspirational goals as one of the reasons why they include SWaM participation as part of their bids, quotes, and proposals, the Commonwealth has only met the goal twice since its establishment in 2004.

2. Subcontractor plans. To increase SWaM business participation in Commonwealth contracts and procurements, DGS requires that prime contractors submit *subcontracting plans* as

part of their bids, quotes, or proposals for all contracts and procurements worth more than \$100,000. The subcontractor plans indicate which subcontractors prime contractors plan on using as part of the work and which of those subcontractors are certified as SWaM businesses. DGS reviews subcontractor plans during the contract and procurement award process.

3. Small and microbusiness set-asides. Previously, DGS set-aside contracts worth less than \$10,000 for micro-business bidding and contracts worth between \$10,000 and \$100,000 for small business bidding. Those set-asides were subject to prices being “fair and reasonable.” In the past, many solicitations had to be reissued without the set-aside element due to a lack of responsive bidders. Now, any business can bid on those contracts. Moreover, due to a rule that a microbusiness or small business can only win a set-aside contract if its bid is within 5 percent of the lowest bid, many set aside contracts are ultimately awarded to larger businesses.

4. Access to capital. The Virginia Small Business Financing Authority (VSBFA) offers loans that are available to certified SWaM businesses. The loans can be indirect, for which VSBFA provides collateral or otherwise guarantees loans that banks offer small businesses. Alternatively, the loans can be direct when banks are not willing to take on particular loans. For example, micro-businesses can borrow up to \$25,000 at relatively low interest rates, childcare facilities can obtain financing, and companies with highly specialized collateral, such as breweries, can qualify for loans. There are also grant programs, including the Small Business Investment Grant Fund that guarantees a 25 percent return on investment for those who invest in small businesses, primarily family and friends of the owner.

5. Business development programs. SBSD provides workshops, technical assistance, and networking events to SWaM-certified and other businesses in Virginia.

a. Workshops. SBSD offers several workshops throughout the year, including “Selling to the Commonwealth,” a three-hour program that demonstrates how to find contracting and procurement opportunities with the Commonwealth and how to use Virginia’s electronic procurement system, eVA; “Growing Sales” conferences that last a half-day and include breakout sessions with experts in different areas; and SWaM Labs, what are held monthly and illustrate the benefits of certification to small businesses in addition to assisting business owners in submitting SWaM certification applications. SBSD also hosts specialized workshops in different regions of the state if there are needs for unique skills or information.

b. Technical assistance. The Commonwealth offers one-on-one business counseling to small business owners. Those sessions are focused on developing businesses’ growth plans, but SBSD also shares other resources to help businesses find more contracting opportunities in Virginia. SBSD also offers the Scaling4Growth Program, which is a six-month master’s in business administration course for SWaM-certified business owners. There are strict requirements for enrolling, and graduates receive assistance and mentorship for three years after the program.

c. Networking. SBSD’s Regional Connect events help vendors form relationships with Commonwealth agencies. The Virginia Association of State College and University Purchasing Professionals (VASCUPP) hosts an annual networking, educational and professional development event titled “SWaMfest.” In addition, most VASCUPP institutions hold SWaM vendor fairs and work with prime contractors to host pre-construction SWaM events.

6. Partnerships. SBSB partners with various organizations to promote contracting and procurement opportunities to SWaM businesses. Some, like the Small Business Development Centers and the Procurement Technical Assistance Center, provide resources to small businesses. Others promote SBSB events to their members, including the Hispanic, Asian, and African American Chambers of Commerce. SBSB also works with the Federal Reserve to promote the Small Business Credit Survey in exchange for specialized reports about Virginia businesses.

7. Outreach efforts. SBSB advertises its events through various channels. Partners send information about SBSB events to their networks, SBSB e-mails certified businesses through Constant Contact, and SBSB updates its events page almost daily. In addition, SBSB runs television ads during the news cycle in Virginia to reach even more businesses. As more events shift online due to the COVID-19 pandemic, SBSB is working to make its workshops available online for people who are unable to attend in person.

C. Other Organizations' Program Measures

In addition to the race- and gender-neutral measures that the Commonwealth currently uses, there are many race- and gender-neutral program measures that other organizations in Virginia use. Figure 8-1 provides examples of those measures.

Figure 8.1

Race- and gender-neutral program measures that organizations in Virginia Use

Type	Program
Technical Assistance	The Fairfax County Economic Development Authority includes a Business Diversity Division that offers workshops, technical assistance, resource matching, mentorship, certification assistance, and other resources to small businesses in the Fairfax County area.
	Loudon County provides several online resources for small businesses, including a thorough resource matrix, explanations of various forms of funding, and a "start-up planning guide." The organization also hosts events for entrepreneurs, including events put on by "1 Million Cups" to connect entrepreneurs to funding and networking opportunities.
	The Small Business Development Center, hosted by the Hampton Roads Chamber , provides "counseling and educational programs" to small businesses (fewer than 100 employees). The programming includes one-on-one counseling, webinars, legal support, financing resources, and more.
	The Northern Virginia Black Chamber of Commerce (NVBCC) provides entrepreneur classes as well as business management training sessions for its members. Those efforts include webinars, resource lists, and marketing. The organization also provides resources to help Black American business owners access to financing. In addition, NVBCC advocates for policies surrounding the growth of small businesses in general and Black American-owned businesses in particular.
	The City of Richmond Office of Minority Business Development offers technical assistance, certification, training opportunities, support finding financing options, and other resources to minority businesses that contract with the City. The office also works to increase the number and capacity of minority-owned businesses in the area.
	As part of the Portsmouth Partnership, Starting Block offers office space available to rent hourly, daily, or monthly depending on startups' needs.
	National Seminars Training offers educational training and seminars across the country. The organization offers workshops and seminars throughout Virginia to businesses in all industries. They cover many topics, from human resource and payroll law to using Excel and project management. Seminars are offered throughout the state on a regular basis.

Figure 8-1 (continued).
Race- and gender-neutral program measures that other organizations in Virginia Use

Type	Program
Technical Assistance	The City of Norfolk offers a series of business training seminars through its Small Business Initiative (SBI). Seminars are suitable for all stages of business growth, free of charge, and cover a variety of topics, including business planning, online marketing, financing, networking, and contracting with government agencies. Recent seminars have covered cash flow management, bookkeeping, tax planning, social media marketing, and search engine optimization. SBI also offers one-on-one business consultations, networking opportunities, and empowerment events.
	The Association of Procurement Technical Assistance Centers (APTAC) is a national nonprofit that offers Procurement Technical Assistance Programs (PTAP) across the country. Its mission is to expand the number of businesses capable of participating in the public sector. The Virginia PTAP provides counseling, training, special events, and bid match services to businesses. Counseling is free for Virginia-based businesses as long as they register with APTAC. The program provides business counseling specifically related to federal set-asides, certification requirements, and pre- and post-contract award compliance. Counseling meetings are conducted in person and scheduled on a first-come first-served basis. Counseling sessions typically last one hour. PTAP offers a number of other business trainings, both in person and via webinar. Trainings are held quarterly and cover procurement-related topics. Most trainings are offered at no charge but some require a small fee.
	Chesapeake's Economic Development Department has established a program called "Ready...Set...GROW" to provide small businesses with consulting services from a Certified Business Advisor, access to resources, assistance with brand development and customer service, and more. Though the organization focuses primarily on minority- and veteran-owned businesses, it also works with woman-owned businesses through partnerships with other organizations such as WPEO-DC/WBENC.
Networking	The Women in Business Council hosts regular meetings, networking receptions, and other events to support Virginia's professional women. They also provide mentorship opportunities.
	The eWomen Network connects women entrepreneurs to one another throughout the country and has five Virginia locations. The organization hosts networking and matchmaking events regularly and provide webinars and workshops for its members.
	The Virginia Chamber of Commerce offers businesses the opportunity to market themselves amongst top executives in Virginia. The chamber hosts business recognition events and conferences on a monthly basis. Events typically cost between \$95 and \$125 per attendee. The chamber has also developed a nonprofit association for CEOs of small- to mid-size businesses called the Virginia Council of CEOs. The association allows CEOs to learn and grow from one another. It currently has 200 members.
	Carolinas-Virginia Minority Supplier Diversity Council is a local branch of the National Minority Supplier Diversity Council that works to connect its corporate members with certified minority-owned businesses in the region. The organization offers certification services and also hosts webinars, conferences, forums, and other events designed to connect minority-owned businesses with those who may wish to contract with them.

Figure 8-1 (continued).
Race- and gender-neutral program measures that other organizations in Virginia Use

Type	Program
Advocacy	The Women Presidents' Educational Organization is a regional partner of WBENC that advocates for woman-owned businesses in Washington DC, Maryland, and Virginia. The organization works to increase awareness and inclusion of woman-owned businesses in the corporate world and supports women who own businesses. The organization also manages WBENC's certification process in the area.
	The National Association of Women Business Owners (NAWBO) Richmond hosts networking events (including virtual events), provides resources, and supports woman-owned businesses in the Richmond area. The organization hosts workshops on brand awareness and business development skills, among other topics. NAWBO also engages in advocacy to support policies that benefit women who own businesses.
Financing	757 Angels is an angel investment network based in the Hampton Roads area that supports entrepreneurs in Virginia. The organization supports businesses in the start-up or early stages with investments between \$100,000 and \$5 million. Applicants can apply for funding and are screened before members can invest in their businesses.
	Maryland has six video slot machines around the state, proceeds from which go to small businesses as well as minority- and woman-owned businesses. Half of the money stays within a small radius of each casino itself, and the rest is available throughout the state.
	Rappahannock Economic Development Corporation offers 504 loans and financing for small businesses, including 20-year fixed rates. The organization works with small businesses to prepare loan applications and work with banks, private investors, and other lending institutions.
	Virginia Community Capital offers loans and other financing options to small businesses in Virginia. The organization also offers free consulting and advisory services. In addition, it provides funding for specific projects that address social challenges (e.g., healthcare and unemployment) in Virginia.
	The Franklin County Office of Economic Development offers several grants to help businesses grow and expand. For example, the Franklin County Job Creation Grant is available to all businesses—new or expanding, in any industry—investing in the local economy and creating local jobs. The grant amount depends on the size of the business's investment and the number of jobs it creates within Franklin County. The grant is available to local employers to support training related to business expansions.
	Hiscox and Hartford Insurance both offer various types of small business insurance, including general and professional liability, errors and omissions, and workers' compensation insurance. Both companies offer free risk assessment to help small businesses select tailored insurance products to cover their needs.
	United Way of Greater Charlottesville partnered with the Minority Business Alliance of the Charlottesville Regional Chamber of Commerce to provide grants to local minority businesses. A total of \$10,000 in grants was awarded in the organization's inaugural year.

Figure 8-1 (continued).
Race- and gender-neutral program measures that other organizations in Virginia Use

Type	Program
Mentorship	SCORE is a nonprofit organization that partners with the Small Business Administration to provide free mentorship to small business owners. The organization has 250 offices across the country, including 28 in Virginia, and it offers virtual services as well. Score also offers webinars, workshops, and online resources to help small businesses.
	THRIVE Mentor Network has partnered with the Small Business Development Centers, George Mason University, Chamber Richmond Virginia , and the Small Business Administration to help individuals and small businesses with every aspect of starting, running, and growing a business. Registration is free, and events are held on a weekly basis. Business owners have the option to choose their own mentor. THRIVE also provides learning guides, which cover a variety of topics related to starting and operating a business.
	The Hampton Roads Chamber of Commerce and the Small Business Development Centers of Hampton Roads created the PROPEL Mentor-Protégé Program to provide support and training to small businesses. The program begins with a seven-week Business Bootcamp and then provides follow-up counseling and monthly mentoring. Mentoring is provided for two years, and participants are matched with successful entrepreneurs recruited from organizations throughout the region. Participants also benefit from peer-to-peer mentoring during monthly Protégé Round Up meetings.
	The Charlottesville Minority Business Program offers one-on-one consultations for start-up businesses, access to subsidized loans with lower eligibility criteria through the Business Equity Fund, and one-time grants for small businesses. The City also hosts a Minority and Women Business Expo, which focuses specifically on selling to the city. Each September, the City hosts a "Minority Business Week" that works to both provide resources for small businesses as well as increase awareness about them.

CHAPTER 9.

Program Considerations

The disparity study provides substantial information that the Commonwealth of Virginia (the Commonwealth) should examine as it considers potential refinements to the Small, Women-owned, and Minority-owned Business (SWaM) Program and ways to better encourage the participation of minority- and woman-owned businesses in Commonwealth and higher education institution (HEI) contracts and procurements. BBC presents several key considerations the Commonwealth should make.

A. Overall Aspirational Goal

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

Regulations for the Federal Disadvantaged Business Enterprise (DBE) Program, which organizations often use as a model to set and adjust their overall goals, outlines a two-step process for setting overall aspirational goals:¹

- A. Establishing a base figure; and
- B. Considering an adjustment.

The Commonwealth could consider following a similar two-step process to develop an overall aspirational goal for the participation of minority- and woman-owned businesses in its contracts and procurements. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the Commonwealth as it establishes the goal.

1. Establishing a base figure. The availability analysis provides information that the Commonwealth can use for establishing a base figure for its overall aspirational goal. The analysis indicates that minority- and woman-owned businesses are potentially available to participate in 32.8 percent of the Commonwealth's contracting and procurement dollars. The Commonwealth could consider 32.8 percent as its base figure for its overall aspirational goal.

¹ 49 Code of Federal Regulations (CFR) Part 26

2. Considering an adjustment. In setting overall aspirational goals, organizations often examine various information to determine whether adjustments to their base figures are necessary to account for past participation of minority- and woman-owned businesses in their contracting; current conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses; and other relevant factors. For example, regulations for the Federal DBE Program outline several factors that organizations might consider when assessing whether to adjust their goals:

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

a. Volume of work minority- and woman-owned businesses have performed in recent years.

The Commonwealth could consider making an adjustment to its base figure based on the degree to which minority- and woman-owned businesses have participated in its contracts and procurements in recent years. Figure 9-1 presents the percentage of contract and procurement dollars that the Commonwealth awarded to minority- and woman-owned businesses in each year of the study period. The median participation of minority- and woman-owned businesses in Commonwealth contracts and procurements during that time was 14.1 percent, which supports a downward adjustment to the base figure.

Figure 9-1.
Minority- and woman-owned business participation in Commonwealth work during the study period

Source:
BBC Research & Consulting utilization analysis.

Fiscal year	Minority- and woman-owned business participation
2015	9.8 %
2016	20.1 %
2017	16.7 %
2018	11.0 %
2019	14.1 %

b. Information related to employment, self-employment, education, training, and unions.

Chapter 3 summarizes information about conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D. BBC's analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that minorities are far less likely than non-Hispanic whites to earn college degrees in Virginia, minorities and women are less likely to work as managers in various industries in Virginia, and minorities and women earn substantially less than non-Hispanic white men in Virginia. Such barriers may decrease the availability of minority- and woman-owned businesses for Commonwealth contracts and procurements, which supports an upward adjustment to the base figure.

c. Information related to financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Virginia do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. For example, minorities were less likely to own homes than non-Hispanic whites in Virginia and were more likely to be denied home loans. Qualitative information collected through public meetings, focus groups, surveys, and in-depth interviews with local businesses also indicated that minority- and woman-owned businesses often have difficulties obtaining business loans and credit. Any barriers to obtaining financing, bonding, or insurance might limit opportunities for minorities and women to successfully form and operate businesses in the local marketplace, which supports an upward adjustment to the base figure.

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

3. Goal revisions. If it decides to establish an overall aspirational goal for minority- and woman-owned business participation, the Commonwealth should determine how frequently it will revise its goal. It should also consider any changes it plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to support the growth of minority- and woman-owned businesses. The Commonwealth should assess how those changes might affect the availability and capacity of minority- and woman-owned businesses to perform on Commonwealth and HEI contracts and procurements. It should also regularly review its goal-setting process to ensure that it provides adequate flexibility to respond to recent changes in marketplace conditions, anticipated contract and procurement opportunities, new statistical or anecdotal evidence, and other factors.

B. Contract-specific Goals

Currently, the SWaM Program comprises all race- and gender-neutral measures, which are designed to encourage the participation of all small businesses in Commonwealth contracts and procurements, regardless of the race/ethnicity or gender of business owners. Disparity analysis results indicate that all relevant racial/ethnic and gender groups—Asian American-, Black American-, Hispanic American-, Native American-, and non-Hispanic white woman-owned businesses—showed substantial disparities on key sets of contracts and procurements that the Commonwealth and HEIs awarded during the study period. Because the Commonwealth uses myriad race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses in its contracting, and because those measures have not sufficiently

addressed disparities for those businesses, it might consider using minority- and woman-owned business goals to award individual contracts in the future. To do so, the Commonwealth would set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project and other factors, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so.

Because the use of such goals would be considered a race- and gender-conscious measure, the Commonwealth will need to ensure that the use of those goals meets the *strict scrutiny standard* of constitutional review, including showing a *compelling governmental interest* for their use and ensuring that their use is *narrowly tailored* (for details, see Chapter 2 and Appendix B). Prior to implementing contract-specific goals, the Commonwealth should consider whether it has fully implemented its existing race- and gender-neutral measures and whether it should implement additional race- and gender-neutral measures to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements.

C. Small Business Set Asides

Disparity analysis results indicated substantial disparities for all relevant racial/ethnic and gender groups on prime contracts that the Commonwealth awarded during the study period. The Commonwealth might consider setting aside select small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. The Commonwealth currently has a small business set aside program where it ostensibly sets asides certain, relatively small contracts for small business bidding. However, if a larger business submits a bid that is more than 5 percent less than the lowest bid submitted by a small business, then in practice, the Commonwealth awards the contract to the larger business. To ensure that small business set asides are effectively encouraging the participation of small businesses, including many minority- and woman-owned businesses, the Commonwealth should consider truly limiting bidding on eligible contracts to certified small businesses, regardless of whether larger business are able to submit lower bids.

D. Subcontracting Minimums

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

E. Unbundling Large Contracts

In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the Commonwealth awarded during the study period. In addition, as part of in-depth interviews and public meetings, several businesses owners reported that the size of government contracts sometimes serves as a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in its work, the Commonwealth should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces, making them more accessible to small businesses, and accepts such attempts as good faith efforts as part of its contracting goals program. Such efforts might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

F. Utilization of Different Businesses

The disparity study indicated that a substantial portion of Commonwealth contract and procurement dollars that were awarded to minority- and woman-owned businesses were largely concentrated with a relatively small number of businesses. The Commonwealth could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, the Commonwealth might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked as part of their bids.

G. Prompt Payment

As part of focus groups and in-depth interviews, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on both private sector and government contracts, particularly when they work as subcontractors and on design-build contracts. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. The Agency Procurement and Surplus Property Manual requires prime contractors to pay subcontractors within seven days of receiving payment from state agencies. The Commonwealth should consider making efforts to further enforce those requirements. Doing so might help ensure that subcontractors receive payment in a timely manner. It may also help ensure that minority- and woman-owned businesses have enough operating capital to remain competitive and successful.

H. Prequalification

Per Code of Virginia, the Commonwealth prequalifies contractors for particular construction projects and limits consideration of associated bids and proposals to only those contractors. Anecdotal evidence indicated that the prequalification process has been a barrier for many small businesses. The Commonwealth should consider ways to offset any burdensome aspects of prequalification to better encourage the participation of small businesses, including many minority- and woman-owned businesses, in the process (e.g., working with local accountants to offer audits at a reduced cost or easing prequalification requirements for SWaM businesses).

I. Capacity Building

Results from the disparity study indicated that there are many minority- and woman-owned businesses in Virginia but most of them have relatively low capacities for Commonwealth work. The Commonwealth should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large Commonwealth and HEI contracts and procurements. Anecdotal evidence indicates that businesses find such programs—when implemented well—to be valuable in helping them grow and learn the necessary skills required to compete in their industries. Anecdotal evidence also indicates that businesses face various challenges—such as access to financing, obtaining equipment, and back office accounting—that inhibit or slow their growth. In addition to considering programs that could be open to all minority- and woman-owned business, the Commonwealth could consider implementing a program to assist certain businesses with development and growth. As part of such a program, the Commonwealth could have an application and interview process to select businesses with which to work closely to provide specific support and resources necessary for growth.

J. Networking and Outreach

The Commonwealth should consider continuing its current networking and outreach efforts and consider broadening those efforts to include more partnerships with local trade organizations and other public organizations and to offer more frequent events. The Commonwealth might consider tailoring some events to specific industries or business groups to further maximize the value of networking events and provide opportunities to foster deeper connections among participants. In addition, the Commonwealth should consider ways it can better leverage technology to network with and provide information to businesses throughout the state. The Commonwealth could consider making use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

K. Data Collection

The Commonwealth and HEIs maintain comprehensive data on the prime contracts they award, and those data are generally well-organized and accessible. However, neither the Commonwealth nor HEIs collect comprehensive data on subcontracts. The Commonwealth should consider collecting comprehensive data on *all* subcontracts, regardless of subcontractors' characteristics or whether they are certified as SWaM businesses, minority-owned businesses, or woman-owned businesses. Collecting data on all subcontracts will help ensure that the Commonwealth monitors the participation of minority- and woman-owned businesses in its work as accurately as possible and will help identify additional businesses that could become certified. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor name, address, phone number, and email address;
- Type of associated work;
- Subcontract award amount;
- Subcontract paid-to-date amounts;

- Ownership status; and
- Certification status.

The Commonwealth should consider collecting those data as part of bids but also requiring prime contractors to submit payment data on subcontracts as part of the invoicing process for all contracts. The Commonwealth should train relevant department staff to collect and enter subcontract data accurately and consistently.

L. Growth Monitoring

The Commonwealth might consider collecting data on the impact the SWaM Program has on the growth of minority- and woman-owned businesses over time. Doing so would require it to collect baseline information on certified minority- and woman-owned businesses—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from businesses on an annual or semiannual basis. The Commonwealth could consider collecting those data from businesses as part of certification and renewal processes. Such metrics would allow it to assess whether the program is helping businesses grow and more effectively tailor the measures it uses as part of the SWaM Program.

M. Exclusive Teaming

Sometimes, subcontractors are asked to enter into exclusive partnerships to be considered as part of potential project teams. As indicated by businesses during in-depth interviews, such teaming requirements ultimately limit opportunities available to small businesses. The Commonwealth should consider prohibiting exclusive subcontracting or teaming requests by integrating such language into its bid, request for proposal (RFP), and contract language. For example, the Dallas/Fort Worth International Airport explicitly prohibits exclusive teaming requirements as part of its RFP language.

N. Department of Small Business and Supplier Diversity (SBSD)

SBSD employs dedicated staff members to implement the SWaM Program and monitor the participation of SWaM businesses in its contracts. Some of the considerations above might require an expansion of SBSD staff in order to effectively implement refinements to contracting policies and program measures. In particular, if the Commonwealth begins using contract-specific goals to award individual contracts, SBSD might consider hiring additional staff members to help with goal-setting and monitoring prime contractor compliance with those goals in coordination with the Department of General Services (DGS), the Virginia Information Technologies Agency, the Virginia Department of Transportation, and higher education institutions with procurement autonomy. Those additional staff members would also be able to help SBSD continue operating other aspects of the SWaM Program, including SWaM certification, business development workshops, and outreach efforts.

In addition, if the Commonwealth begins using contract-specific goals to award individual contracts, SBSD would have to work closely with DGS to ensure that the use of those goals is enforced and there is appropriate monitoring of prime contractor compliance. SBSD and DGS would have to develop a process that is consistent and appropriate across the different contracts to which such goals would apply.

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the Commonwealth of Virginia Disparity Study report.

Anecdotal Information

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

Availability Analysis

An availability analysis assesses the percentage of dollars that one might expect a specific group of businesses to receive on contracts or procurements that a particular organization awards. The availability analysis in this report is based on the match between various characteristics of potentially available businesses and the prime contracts and subcontracts that state agencies awarded during the study period.

Business

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

Business Listing

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

Compelling Governmental Interest

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

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Department of General Services (DGS)

DGS provides a broad range of services related to procurement and operations to other state agencies, select higher education institutions, local government, and businesses. The department is responsible for setting and enforcing procurement policy for select executive branch agencies for non-technology goods and services.

Department of Small Business and Supplier Diversity (SBSD)

SBSD is responsible for administering the Small, Women-owned, and Minority-owned Business Program.

Disparity

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

Disparity Analysis

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

Disparity Index

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

Dun & Bradstreet (D&B)

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

Executive Branch Agency

Executive branch agencies refer to the 117 different agencies, departments, and offices that make up the executive branch of Virginia's state government. Contract and procurement data from each executive branch agency were included as part of the disparity study.

Firm

See *business*.

Higher Education Institution (HEI)

A HEI is any state-funded university, college, or other institution of higher education in Virginia. Contract and procurement data from the following 16 HEIs were included as part of the disparity study: Christopher Newport University, College of William & Mary, George Mason University, James Madison University, Longwood University, Norfolk State University, Old Dominion University, Radford University, Richard Bland College, University of Mary Washington, University of Virginia, Virginia Commonwealth University, Virginia Community College System, Virginia Military Institute, Virginia Polytechnic Institute and State University, and Virginia State University. HEIs with procurement autonomy have statutory authority for setting their own policies for all construction, services, and goods.

Industry

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

Inference of Discrimination

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

Local Marketplace

See relevant geographic market area.

Majority-owned Business

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

Marketplace Conditions

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

Minority

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

Minority-owned Business

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

Narrow Tailoring

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

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

Non-response Bias

Non-response bias occurs in survey research when participants' responses to survey questions theoretically differ from the potential responses of individuals who did not participate in the survey.

Participation

See *utilization*.

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Procurement

See *contract*.

Project

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

Race- and Gender-conscious Measures

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

Race- and Gender-neutral Measures

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

and other methods open to all businesses, regardless of the race/ethnicity or gender of the owners.

Rational Basis

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

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which organizations award most of their contracting dollars are located. The RGMA is also referred to as the *local marketplace*. Case law related to contracting programs and disparity studies requires analyses to focus on the relevant geographic market area. The RGMA for the disparity study is the state of Virginia.

Small Business

A small business is a business with 250 employees or fewer or whose average annual revenues are \$10 million or less.

Small, Women-owned, and Minority-owned Business (SWaM) Program

The SWaM Program is designed to assist small businesses and minority- and woman-owned businesses pursuing work on state contracts or procurements. The program comprises various race- and gender-neutral measures to meet its objectives, including networking and outreach events; training seminars and workshops; financing and bonding assistance; mentorship, monitoring, and reporting; and setting SWaM participation goals on individual contracts. Governor Tim Kaine established the program in 2006, and it is administered by SBSD.

State-funded Contract

State-funded contracts are contracts or projects that are wholly funded by state or local sources. That is, they do not include any federal funds.

Statistically Significant Difference

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

Strict Scrutiny

Strict scrutiny is the legal standard that a government organization's use of race- and gender-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest

threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, an organization must:

- a) Have a compelling governmental interest in remedying past identified discrimination or its present effects; and
- b) Establish that the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. Commonwealth of Virginia agencies had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was July 1, 2014 through June 30, 2019.

Subcontract

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

Subcontractor

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

Subindustry

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

Substantial Disparity

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

Utilization

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

Vendor

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

Virginia Department of Transportation (VDOT)

VDOT is responsible for building, maintaining, and operating the state's roads, bridges, and tunnels. The department is responsible for setting and enforcing procurement policy for road and bridges.

Virginia Information Technologies Agency (VITA)

VITA provides information technology services to executive branch agencies. The department is responsible for setting and enforcing procurement policy for technology goods and services.

Woman-owned Business

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

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

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

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study and the strict scrutiny analysis. The Commonwealth of Virginia is within the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit. This analysis reviews the Fourth Circuit Court of Appeals decision in *H. B. Rowe Co., Inc v. W. Lyndo Tippet, NCDOT et al.*³ and district court decisions in the Fourth Circuit regarding MBE/WBE/DBE programs. The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

In addition, the appendix reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program⁴ and the implementation of the Federal DBE Program by local and state governments. The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,⁵ and the Federal DBE Program that was continued and reauthorized by the Fixing America’s Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination

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

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

³ 615 F.3d 233 (4th Cir. 2010).

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

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

against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence⁶. Congress is currently at the time of this report considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The appendix also analyzes recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, including: *Dunnet Bay Construction Co. v. Illinois DOT*,⁷ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*,⁸ *Western States Paving Co. v. Washington State DOT*,⁹ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹⁰ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,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 these and other recent cases summarized below are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

⁶ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

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

⁸ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, F.3d 1187, (9th Cir. 2013).

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

¹⁰ *Mountain West Holding Co., Inc. v. Montana*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

¹¹ *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

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

¹⁵ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Midwest Fence* filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, *see* 2017 WL 511931 (Feb. 2, 2017), which was *denied*, 2017 WL 497345 (June 26, 2017)..

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

¹⁷ *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

¹⁸ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

B. U.S. Supreme Court Cases

1. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.¹⁹ J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

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

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

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.²³ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”²⁴

¹⁹ 488 U.S. 469 (1989).

²⁰ 488 U.S. at 500, 510.

²¹ 488 U.S. at 480, 505.

²² 488 U.S. at 507-510.

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

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

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

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

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

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

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

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

²⁵ 488 U.S. at 502.

²⁶ *Id.*

²⁷ 488 U.S. at 509.

²⁸ *Id.*

²⁹ 488 U.S. at 509.

³⁰ *Id.*

³¹ 488 U.S. at 492.

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

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

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

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

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

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”³⁷ The evidence found to satisfy the compelling interest standard included numerous congressional investigations and

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

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

³⁴ *Id.*

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

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

³⁷ *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.

hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).³⁸ 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.³⁹
- **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.⁴⁰
- **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.⁴¹
- **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.⁴²
- **F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A Reauthorization Act, FAST Act and MAP-21, respectively which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE and DBE Programs.⁴³ Congress also found in the F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender

³⁸ See, *e.g.*, *Adarand VII*, 228 F.3d at 1167– 76; see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

³⁹ *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.

⁴⁰ *Adarand VII*. at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

⁴¹ *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁴² *Adarand VII*, 228 F.3d at 1174-75; see *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

⁴³ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁴⁴

The Federal DBE Program Implemented By State and Local Governments

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

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴⁵ 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”).⁴⁶ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁷ Most recently, in October 2018, Congress passed the FAA Reauthorization Act⁴⁸. At the present time, pending in Congress is legislation (H.R. 2, Section 1101, Moving Forward Act) to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

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

⁴⁴ *Id.* at § 1101(b)(1).

⁴⁵ 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.

⁴⁶ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁴⁷ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴⁸ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

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.⁴⁹

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE programs. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45. These regulations, and their interpretation by court decisions are instructive to local and state governments for many reasons, including if they are considering the development and implementation of MBE/WBE/DBE programs that satisfy the strict scrutiny standard and are narrowly tailored to remedying specific identified findings of discrimination in their marketplace.

Provided in 49 CFR § 26.45 are regulations regarding how local and state governments as recipients of federal funds should set the overall goals for their DBE programs, which are instructive to local and state government MBE/WBW/DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.⁵⁰ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁵¹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵² 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.⁵³ 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.⁵⁴

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵⁵ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁶

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

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

⁵¹ *Id.*

⁵² *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁵³ *Id.*

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

⁵⁵ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁵⁶ 49 CFR § 26.51(b); 49 CFR § 23.25.

State and local governments are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁵⁷

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

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁵⁸ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁵⁹ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁶⁰

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.⁶¹ It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.⁶² In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁶³

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

⁵⁸ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁵⁹ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶⁰ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶¹ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶² *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶³ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”⁶⁴ “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’”⁶⁵ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁶⁶

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁶⁷ 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.⁶⁸ 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.⁶⁹

To successfully rebut the government’s evidence, the courts hold, including the Fourth Circuit Court of Appeals in *H.B. Rowe*, that a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of remedial action.⁷⁰ 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.⁷¹ Conjecture and unsupported criticisms

⁶⁴ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal*, 2014 WL 1309092 (D. Minn., 2014); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁵ *See e.g., H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁶ *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁷ *Adarand Constructors, Inc. v. Peña*, (“*Adarand III*”), 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁸ *Majeske*, 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁶⁹ *Id.*; *Adarand VII*, 228 F.3d at 1166.

⁷⁰ *See, e.g., H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁷¹ *See, e.g., H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL

of the government's methodology are insufficient.⁷² The courts, including *H. B. Rowe*, have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.⁷³

The Fourth Circuit in *H. B. Rowe* and other 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.”⁷⁴ The Fourth Circuit and other courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.⁷⁵ 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.⁷⁶ It has been further held by the court in *H. B. Rowe* and other courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.⁷⁷

The Fourth Circuit in *H.B. Rowe* 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.”⁷⁸ 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.”⁷⁹ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”⁸⁰

Thus, the Fourth Circuit found that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong

6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

⁷² *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁷³ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁷⁴ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁵ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958; , *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁶ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁷ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁷⁸ 615 F.3d 233 at 241.

⁷⁹ *Id.*, 615 F.3d at 241, quoting *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996).

⁸⁰ *Id.*, quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

basis in evidence for its conclusion that remedial action is necessary.⁸¹ The court in *H.B. Rowe* after finding that there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark, stated the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.”⁸²

The court in *H.B. Rowe* 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.⁸³

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.⁸⁴ “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.”⁸⁵

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.⁸⁶ 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.⁸⁷ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁸⁸

Other considerations regarding statistical evidence include:

⁸¹ 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion), see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

⁸² *Id.*, 615 F.3d at 241. (internal quotation marks omitted).

⁸³ 615 F.3d 233 at 242, citing *Alexander*, 95 F.3d at 315 (citing *Adarand*, 515 U.S. at 227).

⁸⁴ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁸⁵ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

⁸⁶ *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works II*, 321 F.3d 970; *City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁷ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁸ *Western States Paving*, 407 F.3d at 1001.

- **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.⁸⁹ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,⁹⁰ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”⁹¹
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.⁹²
- **Disparity index.** An important component of statistical evidence is the “disparity index.”⁹³ 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.”⁹⁴
- **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.⁹⁵

In terms of statistical evidence, the Fourth Circuit has held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of

⁸⁹ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁰ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹¹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹² See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

⁹³ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

⁹⁴ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

⁹⁵ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.⁹⁶

The Fourth Circuit in *H. B. Rowe* considered the statistical evidence from a disparity study in considering the equal protection challenge to the North Carolina minority- and woman-owned participation program and looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson*'s evidentiary burden was satisfied.⁹⁷ The Fourth Circuit found that disparity studies can be probative evidence of discrimination.⁹⁸

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.⁹⁹ The court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.¹⁰⁰ 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."¹⁰¹ 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."¹⁰²

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹⁰³ Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.¹⁰⁴

Additionally, the court had previously concluded that the local government's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination.¹⁰⁵ Thus, the court held the local government's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹⁰⁶

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹⁰⁷ The court found that the district court's conclusion was directly

⁹⁶ 615 F.3d 233 at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion), and *citing Concrete Works*, 321 F.3d at 958.

⁹⁷ *H. B. Rowe*, 615 F.3d 233, 241-242; *see, e.g., Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 602-605 (3d Cir. 1996).

⁹⁸ *H. B. Rowe*, 615 F.3d at 241-249; *see, e.g., Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 602-605 (3d Cir. 1996).

⁹⁹ *Id.* at 973.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹⁰² *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), *quoting Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹⁰³ *Id.* at 973.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 974.

contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.¹⁰⁸

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹⁰⁹ (“[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.*”¹¹⁰ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹¹¹ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹¹²

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹¹³ The Tenth Circuit ruled that the local government can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹¹⁴

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹¹⁵

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

¹⁰⁸ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁰⁹ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹¹² *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹¹⁵ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.¹¹⁶

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion."¹¹⁷

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹¹⁸

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.¹¹⁹ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹²⁰ 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.¹²¹

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

¹¹⁶ *Id.* at 977.

¹¹⁷ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹¹⁸ *Id.* at 979-80.

¹¹⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹²⁰ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²¹ *Concrete Works I*, 36 F.3d at 1520.

- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹²²

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.¹²³

The Fourth Circuit in *H.B. Rowe* stated that in addition to statistical evidence it "further require[s] that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'"¹²⁴ 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.¹²⁵

The Fourth Circuit stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions."¹²⁶ The court in *H. B. Rowe* held that anecdotal evidence supplements statistical evidence of discrimination.¹²⁷

The court in *H.B. Rowe* found that North Carolina's anecdotal evidence of discrimination sufficiently supplemented the State's statistical showing.¹²⁸ The survey evidence exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors.¹²⁹ The court held that the State could conclude that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action.¹³⁰

The court in *H. B. Rowe* concluded the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the disparity study¹³¹. Thus, the court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.¹³²

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.

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

¹²³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

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

¹²⁵ *Id.* at 249.

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

¹²⁷ *Id.* at 249.

¹²⁸ *Id.*

¹²⁹ *Id.* at 251.

¹³⁰ *Id.*

¹³¹ *Id.* at 251.

¹³² *Id.*

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹³³

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹³⁴

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.”¹³⁵ 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.”¹³⁶

¹³³ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹³⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹³⁵ *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).

¹³⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

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.’”¹³⁷

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹³⁸ 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.”¹³⁹ The Court found that the District failed to show it seriously considered race-neutral measures.

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

Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁴⁰ 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.¹⁴¹

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.”¹⁴²

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

¹³⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

¹³⁸ 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

¹³⁹ 551 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).

¹⁴⁰ *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁴¹ *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also, Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁴² *Croson*, 488 U.S. at 509-510.

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁴³

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.”¹⁴⁴

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.¹⁴⁵ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type

¹⁴³ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁴⁴ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁴⁵ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

program should include: (1) built-in flexibility;¹⁴⁶ (2) good faith efforts provisions;¹⁴⁷ (3) waiver provisions;¹⁴⁸ (4) a rational basis for goals;¹⁴⁹ (5) graduation provisions;¹⁵⁰ (6) remedies only for groups for which there were findings of discrimination;¹⁵¹ (7) sunset provisions;¹⁵² and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁵³

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Fourth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁵⁴ The Fourth Circuit has applied “intermediate scrutiny” to classifications based on gender.¹⁵⁵ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁵⁶

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁵⁷

¹⁴⁶ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁴⁷ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁴⁸ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁴⁹ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁵⁰ *Id.*

¹⁵¹ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

¹⁵² *See, e.g., H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . *see also, Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁵³ *Coral Constr.*, 941 F.2d at 925.

¹⁵⁴ *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁵⁵ *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, e.g., Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259 (1978)).

¹⁵⁶ *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, e.g., Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

¹⁵⁷ *See, AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of*

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.¹⁵⁸

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.¹⁵⁹ The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁶⁰

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁶¹

The Fourth Circuit in *H. B. Rowe*, found that the disparity analysis demonstrated women-owned businesses won far more than their expected share of subcontracting dollars during the study period.¹⁶² Therefore, the court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects.¹⁶³ The court held the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires.¹⁶⁴

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”¹⁶⁵ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.¹⁶⁶ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman

Philadelphia, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

¹⁵⁸ *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*.

¹⁵⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁶⁰ *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁶¹ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁶² 615 F.3d 233 at 254.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 255.

¹⁶⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d Cir. 1993).

¹⁶⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d Cir. 1993).

engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁶⁷

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.¹⁶⁸ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.¹⁶⁹ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁷⁰ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁷¹ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁷² When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire “whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose.”¹⁷³

The courts in Virginia and the Fourth Circuit Court of Appeals in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”¹⁷⁴ This standard the courts conclude is considered quite deferential¹⁷⁵ and “the fit between the enactment and the public purposes behind it need not be mathematically precise.”¹⁷⁶ So long as a government legislature had a reasonable basis for adopting the

¹⁶⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁶⁸ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *see, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254.

¹⁷³ *See, Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *see, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988).

¹⁷⁴ *Gray v. Commonwealth of Virginia*, 274 Va. 290, 645 S.E. 2d 448, 459 (Va. 2007), *citing Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998).

¹⁷⁵ *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013).

¹⁷⁶ *Id.*

classification—which can include “rational speculation unsupported by evidence or empirical data”—the law will pass constitutional muster.¹⁷⁷

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”¹⁷⁸ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.¹⁷⁹

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”¹⁸⁰ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁸¹

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”).¹⁸²

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”¹⁸³

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.¹⁸⁴ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”¹⁸⁵

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation

¹⁷⁷ *Id. Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); see, *Gray v. Commonwealth of Virginia*, 274 Va. 290, 307, 645 S.E. 2d 448, 459 (Va. 2007); *Finn v. Virginia Retirement SVS*, 259 Va. 144, 155, 524 S.E. 2d 125, 131 (2000).

¹⁷⁸ *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *Gray v. Commonwealth of Virginia*, 274 Va. at 308-9, 645 S.E. 2d at 460.

¹⁷⁹ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

¹⁸⁰ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012).

¹⁸¹ *Id.*; see, *Gray v. Commonwealth of Virginia*, 274 Va. at 308, 645 S.E. 2d at 459.

¹⁸² 2012 WL 5939228 (Fed. Cl. 2012).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

(including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.¹⁸⁶ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors....”¹⁸⁷

4. Pending cases (at the time of this report). There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.,** U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019. This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County’s ability to present proof at trial due to the non-party MTA’s failure to meet its discovery obligations, that nothing in the record attributes MTA’s failure to meet its discovery obligations to the County, and that MTA’s efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA’s

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

appeal to the Ninth Circuit.. The district court in Tennessee stated in a footnote: “Now that the Ninth Circuit has dismissed MTA’s appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose.”

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission. The County Commission voted on this matter in November, 2020 and approved Settlement of the case with the County paying Plaintiffs \$331,950. The minority-owned business program appears will be changing from its current form.

Thus, at the time of this report, the case in federal court in Tennessee remains pending until and if the settlement is approved by the court.

- **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also has denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss shall be scheduled for a hearing at a date mutually agreeable to the parties.

At the time of this report, MTA had filed a Motion to Dismiss the Second Amended Complaint. The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether

the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

The Court also ordered that MTA and the County file a discovery briefing schedule, and Intervenor the AGC may file a discovery brief. The Court also stated that if there is limited discovery, the AGC may participate in depositions and file a motion for discovery. If the parties agree to limited discovery, then that discovery deadline is October 30, 2020.

The Court on November 17, 2020 issued an order finding that certain documents generated by MTA are exempt from the public records requests as trade secrets under Florida's Uniform Trade Secrets Act.

- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.;** U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege this case arises from Defendant's MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs allege the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of

Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify

as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

At the time of this report, the court has issued a Memorandum and Order, dated July 27, 2020, which provides the the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

■ **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.,** U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants have filed a Motion to Dismiss asserting *inter alia* that the court does not have jurisdiction, which is pending. The parties are to complete filing briefs by September 2020. Plaintiff has filed written discovery, which is pending, as defendants have filed a motion to stay discovery pending the outcome of the Motion to Dismiss.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the strict scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and

four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants

reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a

strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the fifteen percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a fifteen percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the fifteen percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

Upon review of all factors together, the court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lac of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to

compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

- **Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.**

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry’s policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH’s policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys’ fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous “negotiations” with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, which are instructive to the study. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Fourth Circuit Court of Appeals

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 *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors

approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the

context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, citing *Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors

that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot- be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native

American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the

race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

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

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

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

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

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

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

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

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

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

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination 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. H. B. Rowe Corp., Inc. v. W. Lyndo Tippet, 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. Tippet, 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. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather “encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of

MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court’s analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F.3d 233 (4th Cir. 2010), discussed above.

3. 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.

4. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000). Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. (“MMCA”) opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City’s 1999 numerical set-aside goals for Minority- and Women-Owned Business Enterprises (“MWBES”), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff’s facial attack on the constitutionality of the Ordinance, concluding that there existed “a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action.” *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows

it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* citing *Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying

private discrimination in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

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

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, *quoting Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

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

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

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

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said,

determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, *quoting Contractors Ass’n*, 6 F.3d at 1010.

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

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, *quoting Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, *citing Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of

20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

5. 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.

6. *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.

7. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion). Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants’ Motions for Summary Judgment on all of Virdi’s claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants’ Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants’ motion for a judgment as a matter of law on the remaining claims at the close of Virdi’s case. *Id.*

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that ‘[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.’” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural

contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

8. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari). This case is instructive to the disparity study because it is a decision that upholds the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

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

Case history. Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

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

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

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

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

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

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

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

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

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

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

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

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

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

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

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

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

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area.

Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

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

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

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

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

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

segregated construction market.” *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, *citing Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "'public or private, with some specificity.'" *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court's mandate in *Concrete Works II*, the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id.* The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies

measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, *quoting*, *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, *quoting* *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, *quoting* *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining

credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, 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.

9. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002). This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

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

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

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

10. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001). This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the

Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, quoting in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local

government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

11. Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998). This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding

unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into

account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. *Id.* at 736. “If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct. ...” *Id.* at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting” *Id.* at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

12. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999). A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a "guess" that was adopted by the City. *Id.* The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program's adoption, the City's Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15%. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1%. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's

Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

13. 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.

14. 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 nonheterogeneous 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.

15. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996). The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the

highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the

Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the

plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received

in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Croson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these

associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp. at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of

discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study’s analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study’s analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting

market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

16. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994)

The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works")

appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs")¹ and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating "injury in fact," Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver's race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The

court applied strict scrutiny to the Ordinance's race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id. citing, Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works ("DPW") construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body's strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver's contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, *quoting, International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id.* at 1521, *quoting, Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments "must identify that discrimination ... with some specificity before they may use race-conscious relief." *Id., citing Croson*, at 504. The court said that the Supreme Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Id., quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment

does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing, Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to

the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver's Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed

strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. Nevertheless, the court concluded Denver’s data indicated significant WBE underutilization such that the Ordinance’s gender classification arose from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, *quoting, Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar

terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver’s empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver’s argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion or request for a preliminary injunction. *Id.* at 1527 *citing*, *Contractors Ass’n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the “percentage of [MBE] availability or composition in the ‘population’ of Philadelphia area construction firms”); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented “detailed findings of prior

discrimination”); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between “the total percentage of minorities involved in construction and the work going to minorities” shows that “the racial classification in the County plan [was] necessary”).

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstated “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms.” *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm’s precise “capacity” at a given moment in time belied quantification due to the industry’s highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, “although almost all firms contacted indicated that they were interested in City work.” *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver’s data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver’s expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself

discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors’ experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS’s bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled “remodeling,” as opposed to “reconstruction,” because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance.

Id. at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver’s statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver’s evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver’s burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a “strong basis in evidence” that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works’ burden to show that there was no such strong basis in evidence to support Denver’s affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver’s data and had put forth evidence that Denver’s data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver’s evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver’s disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court’s conclusion with respect to the second prong of *Croson*’s strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

17. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993). An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17–500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17–503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors' equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, *quoting*, [735 F.Supp. at 1295–98](#). The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298–99](#). The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. [at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at [1268](#). On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons.

In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged." *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [*Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Id.* at 999. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Id.*

The Court agreed with the district court that the definition of "socially and economically disadvantaged individuals" included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, citing, *Hogan* [458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, citing, [*Coral Constr. Co. v. King County*, 941 F.2d 910, 930 \(9th Cir.1991\)](#), cert. denied, [502 U.S. 1033 \(1992\)](#); [*Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 \(6th Cir.1987\)](#), aff'd mem., [489 U.S. 1061 \(1989\)](#); [*Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 \(9th Cir.1987\)](#); [*Main Line Paving Co. v. Board of Educ.*, 725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [*Cone Corp. v. Hillsborough County*, 908 F.2d 908 \(11th Cir.\)](#), cert. denied, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, *citing* [Cleburne, 473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, *quoting*, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1002, *quoting*, [488 U.S. at 492](#).

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* [488 U.S. at 502](#).

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, *quoting*, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, [1295-98](#).

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. [735 F.Supp. at 1295](#). The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, [488 U.S. at 492](#).

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, [488 U.S. at 480](#).

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the

enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, quoting, [735 F.Supp. at 1296](#).

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, [Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919](#), the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This

equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson's* evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [*Cone Corp.*, 908 F.2d at 916 \(10.78 disparity index\)](#); [*AGC of California*, 950 F.2d at 1414 \(22.4 disparity index\)](#); [*Concrete Works*, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [*Stuart*, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [*O'Donnell*, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson's* reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the

statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian-American, Pacific-Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity” . *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, *quoting*, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered

for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s fifteen percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.* at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by

handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

18. 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 subpart 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 *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few

individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

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

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

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

19. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991). In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination.” *Id.* at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

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

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the

validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

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

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

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

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

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and

accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

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

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

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

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

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

Recent District Court Decisions

20. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016).

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert.

Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the

incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the

utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.*

Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found,

however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

21. 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.

22. 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.

23. *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.

24. 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.

25. 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).

26. 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 Intervenorors 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 Intervenorors did not actually offer any of the evidence to the court in this case. The Intervenorors 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 Intervenorors 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 Intervenorors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenorors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in

‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act’s minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State’s goals could not be considered “compelling,” the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act’s minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act’s racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this “informational” program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government’s use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma’s Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the

MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts

awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

27. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000). This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. 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).

28. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999). The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

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

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

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

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

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

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*

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

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

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

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to "race-based quotas". *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise "dooms Ohio's program of race-based quotas". *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business." *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

29. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998). This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

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

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient

proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

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

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

Recent Decisions in Federal Circuit Courts of Appeal

30. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019. Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

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

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s

discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

31. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (Not for Publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. See *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of

action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

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

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

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

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.),

Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

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

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

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available *sub*contractors to the proportion of *prime* contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

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

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

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

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to *Mountain West's* case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11.

32. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017). Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see discussion of district court decision below*). The Seventh Circuit Court of Appeals

affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

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

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

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

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

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

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

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

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

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

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

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

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility

and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at *7.

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

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

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

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

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

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-

assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, quoting § 26.51(e)(1)(emphasis added).

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

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

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

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

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination,

but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court

said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other

mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

33. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016). Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was

substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* *Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court

stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT “acted with discriminatory intent.” *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on “the federal government’s compelling interest in remedying the effects of past discrimination in the national construction market.” *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: “[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority.” *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract’s DBE participation goal at 22% without the required analysis; (2) implementing a “no-waiver” policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court’s conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT’s record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT’s determination that Dunnet Bay failed

to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

34. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013). The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

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

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of

Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

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

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

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

35. 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.

36. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007). In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation’s (“IDOT”) DBE Program. Plaintiff Northern Contracting Inc. (“NCI”) was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet’s Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along

with other data, including DBE utilization on IDOTs “zero goal” experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT’s DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government’s compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.” *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. 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.*

37. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference

program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; *see also* Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because

minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

38. 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*.).

39. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001). This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

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

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee *Adarand Constructors, Inc.* In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237;

see also *Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’ “ *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

Evidence required to show compelling interest. While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘strong basis in evidence for [the government’s] conclusion that remedial action was necessary.’ “ *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to Adarand to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O’Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest* “)

(citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Id. at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government's evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court's decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government's review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." *Id.* *quoting*, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

The court said that it was mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 1172, *quoting*, *Croson* at 501-02. But the court found that here, it was unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing, Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, *quoting, Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government's evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting, Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, *quoting, Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, *citing, Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, *quoting, Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, *quoting, Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

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

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

Holding. Mindful of the Supreme Court’s mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*’s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

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

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

40. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017). Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that

even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal

Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and race based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at *14, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but,

at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id.*, *citing*, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

41. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017). In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for

defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of \$1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, citing, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, see [Midwest Fence](#)

[*Corp. v. United States Dep't of Transp.*, 840 F.3d 932 \(7th Cir. 2016\)](#) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and “good faith efforts” language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase “commercially useful function,” the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, citing, [49 C.F.R. §§ 26.55\(c\)\(1\)-\(2\)](#). The phrases “industry practices” and “other relevant factors” are undefined, the court said, but “an undefined word or phrase does not render a statute void when a court could ascertain the term’s meaning by reading it in context.” *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, citing, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function

when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); [23 U.S.C. § 304](#) (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); [23 U.S.C. § 315](#) (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp.](#), 840 F.3d at 942 (citing [Western States Paving Co. v. Washington State Dep’t of Transportation](#), 407 F.3d 983, 993 (9th Cir. 2005); [Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation](#), 345 F.3d 964, 973 (8th Cir. 2003); [Adarand Constructors, Inc. v. Slater](#), 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

42. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).¹⁸⁸ In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

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

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

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number 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

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

be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing “hard proof” to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court said it does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own. *Id.*

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

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT’s implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest’s ability to compete for work in these Districts, the court dismissed Midwest’s claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that

were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep’t. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services.

Id. The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program

is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to

DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or

unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage

of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. *See*, 840 F.3d 932 (7th Cir. 2016) discussed above.

43. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014). In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing

discrimination in the construction industry is overconcentrated in particular sub-categories of work.” *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they “simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

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

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to

success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

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

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

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.

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

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

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

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small

businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative

evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICS codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every

individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICS codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

44. 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.

45. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013). This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a

subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if 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.

46. 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.*

47. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010). Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the

consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace.” *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE

contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that

NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate

DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procured 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.

48. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009). Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the

recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable

evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

49. 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.

50. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion). This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d *et seq.*) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

51. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007). This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

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

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court

provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

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

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

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

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past

utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

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

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

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. "Unbundling" large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

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

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

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and

insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

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

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

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

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

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because of industry discrimination.*'

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

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

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

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

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

52. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004). This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants’ Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow

tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, citing and quoting *Sherbrooke Turf*, 345 F.3d at 972, quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every 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.

53. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003). *Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

54. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003). The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

55. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002).

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation (“DOT”) from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT’s implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants’ (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

56. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015). In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration’s 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by “socially and economically disadvantaged” individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe’s allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id*. Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id*.

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial

groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id.* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id.* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id.* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id.* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id.* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id.* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id.* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

57. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008). Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically 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 relied 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.

58. Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016). Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of

Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff *Rothe* and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff *Rothe's* motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that *DynaLantic* had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that *DynaLantic* had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants’ expert evidence. One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants’ additional expert’s testimony as admissible in connection with that expert’s review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the

government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

59. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014).

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five

percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff’s business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*,

488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index

of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s

initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are

qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic*, at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson*, as well as the Federal Circuit's decision in *O'Donnell Construction Company*, which adopted *Croson's* reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United 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.

60. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007). *DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction

for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

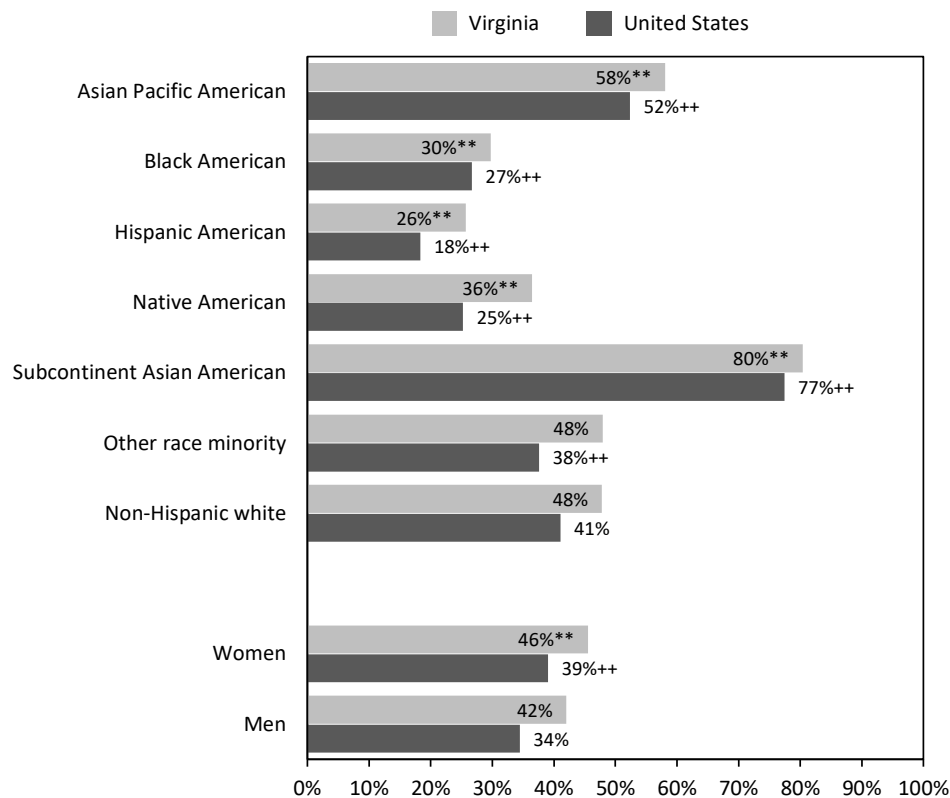
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses of marketplace conditions in Virginia to assess whether minorities, women, and minorities- and woman-owned businesses face any barriers in the local construction, professional services, and goods and other services industries. The study team examined local marketplace conditions in four primary areas:

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

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a
four-year degree in Virginia and the United States, 2014-2018

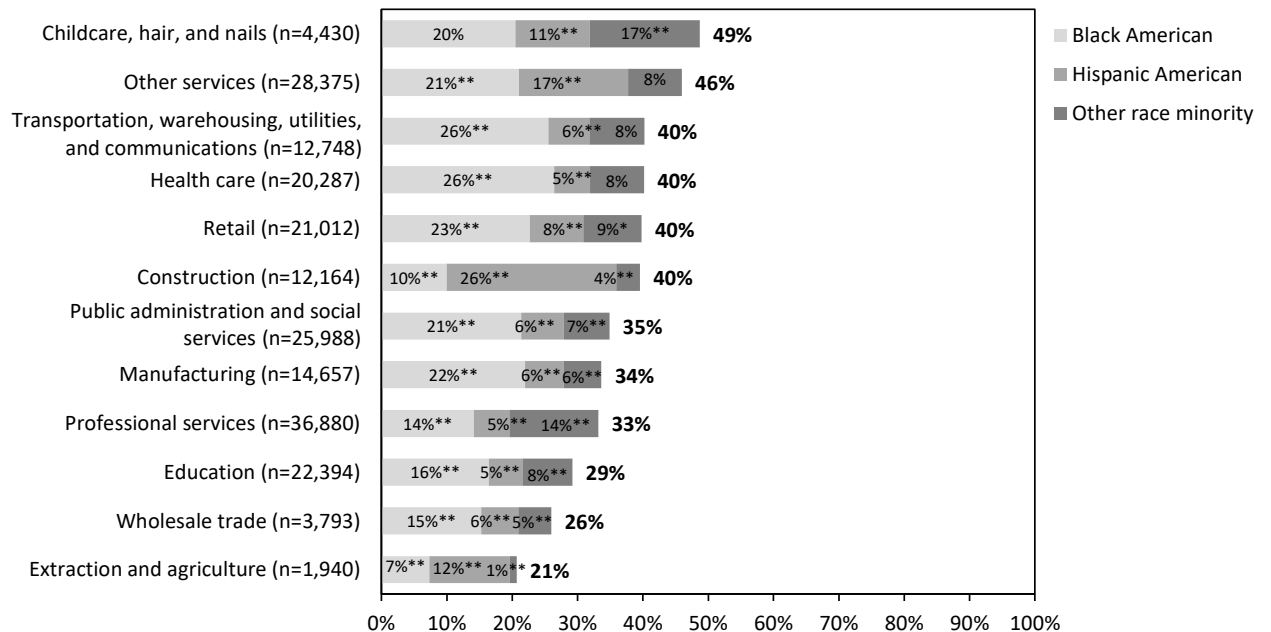


Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level for Virginia and the United States, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-1 indicates that, compared to non-Hispanic white workers, smaller percentages of Black American, Hispanic American, and Native American workers have four-year college degrees.

Figure C-2.
Percent representation of minorities in various Virginia industries



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

The representation of minorities among all Virginia workers is 19% for Black Americans, 9% for Hispanic Americans, 8% for Other minorities and 36% for all minorities considered together.

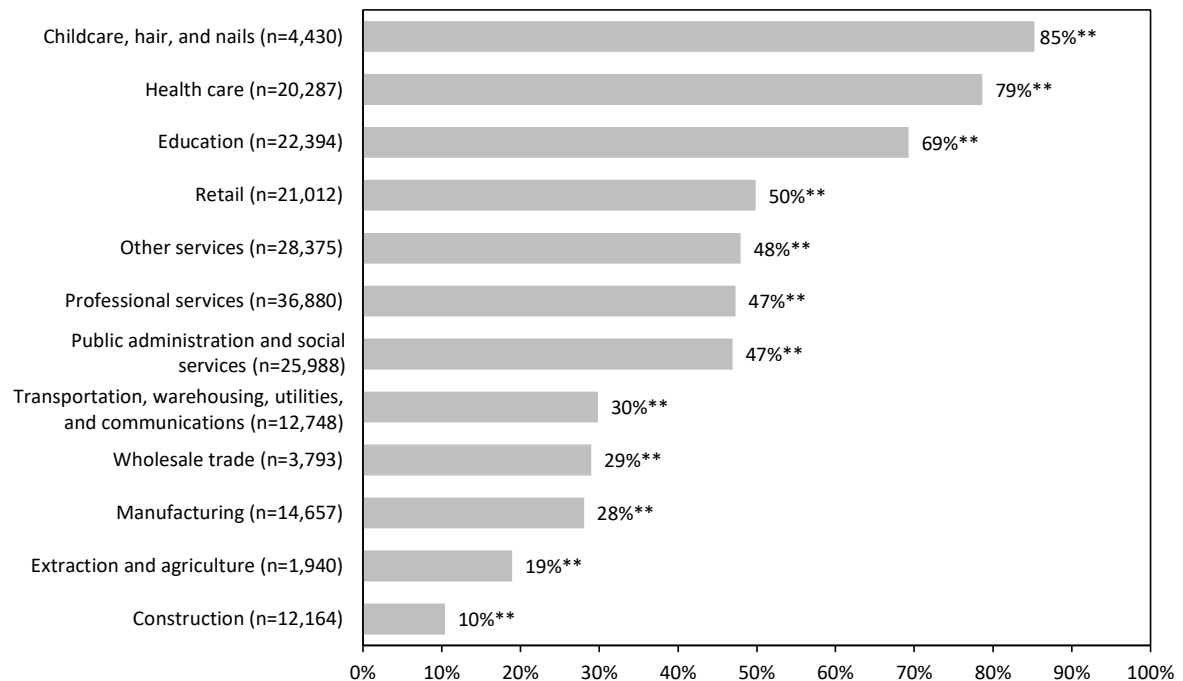
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, and other races.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figures C-2 indicates that the Virginia industries with the highest representations of minority workers are childcare, hair, and nails; other services; and transportation, warehousing, utilities, and communications. The Virginia industries with the lowest representations of minority workers are education, wholesale trade, and extraction and agriculture.

Figure C-3.
Percent representation of women in various Virginia industries



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

The representation of women among all Virginia workers is 47%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figures C-3 indicates that the Virginia industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are manufacturing, extraction and agriculture, and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries
and all industries in Virginia and the United States, 2014-2018

	All Industries (n= 215,333)	Construction (n= 12,164)	Professional Services (n= 25,390)	Goods & Other Services (n= 12,666)
Race/ethnicity				
Asian Pacific American	5.3 %	2.2 % **	7.9 % **	4.4 % **
Black American	19.6 %	10.0 % **	12.9 % **	22.5 % **
Hispanic American	9.3 %	26.0 % **	5.4 % **	13.0 % **
Native American	0.6 %	0.7 %	0.5 % **	0.5 %
Subcontinent Asian American	2.3 %	0.5 % **	6.8 % **	2.4 %
Other race minority	0.2 %	0.2 %	0.3 %	0.2 %
Total minority	37.4 %	39.6 %	33.8 %	43.0 %
Non-Hispanic white	62.6 %	60.4 % **	66.2 % **	57.0 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.4 %	10.4 % **	41.6 % **	39.3 % **
Men	52.6 %	89.6 % **	58.4 % **	60.7 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
	All Industries (n= 7,743,859)	Construction (n= 472,930)	Professional Services (n= 580,595)	Goods & Other Services (n= 536,543)
Race/ethnicity				
Asian Pacific American	4.9 %	1.8 % **	6.7 % **	4.4 % **
Black American	12.5 %	5.9 % **	10.2 % **	13.5 % **
Hispanic American	17.0 %	28.0 % **	10.5 % **	20.7 % **
Native American	1.2 %	1.3 % **	0.9 % **	1.0 % **
Subcontinent Asian American	1.5 %	0.3 % **	4.7 % **	1.5 % *
Other race minority	0.2 %	0.2 %	0.3 % *	0.3 % **
Total minority	37.3 %	37.6 %	33.2 %	41.4 %
Non-Hispanic white	62.7 %	62.4 % **	66.8 % **	58.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.2 %	9.4 % **	44.3 % **	37.1 % **
Men	52.8 %	90.6 % **	55.7 % **	62.9 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

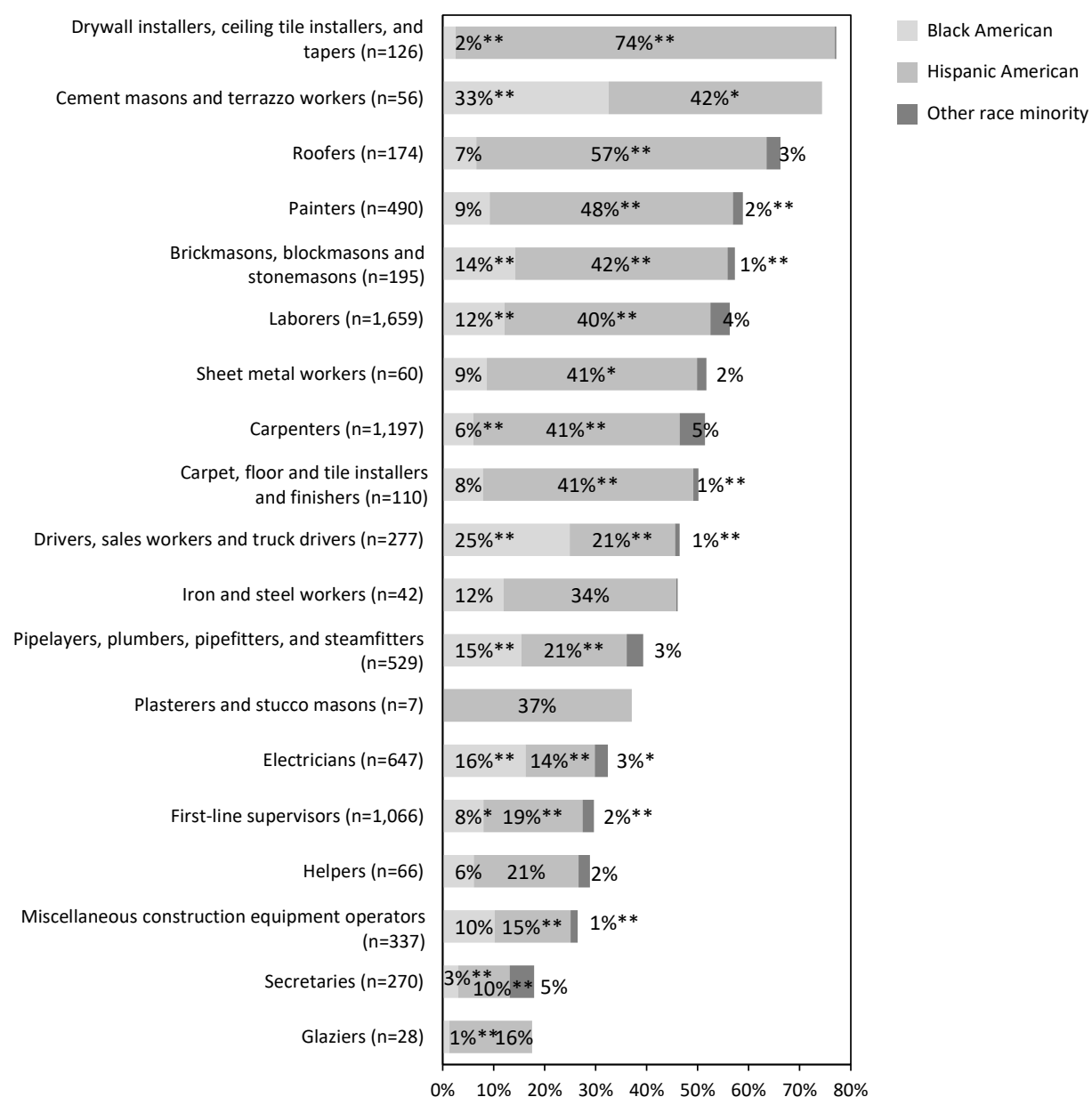
Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries considered together is statistically significant at the 90% or 95% confidence level, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and women work in the Virginia construction industry.
- Smaller percentages of Black Americans, Hispanic Americans, Native Americans, and women work in the Virginia professional services industry.
- Smaller percentages of Asian Pacific Americans and women work in the Virginia goods and other services industry.

Figure C-5.
Percent representation of minorities in selected construction occupations in Virginia
2014-2018



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Virginia construction workers is 10% for Black American, 25% for Hispanic Americans, 3% for other minorities, and 38% for all minorities considered together

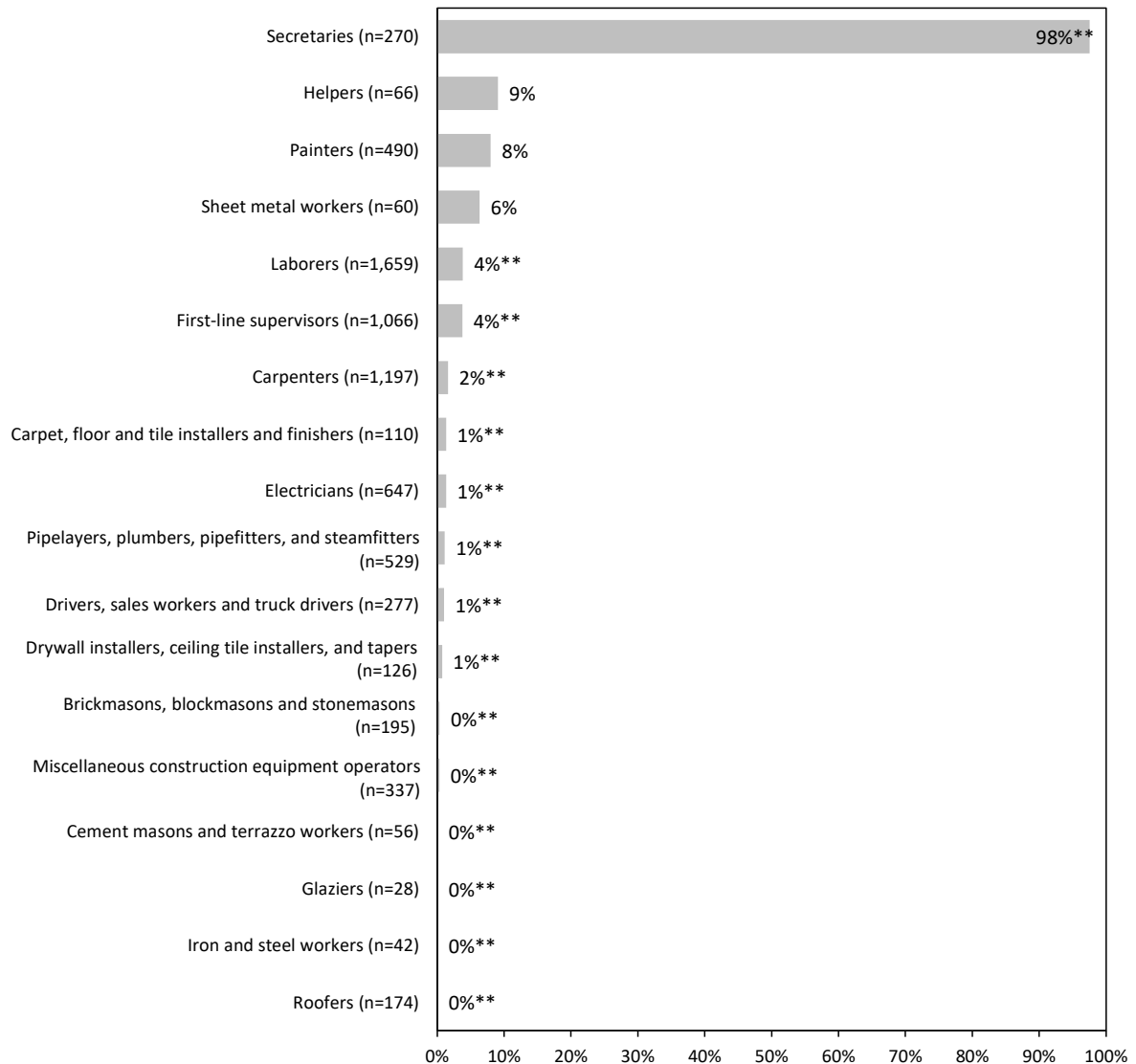
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2014-2018 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in Virginia are drywallers, ceiling installers, and tapers; cement masons and terrazzo workers; and roofers. The construction occupations with the lowest representations of minority workers are miscellaneous construction equipment operators, secretaries, and glaziers.

Figure C-6.
Percent representation of women in selected construction occupations in Virginia, 2014-2018



Notes: ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Virginia construction workers is 10%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators

Source: BBC Research & Consulting from 2014-2018 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the construction occupations in Virginia with the highest representations of women workers are secretaries, helpers, and painters. The construction occupations with the lowest representations of women workers are glaziers, iron and steel workers, and roofers.

Figure C-7.
Percentage of workers who worked as a manager in study-related industries in Virginia and the United States, 2014-2018

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	9.5 %	5.0 % **	3.5 %
Black American	4.4 % **	4.4 % **	0.9 % **
Hispanic American	2.6 % **	6.2 %	0.4 % **
Native American	12.8 %	4.0 % *	0.6 % **
Subcontinent Asian American	19.2 %	9.7 % **	1.5 %
Other race minority	0.0 % †	6.0 %	0.0 %
Non-Hispanic white	11.6 %	7.3 %	2.8 %
Gender			
Women	7.8 %	5.5 % **	1.3 % **
Men	8.6 %	7.7 %	2.5 %
All individuals	8.5 %	6.8 %	2.0 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	9.3 % *	4.7 % **	2.7 %
Black American	4.4 % **	3.3 % **	0.8 % **
Hispanic American	3.2 % **	3.7 % **	1.0 % **
Native American	5.4 % **	5.3 % **	1.6 % **
Subcontinent Asian American	11.8 % *	7.7 % **	2.4 % **
Other race minority	5.5 % **	5.2 %	1.9 % **
Non-Hispanic white	9.9 %	6.1 %	2.9 %
Gender			
Women	6.9 % **	4.2 % **	1.2 % **
Men	7.7 %	6.6 %	2.8 %
All individuals	7.6 %	5.6 %	2.2 %

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

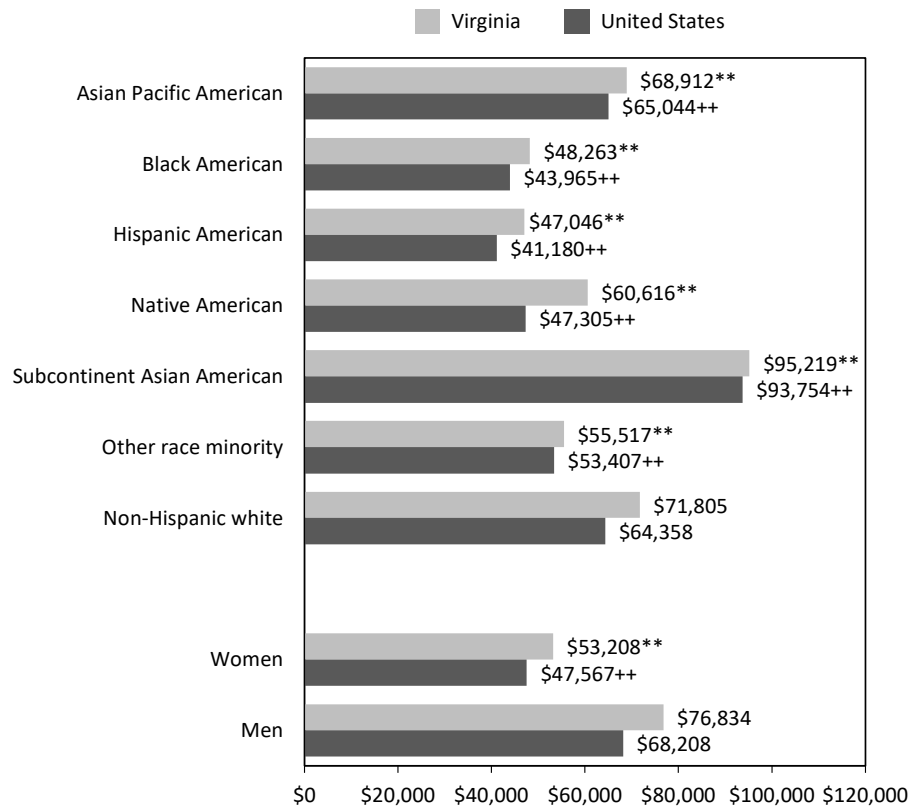
† Denotes that significant differences in proportions were not reported due to small sample size.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Figure C-7 indicates that:

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

Figure C-8.
Mean annual wages in Virginia and the United States, 2014-2018



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

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women).

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-8 indicates that, compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Virginia earn substantially less in wages. In addition, compared to men, women earn less in wages.

Figure C-9.
Predictors of annual wages
in Virginia, 2014-2018

Notes:

The regression includes 36,832 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	8215.822 **
Asian Pacific American	0.855 **
Black American	0.822 **
Hispanic American	0.849 **
Native American	0.941
Subcontinent Asian American	1.028
Other minority group	0.984
Women	0.810 **
Less than high school education	0.900 **
Some college	1.197 **
Four-year degree	1.633 **
Advanced degree	2.211 **
Disabled	0.824 **
Military experience	1.001
Speaks English well	1.321 **
Age	1.063 **
Age-squared	0.999 **
Married	1.126 **
Children	1.004
Number of people over 65 in household	0.903 **
Public sector worker	1.173 **
Manager	1.267 **
Part time worker	0.359 **
Extraction and agriculture	0.725 **
Construction	0.895 **
Wholesale trade	0.950 *
Retail trade	0.726 **
Transportation, warehouse, & information	0.970
Professional services	1.034 **
Education	0.648 **
Health care	0.990
Other services	0.715 **
Public administration and social services	0.780 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in Virginia, being Asian Pacific American, Black American, or Hispanic American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.82 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, compared to being a man, being a woman is related to lower annual wages.

Figure C-10.
Home ownership rates
in Virginia and the
United States, 2014-
2018

Note:

The sample universe is all households.

**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Virginia and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

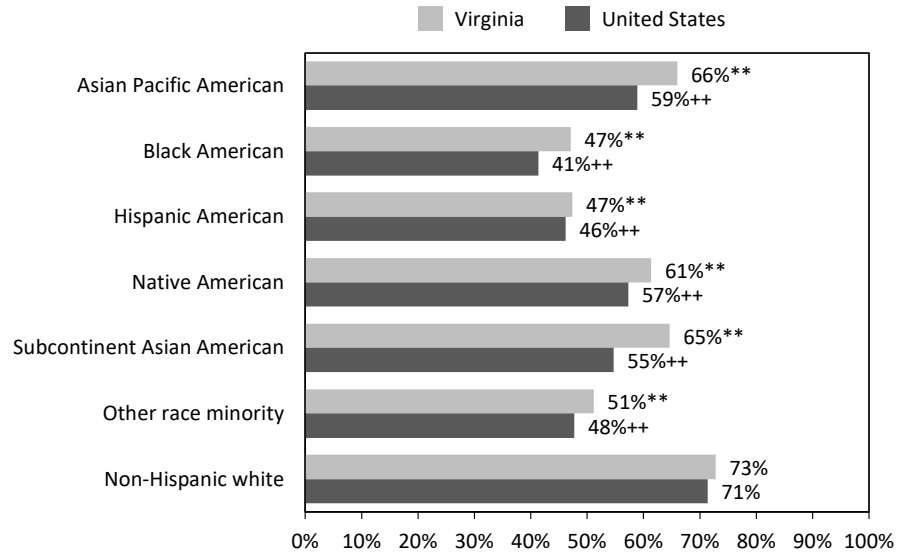
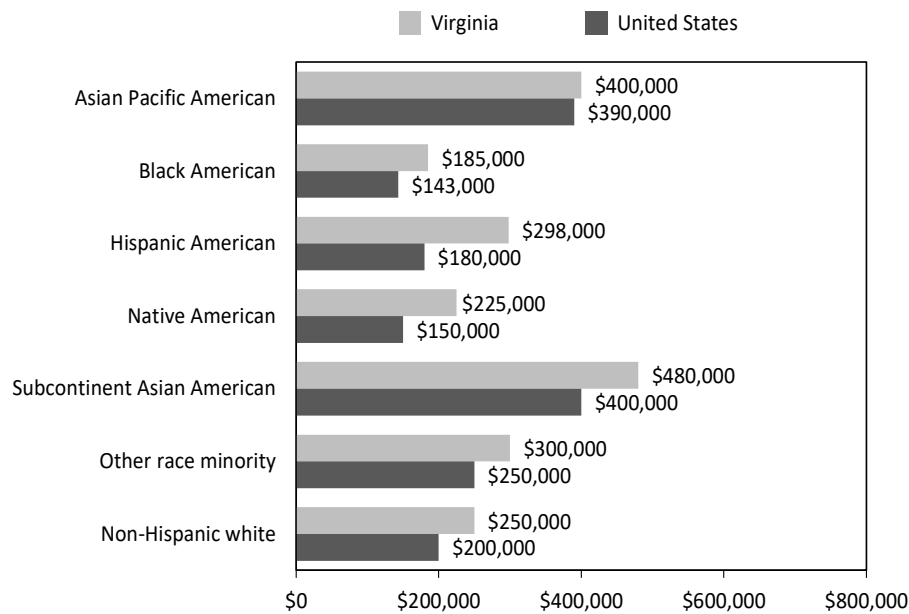


Figure C-10 indicates that all relevant minority groups in Virginia exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure C-11.
Median home values in Virginia and the United States, 2014-2018



Note: The sample universe is all owner-occupied housing units.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-11 indicates that homeowners that identify as Black Americans and Native Americans own homes that, on average, are worth less than those of non-Hispanic whites.

Figure C-12.
Denial rates of conventional
purchase loans for high-income
households in Virginia

Note:

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

Native Americans are combined with Pacific Islanders due to small samples.

Source:

FFIEC HMDA data 2017. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

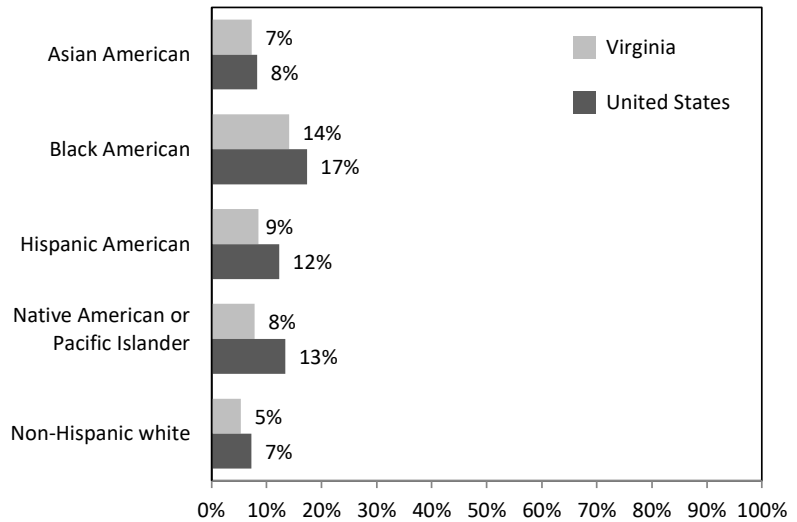


Figure C-12 indicates that Black Americans, Hispanic Americans, and Native Americans or Other Pacific Islanders in Virginia are denied home loans at higher rates than non-Hispanic whites.

Figure C-13.
Percent of
conventional home
purchase loans that
were subprime in
Virginia and the
United States, 2017

Source:
 FFIEC HMDA data 2017. The raw
 data extract was obtained from the
 Consumer Financial Protection
 Bureau HMDA data tool:
<http://www.consumerfinance.gov/hmda/explore>.

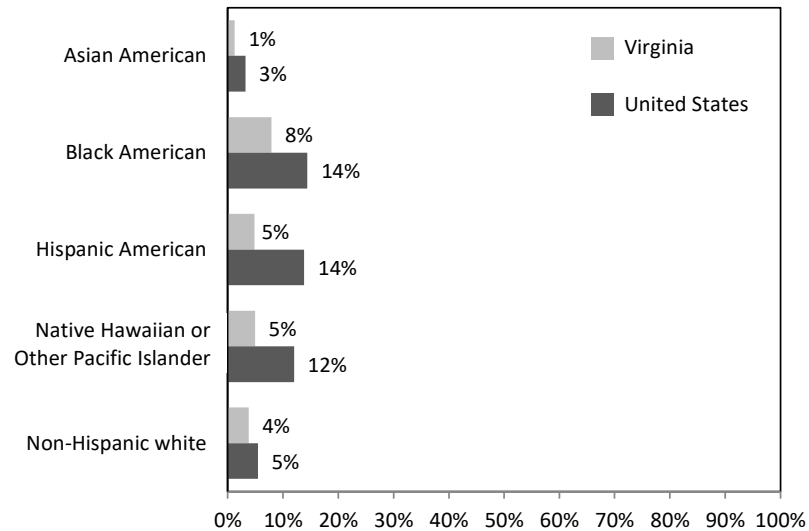


Figure C-13 indicates that Black Americans, Hispanic Americans, and Native American or Pacific Islanders in Virginia are awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

Figure C-14.
Business loan denial
rates in the South
Atlantic Division and
the United States,
2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The South Atlantic Division consists of Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

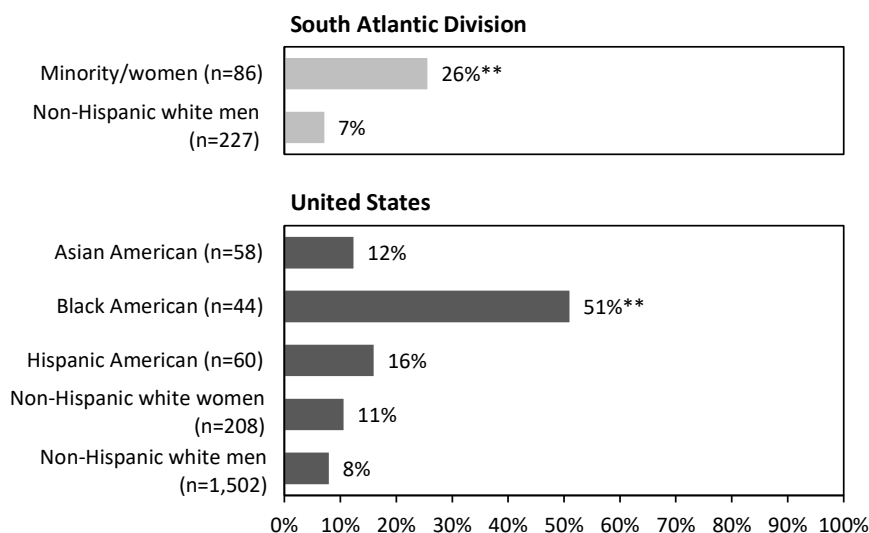


Figure C-14 indicates that minority- and woman-owned businesses in the South Atlantic Division—which includes Virginia—were denied business loans at greater rates than business owned by non-Hispanic white men. In addition, nationally, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

Figure C-15.
Businesses that did
not apply for loans
due to fear of denial
in the South Atlantic
Division and the
United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The South Atlantic Division consists of Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Source:

BBC Research & Consulting from
 2003 Survey of Small Business
 Finance.

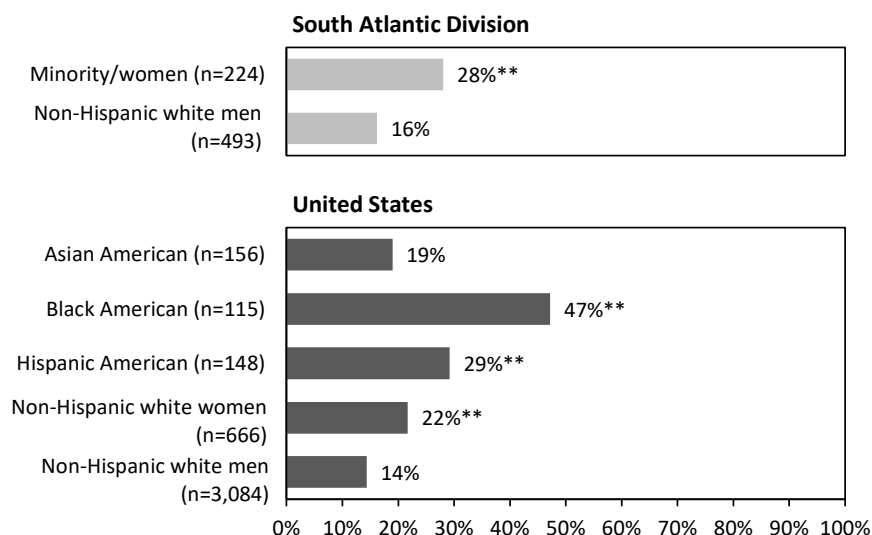


Figure C-15 indicates that in 2003, minority- and woman-owned businesses in the South Atlantic Division were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. In addition, Black American-owned businesses, Hispanic American-owned businesses, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-16.
Mean values of approved
business loans, Pacific
Division and the United
States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The South Atlantic Division consists of Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Source:

BBC Research & Consulting from 2003
 Survey of Small Business Finance.

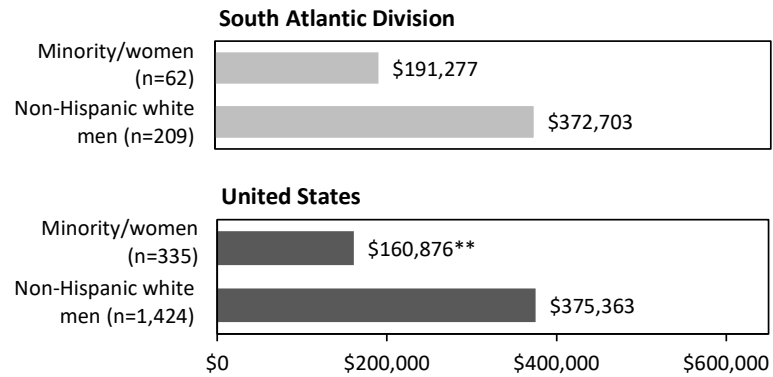


Figure C-16 indicates that, in 2003, minority- and woman-owned businesses in the South Atlantic Division and the United States who received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-17.
Business ownership rates in study-related industries in Virginia
and the United States, 2014-2018

San Diego	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	30.5 % **	8.1 % **	13.9 % **
Black American	13.4 % **	6.3 % **	8.9 %
Hispanic American	14.2 % **	6.7 % **	9.4 %
Native American	22.3 %	8.4 %	10.1 %
Subcontinent Asian American	19.7 %	10.3 % **	27.2 % **
Other minority group	22.9 % †	11.9 %	20.0 %
Non-Hispanic white	22.8 %	12.9 %	8.5 %
Gender			
Women	14.3 % **	11.1 %	7.6 % **
Men	20.4 %	11.2 %	10.6 %
All individuals	19.8 %	11.1 %	9.4 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	22.7 % **	10.4 % **	11.3 % **
Black American	16.9 % **	8.4 % **	6.9 % **
Hispanic American	17.8 % **	10.2 % **	9.7 % *
Native American	18.8 % **	14.2 % **	8.5 % **
Subcontinent Asian American	21.2 % **	7.0 % **	23.5 % **
Other minority group	24.9 %	11.8 % **	15.5 % **
Non-Hispanic white	25.6 %	17.5 %	9.4 %
Gender			
Women	16.2 % **	13.6 % **	9.1 % **
Men	23.4 %	15.8 %	9.6 %
All individuals	22.7 %	14.8 %	9.4 %

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

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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-17 indicates that:

- Compared to non-Hispanic whites, Black Americans and Hispanic Americans working in the Virginia construction industry own businesses at a lower rate. In addition, compared to men, women working in the Virginia construction industry own businesses at a lower rate.
- Compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, and Subcontinent Asian Americans working in the Virginia professional services industry own businesses at a lower rate. In addition, compared to men, women working in the Virginia professional services industry own businesses at a lower rate.
- Compared to men, women working in the Virginia goods and other services industry own businesses at a lower rate.

Figure C-18.
Predictors of business ownership in
construction in Virginia, 2014-2018

Note:

The regression included 10,669 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-3.1086 **
Age	0.0617 **
Age-squared	-0.0004 **
Married	-0.0030
Disabled	0.0555
Number of children in househo	0.0670 **
Number of people over 65 in hc	0.0171
Owens home	0.1220 **
Home value (\$000s)	0.0004 **
Monthly mortgage payment (\$	-0.0618 **
Interest and dividend income (\$	0.0030 **
Income of spouse or partner (\$)	-0.0001
Speaks English well	0.2817 **
Less than high school educatio	-0.0438
Some college	0.1143 **
Four-year degree	0.0301
Advanced degree	-0.0889
Asian Pacific American	0.3042 **
Black American	-0.2841 **
Hispanic American	-0.0485
Native American	0.0421
Subcontinent Asian American	0.0552
Other minority group	0.0789
Women	-0.3750 **

Figure C-18 indicates that being Black American is associated with a lower likelihood of owning a construction business in Virginia compared to being non-Hispanic white, and being a woman is associated with a lower likelihood of owning a construction business compared to being a man.

Figure C-19.
Simulated business ownership rates for Virginia construction workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	13.9%	21.0%	66
Non-Hispanic white women	14.5%	27.2%	54

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates that Black men own construction businesses in Virginia at a rate that is 66 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). In addition, women own construction businesses in at a rate that is 54 percent that of similarly situated non-Hispanic white men.

**Figure C-20.
Predictors of business
ownership in professional
services in Virginia,
2014-2018**

Note:

The regression included 22,991 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-2.7028 **
Age	0.0203 **
Age-squared	0.0001
Married	-0.0024
Disabled	0.0240
Number of children in household	0.0549 **
Number of people over 65 in household	0.0807 **
Owns home	-0.0259
Home value (\$000s)	0.0002 **
Monthly mortgage payment (\$000s)	-0.0281 **
Interest and dividend income (\$000s)	0.0016 **
Income of spouse or partner (\$000s)	0.0011 **
Speaks English well	0.0835
Less than high school education	0.1282
Some college	0.1512 **
Four-year degree	0.2788 **
Advanced degree	0.2521 **
Asian Pacific American	-0.2455 **
Black American	-0.2737 **
Hispanic American	-0.2885 **
Native American	-0.2760
Subcontinent Asian American	0.0110
Other minority group	0.1930
Women	0.0370

Figure C-20 indicates that being Asian Pacific American, Black American, or Hispanic American is associated with a lower likelihood of owning a professional services business in Virginia compared to being non-Hispanic white.

Figure C-21.
Simulated business ownership rates for Virginia professional services workers,
2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	7.4%	11.1%	67
Black American	6.4%	10.3%	61
Hispanic American	6.1%	10.0%	61

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-21 indicates that:

- Asian Pacific Americans own professional services businesses in Virginia at a rate that is 67 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Black Americans own professional services businesses in Virginia at a rate that is 61 percent that of similarly situated non-Hispanic white men.
- Hispanic Americans own professional services businesses in Virginia at a rate that is 61 percent that of similarly situated non-Hispanic white men.

Figure C-22.
Predictors of business
ownership in goods and
other services in Virginia,
2014-2018

Note:

The regression included 11,118 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Other race minority omitted from the regression due to small sample size.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-3.4301 **
Age	0.0648 **
Age-squared	-0.0004 **
Married	0.1574 **
Disabled	-0.0128
Number of children in household	0.0850 **
Number of people over 65 in household	0.0271
Owns home	-0.2246 **
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	-0.0121
Interest and dividend income (\$000s)	0.0039 **
Income of spouse or partner (\$000s)	-0.0002
Speaks English well	0.0067
Less than high school education	0.0830
Some college	0.0981 **
Four-year degree	0.1195 **
Advanced degree	-0.0875
Asian Pacific American	0.1285
Black American	0.1223 **
Hispanic American	0.1746 **
Native American	0.2849
Subcontinent Asian American	0.6919 **
Other minority group	0.6298
Women	-0.1717 **

Figure C-22 indicates that being a woman is associated with a lower likelihood of owning a goods and other services business compared to being a man.

Figure C-23.
Disparities in business ownership rates for Virginia goods and other services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	7.8%	7.7%	101

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that non-Hispanic white women own goods and other services businesses in Virginia at a rate that is comparable to that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

Figure C-24.
Rates of business
closure and expansion,
Virginia and the
United States, 2002-
2006

Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

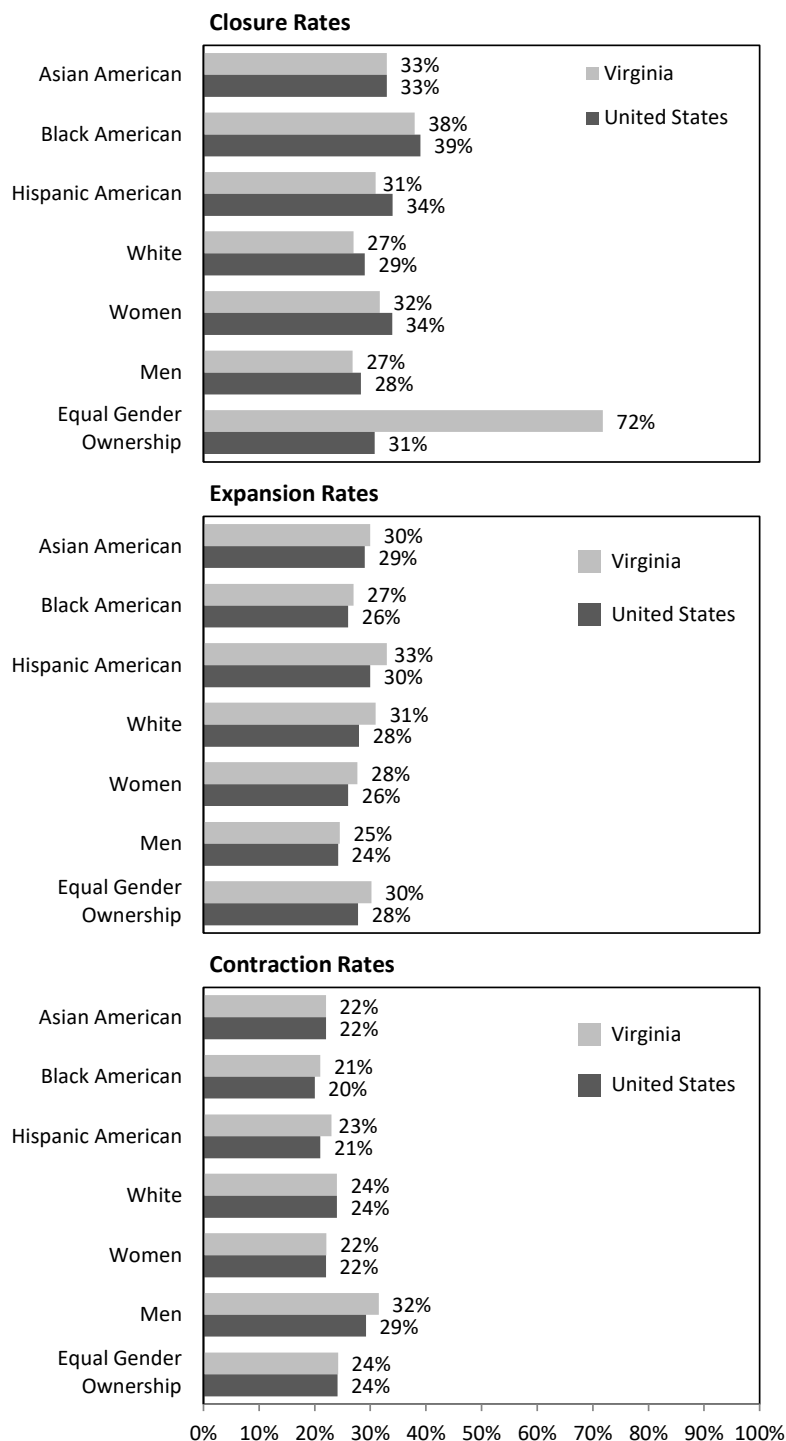
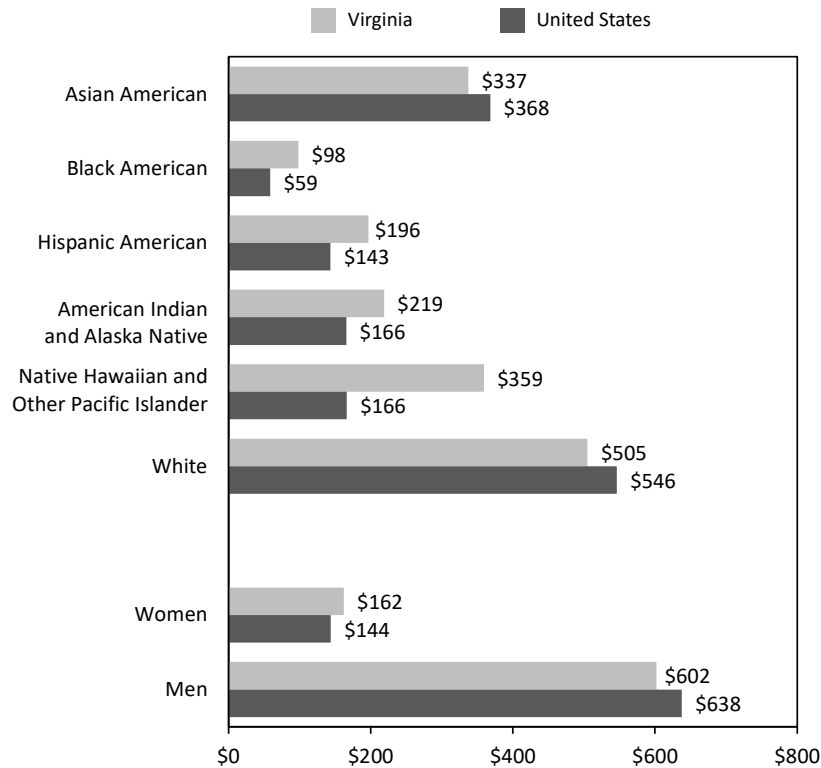


Figure C-24 indicates that Asian American-, Black American- and Hispanic American-owned businesses in Virginia appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. With regard to expansion rates, Black American-owned businesses in Virginia appear to expand at lower rates than non-Hispanic white-owned businesses.

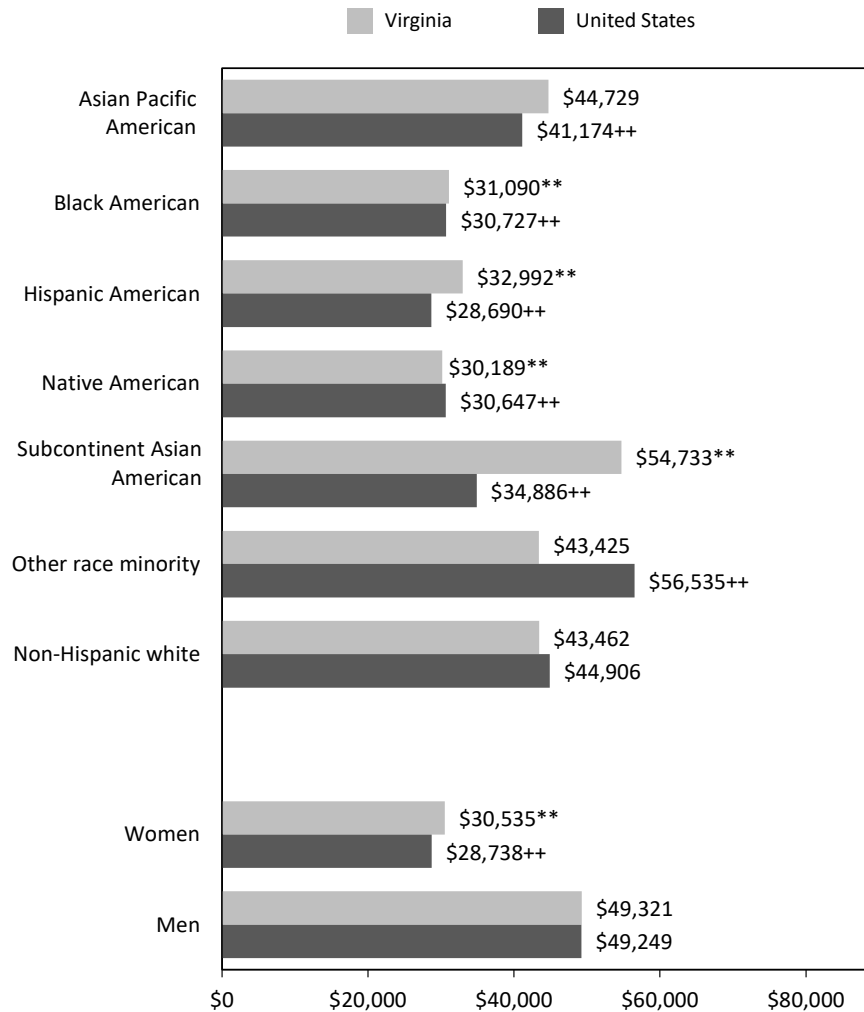
Figure C-25.
Mean annual business receipts (in thousands)
in Virginia and the United States, 2012



Note: Includes employer and non-employer firms.
 Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.
 Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure C-25 indicates that in 2012, all relevant minority groups in Virginia showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in Virginia showed lower mean annual business receipts than businesses owned by men.

Figure C-26.
Mean annual business owner earnings in Virginia and the United States,
2014-2018



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for Virginia and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-26 indicates that the owners of Black American-, Hispanic American-, and Native American-owned businesses in Virginia earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned earn less on average than the owners of businesses owned by men.

Figure C-27.
Predictors of business owner
earnings in Virginia, 2014-2018

Notes:

The regression includes 10,441 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	343.735 **
Age	1.177 **
Age-squared	0.998 **
Married	1.224 **
Speaks English well	0.924
Disabled	0.511 **
Less than high school	0.766 **
Some college	1.063
Four-year degree	1.277 **
Advanced degree	1.805 **
Asian Pacific American	1.178 *
Black American	0.847 *
Hispanic American	1.219 **
Native American	0.972
Subcontinent Asian American	1.434 **
Other race minority	0.785
Women	0.539 **
Veteran	0.867

Figure C-27 indicates that, compared to being the owner of a non-Hispanic white owned business in Virginia, being the owner of a Black American-owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being the owner of a business owned by men, being the owner of a woman-owned business is related to lower business earnings.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners, trade association representatives, and other stakeholders as part of the 2020 Commonwealth of Virginia Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

- A. **Introduction** describes the process for gathering and analyzing the anecdotal information summarized in Appendix D;
- B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;
- C. **Ownership and certification** presents information about businesses' statuses as minority- and woman-owned businesses, certification processes, and business owners' experiences with the Commonwealth of Virginia's certification program;
- D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;
- E. **Doing Business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with minority- and woman-owned businesses;
- F. **Doing business with state agencies** describes business owners' experiences working with or attempting to work with Virginia state agencies and higher education institutions (HEIs) and identifies potential barriers to doing work for them;
- G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in Virginia and what it takes for businesses to be successful;
- H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;
- I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects minority- or woman-owned businesses;
- J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other efforts to remove barriers for businesses in Virginia;

- K. Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and
- L. Other insights and recommendations** presents additional comments and recommendations for state agencies and HEIs to consider.

A. Introduction

Throughout the study, business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with the Commonwealth of Virginia, HEIs, and other organizations in the region. That information was collected through one of the following methods, which the study team facilitated between June 2020 and November 2020:

- In-depth interviews (60 participants);
- Availability surveys (678 participants who submitted anecdotal information);
- Focus groups (12 participants);
- Oral or written testimony during a public forum (20 participants); and
- Written testimony via fax or e-mail (22 participants).

1. In-depth interviews. From July to October 2020, the study team conducted 60 in-depth interviews with owners and representatives of Virginia businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, the Department of Small Business and Supplier Diversity (SBSD)'s certification program, and businesses' experiences working, or attempting to work, with other public agencies in Virginia.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. All of the businesses that participated in the interviews conduct work in Virginia.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from June to November 2020. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Virginia marketplace. A total of 678 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix "AV".

3. Focus groups. The study team conducted four focus groups with trade association representatives. During the focus groups the study team asked participants to share their insights about working in the Virginia marketplace and with public sector and private sector organizations. Comments from the focus groups are denoted by the prefix “FG.”

4. Public forums. The Commonwealth and the study team solicited written and verbal testimony at six online public forums. The meetings were held on June 16, June 18, September 28, September 30, October 6, and October 8, 2020. The study team reviewed and analyzed all public comments from the six meetings and included many of those comments in Appendix D. Those comments are denoted by the prefix “PT.”

5. Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. Written testimony is denoted by the prefix “WT”.

B. Background on Construction, Professional Services, and Goods and Services Industries

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size;
5. Business growth; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, they were from well-established firms to newly established firms, and worked on small-to-large contracts in the Virginia marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 18 construction firms, 24 firms providing professional services, and 11 firms supplying goods and services.

Eighteen firms worked in the construction industry. [#6, #7, #9, #17, #18, #21, #22, #27, #28, #30, #38, #42, #44, #47, #48, #49, #56, #59] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, “We are doing the heavy infrastructure road construction.” [#6]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, “It’s new construction, new commercial construction. Anything construction. I can do roads. I can do engineering. My specialty is pre-design where somebody has an idea, because that’s what I normally would do is that type of thing. Like I said, I’m not limited to just that. If somebody needed carpet, if somebody needed paint, if somebody needed window replacement,

anything in construction I can do. All the way up to new commercial steel buildings. I can do it all."[#18]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Excavating contractors, road construction, heavy and highway underground utilities."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "It's an electrical contractor. We do mostly residential. We do some light commercial. You have items like panel changes, installing lighting- interior lighting, exterior lighting- the wiring of HVAC units, installation of generators, pretty much any repairs, outlet switches, any electrical circuit repairs, we take care of. We do new builds, we do remodels. Pretty much just anything that we can handle ourselves. We shy away from government jobs or chain store type of jobs because we're just not big enough."[#22]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Dump truck and hauling. Demolition. Have a backhoes, bobcat, bulldozer. Yes, and I just try to go around and just grab work that I can see. Work with state on DDOT jobs."[#27]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Heavy construction. We specialize in pile driving."[#30]
- The non-Hispanic white male representative of a majority-owned construction company stated, "Institutional construction."[#38]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Construction. excavating and grading, pretty much I do a drainage, driveways, lot clearing for creating homes, any residential problems, like if you want to clear extra on their lot or redo their yard, driveways, and again, add drainage, culvert pipe."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Primarily heating and air conditioning. We do water heaters and stuff like that also. Tankless water heaters, regular water heaters, all that stuff like that."[#44]
- The Native American male owner of an uncertified MBE construction company stated, "We do site preparation, highway construction, as well as all your underground utilities, storm sewer, sanitary sewer and fire protection lines as well as potable water, domestic water."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Become more of a brokerage business where we man all the different capacities on the job, from steel work to the concrete work and all that stuff. So much of that stuff is sub now, so we're not nearly as large as we used to be, manpower wise."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "We basically work within the infrastructure. New or old buildings that need to be re-wired, wiring between buildings. We take care of the infrastructure. The voice, data, fiber optics."[#49]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "We went into usually existing facilities, sometimes from ground up, but usually existing and we renovated the buildings to their specifications."[#59]

Twenty-four firms worked in the engineering and professional services industry. [#2, #3, #4, #5, #8, #10, #12, #14, #15, #20, #23, #25, #36, #39, #40, #43, #45, #51, #53, #54, #55, #57, #58, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Yeah, we're a consulting firm, but our principal disciplines are community planning, landscape architecture, architecture, and historic preservation, all professions."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Our business model is architecture and engineering. Basically, we provide those services for design and renovations and buildings and the like for different groups; state government, local government, some industrial clients and other clients in the area."[#3]
- The Black American male owner of an MBE-certified professional services firm stated, "It's a consultant business. Engineering."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Most of what I've done is rezoning type work, entitlements for properties, neighborhoods, multi-family communities. I'm a planner. My background is all planning type work, but I've always worked with civil engineers and architects. So my partner is a professional engineering and we have about four professional engineers in the firm now. But when I first started, I started out as a consultant for planning, specifically to planning, field studies, sensitivity studies. And as I've grown, I've brought on architectural design as well as the civil engineering piece."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We do cultural resource consulting, so it's archeology, architecture history, that kind of stuff."[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Engineering consulting. Security and embedded systems."[#10]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "So we're a small professional services company, that we provide architectural services. We do a mixture of commercial, residential, religious, and small government projects. We did have a specialty in public libraries."[#12]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "A high tech services and development company. We build different types of products, mostly unmanned systems. We develop and create training systems, target systems, and then we provide network services, cyber security services and a number of other network services for customers throughout the country. Not just the government and federal, but commercial customers."[#14]
- The Asian American male owner of an uncertified MBE professional services firm stated, "Architecture and interior design. It's buildings. We do both residential and commercial work, and we do new construction, renovation, addition and interior design."[#15]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Aviation maintenance and engineering services. What we do is basically take care of the structural and logistics for aircraft, mostly for the U.S. Navy, from

cradle to grave. All the way from when they bring the aircraft in to when they put it out in the desert in the boneyard."[#20]

- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "There are support services. They range from engineering services, management and logistics, are our primary areas. If those are included, some mechanical and electrical drafters for designers, so they help install new parts on their aircraft and figure out what kind of wiring, harnesses and structures need to be created in order to allow those to be installed and to integrate them with all the other systems the aircraft already has. We have a number of people who work in logistics and integration, so making sure that all of these new parts, new systems that are being installed on the aircraft, that they have all the proper training manuals and maintenance manuals, all the required parts and part supply and tools, all of that to allow the use of them to their fullest extent."[#23]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We are a small architecture and interior design firm."[#25]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "We actually put chemical and radiological and photographic sensors in primarily aviation platforms, but we're not really platform specific. Sometimes they can be on buildings and sometimes they can be on a vehicle, but our contract with the EPA is with these sensors in airplanes. So, we do all kinds of aviation platforms, from drones all the way up to fixed-wing airplane in some cases we have in the past put them on helicopters as well. So that is in a nutshell what we do, very kind of niche branded."[#36]
- The Black American male owner of an uncertified MBE professional services firm stated, "Engineering services and project management consulting. So, we work with engineering and construction companies that are looking for support in project management and also in engineering management. We do organizational reviews to see how they can more efficiently run their operations. We lean on our experience from running very large projects, very large programs and working at the corporate level to help small and mid-sized companies take their organization to the next level. So, we've got a few clients. We're not really aggressively out there pursuing work, but people keep coming to us asking for help and that's really how we're growing the business."[#39]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "And then we've sort of evolved into an IT support company, network support, we also had one of our core businesses was surveillance cameras. And we do provide a lot of cameras to the DC area, and for various agencies down there, and so that's one of our businesses that also kind of moved us this way after 9/11. Then we also have expanded to include audio/visual services. So, we do things like video conferencing, and video walls, and we do set up a lot of basic infrastructure again for those services. Things like some cabling, some systems that run the audio/visual equipment. And things like from even microphones, or touch panels, control panels. We do that, both really domestically, the entire United States, as well as overseas."[#40]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "You would look at it and call it a lobbying firm. Our position statement is, 'Our clients do business with government, we make it easy.'"[#43]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "We do a lot of employer outreach type work. Sales training. But most importantly, we work in the transportation industry. And our job is to reduce the number of vehicles on the highway by promoting carpooling, van pooling, tele work, alternative work hours, guaranteed ride home, riding scooters, biking, walking, anything that reduces the number of vehicles on the road."[#45]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I'm a registered professional civil engineer, but my background is with mostly natural gas, petroleum, and pipeline engineering and management in construction and stuff. I don't build, but I can manage construction and that type of thing. So anyway, that's a crossover between civil and mechanical, because piping is a little bit of both, so my specialty is that."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Architectural design and services."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It's an architectural design and project management business."[#54]
- The Black American male owner of an MBE-certified professional services firm stated, "I'm a construction manager by trade."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "An architectural design firm."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "And our area of business is more of data analytics using machine learning techniques and artificial intelligence."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We are a cybersecurity firm."[#60]

Eleven firms worked in the goods and services industry. [#11, #13, #19, #29, #32, #34, #35, #41, #46, #50, #52] For example:

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Our main focus is vehicle wraps and graphics."[#11]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "It's considered a contract office furniture dealer and interior design firm."[#19]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "It's actually medical services and adaptive equipment for vehicles, for people with disabilities."[#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "We do automobile service, so oil changes, car inspections, repair, so if one has a faulty part or something like that, he does that type of repair."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "We mainly specialize at this moment is construction site security, so everything pertaining to construction sites. We might link a construction site. We specialize in

deployments of evaluations at construction sites and just assess the trade, methods that we have, and all that stuff. But with ours, it's specialized in construction and construction-related. That's where our service is different, because we have familiarity with the whole construction industry, with all the, I guess, the importance of a construction site. We focus on putting security guards there and having the knowledge that we have over the past couple years."[#35]

- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "I just make greeting cards now, some other things, but basically greeting cards."[#41]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "We do auto sales, auto repairs, state inspections, general automotive, cars, trucks, SUVs, all that stuff. Sales and repairs, anything from brakes to engine, transmission replacement, wheel alignment, all that stuff."[#46]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "We have a farm market and wedding venue. And we are organically grown growers. We are not certified organic, but we do grow our produce and our blackberries."[#50]

Years in business. Fifty-five businesses reported their date of establishment. The majority of firms (35 out of 55 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Eight out of the 55 businesses had been in business for between five and ten years. Twelve firms were newly established, having been in business for less than four years.

Twelve firms reported they had been in business for fewer than four years. [#1, #4, #9, #26, #32, #36, #39, #42, #45, #47, #51, #52] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "It would have been I want to say probably around about 2016, '17 is when I started an LLC. And it may have been a little earlier than that. It's been about three years ago, three or four years ago that I started an LLC. And the main reasons for the LLC was to go after the government contracts. It had to cease two years later."[#1]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have been in business four years."[#32]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "We stood up in November, really two years plus. Yeah, we stood up in November of 2019."[#36]
- The Black American male owner of an uncertified MBE professional services firm stated, "We've only been in the business for a year."[#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I haven't even been in business for myself, but not even a year yet."[#42]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "We started November 17, 2017."[#45]

- The Native American male owner of an uncertified MBE construction company stated, "We've been in business for just over four years."[#47]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "February 2017 I opened the doors."[#51]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "We've been in business for a little over two years."[#52]

Eight firms reported they had been in business for five to ten years. [#10, #15, #24, #35, #46, #50, #55, #58] For example:

- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "I want to say it's about five years now."[#10]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I started it in 2010."[#24]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "We opened the company in 2014."[#46]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "This is the beginning of our fifth year. So, we've been four years in business."[#50]
- The Black American male owner of an MBE-certified professional services firm stated, "We've been in business since 2015."[#55]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "We have established in 2015."[#58]

Thirty-five firms reported they had been in business for more than ten years. [#2, #3, #5, #6, #7, #8, #13, #13, #14, #16, #17, #19, #20, #21, #22, #23, #25, #27, #28, #29, #30, #33, #37, #38, #40, #43, #44, #48, #49, #53, #54, #56, #57, #59, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "We founded this business in 1988. 32 years."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We started in 2005."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I started the company 16 1/2 years ago."[#5]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "I'd say probably sometime in the 1950s. I think it was 50."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "This is my company and I have been here since... I started in 2005."[#8]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I've been with this firm since 1975. If you go back on the history of the firm, it originated sometime in the 1960s. When I got there in 1975, it had a different name. The original founder was there in 1985. He passed away and it became a design collaborative.

And that's when I moved up to an ownership position with a couple of other guys. We've been here as a small architectural firm for quite a while."[#12]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "24 years and 10 months."[#13]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "We're celebrating our 20th anniversary this year."[#19]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Since 1968. The business was established by my father. That was in... I'd say incorporated the business in 1968."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We've been in business since June of 2005."[#22]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "My husband and I started the firm in 1993."[#25]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "It's a family-owned business so 46 years."[#29]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "2004 is when we started. Then we incorporated as an LLC in 2008."[#33]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "We are currently in business we're working on our 26th year in November."[#40]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "22 years old. I started it with an angel investor in 1998, and it's my third business I've done in my career."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We started our business in 2002."[#44]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We've actually been in business for 100 years. We are celebrating our 100th year anniversary. My father started the business in 1920."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "Back in 2003, we officially opened our doors for our business."[#49]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I've owned the business for 11 years. The business has been around for 35 years."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Started in 1947."[#57]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority (37/60) of business owners and founders had worked in the industry or a related industry before starting their own businesses. [#3, #4, #5, #6, #10, #12, #14, #15, #16, #17, #18, #19, #20, #21, #22, #23, #26, #27, #32, #33, #34, #35, #36, #39, #40, #42, #43, #44, #45, #47, #49, #51, #54, #55, #56, #58, #59] This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement. Here are some of the founder stories from interviews:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We had done some work for the state at our former employer and knew there was a need to serve the market in a smaller project size, and so that's what we jumped out and did."[#3]
- The Black American male owner of an MBE-certified professional services firm stated, "Yes. I was in the Navy, and when I got out of the Navy, I finished my engineering degree and started working for a contract company. It seems like something that I should go into through government contract plans. And so, I decided to just slowly start an LLC and then slowly develop it over a period of time. It's not something that's fully developed yet, but it's in the process of building an actual business. That's how it came about."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "So luckily when I moved here, I had clients sort of built in already, if that made sense and I started the firm. I had opportunity at that time for someone to help me financially to start the company and I did so. And it's grown since then."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I had most of my training in the United States Navy in their Construction Division."[#6]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "So I was an employee at a government contractor for about 10 years and I just kind of got burnt out and I thought, you know what? I've gotten really good at this whole security and engineering thing. I'll going to try sharing my skills and experience with non-government entities. Right? Because everyone always says, oh, companies aren't focusing enough on security. And I'm like, well I'll help them get it right. And so that's when I stood up the LLC. And what was nice about it is that because I have a very high level of experience, there aren't many companies that could afford to pay me to be an employee full time, but it was very easy for them to pay a consultant quarter time or whatever for six months to a year to help get a product off the ground or something along those lines. And so, it worked really well. And you'll notice I'm using the past tense. So, it was working really well."[#10]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "And these days you can't become an architect unless you go to architecture school. When I was coming up and my partner was coming up, you could still... And just like I think you can read for the law without going to law school. You could still become an architect. You could still sit for the examination without going to college. But we went to college. That was our path up."[#12]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "So someone approached me about operating a computer game and I was still act of duty

military. And I thought wow, that is interesting, that's something I want to do. And I decided to leave the Navy early and take the job. That's how I got into simulation. And then one day my boss who was then the Vice President and Chief Operation Officer, came to me and said you know you're never going to become the CEO of this great company. And he explained to me why and his... The reason he did that was to push me out. And he wanted to push me out because he felt that I could do it on my own."[#14]

- The Asian American male owner of an uncertified MBE professional services firm stated, "Both my partner and I have been working for other firms for a long time, and we just reached a point of we want to try our own approach, that's how we started our own firm."[#15]
- The Black American male owner of an MBE-certified construction company stated, "I was working with another painting outfit for many years and it grew and grew and grew, but the employees didn't go anywhere pretty much. So, I talked to my fiancé and I told her I was going to start my own business in 1990, and I did."[#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I had worked for four other general contractors and I really felt like I was very blessed and each one of them had some really awesome traits."[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "So with that being said, when I was in my 20s... So I don't know, late 2000. 2010 or 2005, around that area, he got into building. He had a partner and he needed experience, but he had the money. I was doing the books for him and what ended up happening was I got my builder's license to go into business with four builders. That's how I got my construction. That's how I started in the construction industry hands on. Then in 2010, three years later. We started that as a sole proprietor in '07. I got my license for building in '09 and then I started a company with my dad with Orr Builders in 2010. At that point, my husband and I got married and we switched the gutter company to an LLC and got it 100% legit because we were too big. Then at that point, I owned the company."[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Well, I'll try and keep it short, but it was a journey. I'm a certified interior designer. I was living in New York and in the industry for about 20 years, doing commercial work in major cities; New York City, Boston, Philadelphia, Baltimore, from Upstate New York. And in '97, I married my husband who was Navy. And in a few short months, he was deployed to Norfolk, Virginia to go overseas. And so, I moved to Virginia on his six-month deployment. That would be August, in '98. the plan was that they were going to open up a branch here and I would run it for them and start it and generate business down here for them. And the long story short part is they didn't have their heart in it. They didn't want... They didn't want to lose me, so they kind of said that, but when push came to shove and when it came time to actually start doing it, they didn't want to do it. So, I was marketing for their company, putting out brochures and attending networking meetings, meeting anybody in business here that I could, under their name. And then I got smart and thought, 'What the heck are you doing this for? Why don't you do it for yourself?' and my husband encouraged me and said the same thing. 'Why don't you just start your own thing? Instead of marketing them.' I had all the contacts in the industry. I've been in the industry for so long. And so that's what I started to do. I had my first child and he was deployed in and out for about 10

years. I didn't want to put her in daycare, didn't know a soul, didn't have a friend. So, kind of keeping her close to home, not having any frame of reference for childcare. And so, that's what I did. I started the company from home with a newborn and took her on many trips with me because I had to, and that was very well received even way back in the day. And business just took off. I earned my first government contract within a couple of years, which really kind of got things started."[#19]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I had 20 years of service in the U.S. Navy. I retired from the U.S. Navy in 1990. I started working for a government contractor doing and I worked for them for 15 years before I started my own company."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, he had worked as an independent contractor for some time and he had grown the business and it got to the point to where he was advised by attorneys that he should probably consider incorporating the business simply for business purposes and liability purposes. So, he set it up, like I said, and incorporated, on August 14th, 1968. So anyway, that's the way it was set up. He had an extensive background in this type of work before the business was established. So, it wasn't anything that was totally new to him or anything. So, like I said, that's the history the way it was set up or when it was established. And I think at that time, I mean, you look back on it now, and I think it was something that the family set it up. Of course, he held the majority of the stock, but with my mother. So, like I said, over a period of time, and with his passing and my mother's passing, the stock was passed down to us and that's where we stand today."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Okay. He worked for another electrical contractor for seven years. He got to a salary cap that we realized would not comfortably support our growing family. We already had two kids and then we had two more. Once he was informed by his boss that he pretty much had capped out at about \$18 an hour, we realized that wasn't going to get us what we wanted to do."[#22]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "They did a lot of work with environmental controls that would go inside the smokestacks of large factories and such and measure the exhaust gases from those stacks. Then, in 2007, they decided to venture into government contracting. And so, they sold 51% of the company to a Hawaiian corporation. And that then qualified the company as a Hawaiian native owned company, and they were able to become an 8(a) company, giving them certain privileges in competing for government contracting. They continued to grow, picked up a number of contracts, mostly supporting the US Army, but some also with the Navy and Air Force. And then, in 2016, grew out of the 8(a) program, and since then, we've been working to grow the company on its own"[#23]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Well I've been in the moving business off and on since 1994. And I had gotten out of the business in the mid 2000's and did some real estate and did some construction. And also, some furniture liquidation. Some bankruptcies buying them, assets, and reselling them. But when we decided to move here from New Jersey, and we picked this area. My wife is from Virginia Beach. And it was low hanging fruit just to get back into the

moving business. It was just too much opportunity to pass up. It was my past experience and also everything I already had in place as far as trucks and just the experience. So, I came here and I started a moving and storage business."[#26]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "Back in 1999, well back in 1996, I went out and got my CDLs and I was driving with different companies, truck and stuff. Then I went over to dump trucks. I always wanted to start my own. So, in 2003 I was kind of like blessed to get my first dump truck. We had a storm; I want to say it was Isabelle or Irene. So, I decided that I would start out, which I thought it was a great time, but it was a struggle."[#27]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "In this particular industry, prior to starting the business, I had about 15 years' of experience. I'm an occupational therapist, and I was doing, providing the driver rehabilitation or therapy for evaluation training for adaptive equipment, or techniques, depending on the disability."[#32]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I started it, I used to work for my company. And I saw how unequal it was, so I found people who are selling houses or buying houses. They were not reliable to do it, so I created the company to meet that need. So, I started that. So that is why I started this."[#33]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "My grandfather was working for another car dealership shop in the area and wanted to start his own."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yes, I founded it back in 2009 after working as just a regular security officer. I figured out offensive skills, and then all the opportunities out there, and it's better for me to form a business. So, that's why I went into the business."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "I've been listed as a chem-bio radiological, nuclear businessman who was in this business. So, I have four to five years' experience in the chemical and radiological business. In my previous company, I've done everything from the ground up from program management all the way to the vice president of business development. So, I had a pretty good handle on what we needed to run a business, although there was plenty to learn."[#36]
- The Black American male owner of an uncertified MBE professional services firm stated, "Well, I worked for 35 years in the engineering industry, retired from my last company after 22 years and decided to start my own consulting firm."[#39]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Well, my husband started it in '94, and in '98 I joined it. Originally it was him, he started it out of our house. He has many years' experience, and he worked for a couple of large manufacturers of cable, and as well as some other connectors, and things like that. He worked for Belden Corporation, and was a design chief engineer there. And has several patents. And then he worked for AMP, which now is Tyco I believe. So, he worked with them for quite a while. And so originally basically it was him and then he gradually added a salesperson, and then some technicians, and then along the way I'm actually an RN, and I

actually have a master's degree in nursing, so this is way out there for me. But I was helping him establish policies and procedures, and things. Well, we decided in '98 for me to join the organization and to help with accounting and giving more first team support. Shipping, and helping with the office types of things. And so that's really originally what I was doing."[#40]

- The non-Hispanic white male owner of a majority-owned construction firm stated, "I'm done this work probably about 20 years."[#42]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, I started many years ago as an engineer, building ships and freight trains, and heavy black construction, black-steel construction left Virginia in the late '70s, early '80s, or left America for overseas. And I lucked out in, I was in Louisiana at the time, and I lucked out with the 1984 World's Fair coming to New Orleans. And because I had been actively involved in politics, and I've always been around politics, I ended up garnering a job at the World's Fair in 1982, of which I did a career change. I went in there performing engineering functions, got heavily into the contracting with the sponsors of the World's Fair. Ended up going into the marketing and actually saving, and going after, and selling new sponsorships into the World's Fair. And this is where I met Judy Hampton, who Marsha-Ann Hampton, who was head of information services. And I came out of there in advertising and BS, is what I call it. But I did a career change through, from that '82 to '84 period and ended up starting my very first business out of the fair, which was an advertising agency that did a lot of political campaign management, and then we started doing lobbying and stuff. I started getting into government affairs, and lobbying, and marketing, and advertising at the end of 1984, the first in 1985 was my first business. And what I was seeing, having actively been involved with the legislative process here in Virginia, throughout the early '90s, from Governor Baliles, Governor Warner, Governor Allen, I saw that while you had a bunch of good governmental affairs shops, and this was the niche, there was nobody that was helping businesses sell to government."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, I used to be an HVAC electrical... HVAC director and electrical director for a large management firm. And when my son got out of school, I had trained him through the years. He started working with me when he was like 15, and when he graduated school, high school, we decided to start our own business. So that's what we did I cashed my 401K in, and we started our running service, and we built our business around service, not new construction. When we first started out, we built it totally around service. Service, repair, and replacements. That's what we specialize in is service, repair, retrofits. We do some new constructions but it's very limited. And that's why the crash in '08 didn't wipe us out. We didn't have all our chickens in one basket."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I worked for the Commonwealth of Virginia, and I had a great job. I had two promotions in less than three years. I got my two-year certified public manager under my belt. Less than a month later, I get laid off from the Commonwealth of Virginia. So, I pretty much didn't have... I mean, I had to start a new job. And that's the first time I had my own business. And that was just a simple sole proprietorship because I only wanted to do my own business until I had a real job with benefits and everything. So, I got on a big contract in

northern Virginia for four and a half years. But that project was over, and when it was over, there went my job. So then, I went to work for a company out of Pennsylvania selling buses for them. So, I sold buses for four and a half years. It was taking over my life. And that's when I said I'm walking away and I don't know what I'm going to do, but I'll figure it out. And I went ahead and started my company. That was in November 2017, because I had to do something different."[#45]

- The Native American male owner of an uncertified MBE construction company stated, "I'm 30 years old now. I started the business when I was 26. It's all I've ever done. I've been around construction my entire life, and was running a utility division for another company, and decided it was a good time to go out on my own, especially wanting to take advantage of the programs that the Commonwealth had available to minorities, and so I guess my background was more so in the actual running of the jobs and performing the work versus the business side of it. The business side, I'm still learning every day, but we've been doing pretty well."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "Beforehand, my only two jobs I've ever had is I worked for Henrico County Schools in the field of maintenance section for multiple years. Then I left there, went to Verizon proving that there's a lot of similarities that run parallel to the two. But Verizon is where I actually got into the communication's arena. Worked for Verizon for five years and Verizon decided closeout the department that we were working in, me and some other guys were working in, which left an opening in the communication's area. They're the best trainers in the world, I would say. It left me with a highly trainable skill. The customers I was maintaining for Verizon was the City of Richmond. At this time, they came to me and said, 'Hey, have you thought about starting your own business and doing the same kind of work you do for us now?' That's what actually sparked the interest in had me start my company."[#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I'll start out before that. Before that, for 24 years I was a manager. Well, I started out as an engineer but then worked my way up to one of the... It's middle-management with RK&K, but middle-management with Rummel, Klepper and Kahl is like one step below the partners. So that's where I was for most of the last 24 years. And I managed the regional office for part of the time, which was up to about 50 people when I retired. they basically asked me to retire just after Thanksgiving of 2016, because one thing, I was old, and the other thing is, they became management top-heavy. They kept promoting people up. It's a different sense of loss. I started at RK&K with 210 people and I left with about 2000, maybe 100 people. So, yeah. What happened is, in order to get larger business they were killing their middle managers and people under me. And people do not like to tell upper management those things. It was a need-based thing. It's like, 'Okay, we still need to have this other income.' And then I wasn't sure... I was thinking going to Walmart or going to Lowe's and greeting people, whatever. I don't need the stress that this thing has given me all my life. I mean, I thrive on stress a little bit, but after you do it... Because, before that, from when I graduated from college in '78, just about every job I had was pretty stressful. I always worked my way up."[#51]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Well, I was always interested in houses and design based on living with my

grandmother. My mother was killed in a car accident when we were really young, and when I moved into my grandmother's home, it was really old. And I used to sketch the way that I wanted her house to be. And, asked if I was interested in architecture. I didn't know what architecture was, and when she explained it to me, I told her that that's what I wanted to do. She told me, she said, 'You know, blacks normally can't afford an architect.' And I was determined that I was going to be that architect that they could afford. So, that's what got me interested. No, I've always worked with either an architecture firm or a local government as a project manager, or an architect. I went to Tuskegee University and got my degree in architectural science. And after that, I've worked for several different architectural firms from Atlanta to Richmond, to San Bernardino, California. I just decided to form Architecturally Yours because I wanted to be the architect for people that felt like they couldn't afford an architect."[#54]

- The Black American male owner of an uncertified MBE professional services firm stated, "I came to want to do a business by always working in a business the same way, form, and fashion. I'm a construction manager by trade. I went to school for it. That's what I've been doing since 2000. Working in this field has been rewarding, but I feel like I've gotten to a place in my company where I'm just hitting a ceiling. Although I still enjoy my job, I don't feel the rewards of it anymore. I started my business in the hope and sense that I could bring something more than just getting up and going to work for a check for someone else every day. I felt like I could do the job on my own and actually create something and move forward doing that and doing my business, which is still construction management."[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I purchased the business from the original owner, that was at the time, retiring. I went to work for him one year before taking over the business."[#56]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "I have PhD in computer science, and my wife also has graduate degree in computer science. So, we are technically very sound. And we've been working. I've been working in the industry outside, working with the clients a lot more. And she was working more independent, like contractor. So, we do have experience in the industry. I have lots of experience. I have patents, I have business publications."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Well, it was kind of a fluke thing. We had, under my original corporation, Hepler Construction Company, we had a contracting license in Virginia. Somehow the state messed it up and let another company form Hepler Construction Company in Virginia. So, I had to start another corporation to do work for this company we'd worked for 29 years. That was how Hepler Contracting got started."[#59]

Other motivations. There were also other reasons and motivations for the establishment of interviewees' businesses. [#1, #2, #8, #11, #14, #17, #28, #29, #31, #35, #36, #37, #39, #52, #60] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "Hoping that if I could get government contracts, that would sustain me and allow me to grow my business. Put those dollars toward advertising and marketing for private companies. Because I couldn't get any government contracts, I just thought, 'Well, I'm just

not getting it.' And I moved on. It kind of took a back seat to pursuing engineering work."[#1]

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, I grew up in the Roanoke valley, and so after going in different places, schools, working, came back to Roanoke in 1988 to start this company. And so, I had some family connections here and some people that I knew that I've grown up with actually that I relied on for first clients. And then also, just went to visit people in local governments, told them I was thinking about opening up an office. Like I went to see the Roanoke city planner, for example, and said, 'I'm thinking about opening an office here. Do you think there'd be any kind of work that we could do for you?' and she told me this 20 years later, she said, 'David, we didn't have anything for you to do, but I went to the city manager and dreamed up a project that had a tiny fee and so we could help you out getting started.' And I thought, what a great story that was. So, it was a little economic development thing that they did to kind of help us get started, which was really great. I think that would be... and I'm not telling you this, but I think it'd be maybe an interesting story that you could tell another municipality. So anyway, we kind of got grounded here, and our business model was originally to work as a sub-consultant to some of the larger firms, which is what a lot of SWaM businesses do. This was kind of before we really thought this through, but that was our model because we tend to have specialties, like landscape architects. There are not that many of us, so a large engineering firm sort of going after a project to chase it might consider putting us on the team. And that worked. That was a really good model for us. And then later, developed some real specialties with those four disciplines in house that we kind of work around the state."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I started off walking by... I'm from Tennessee originally and when I was a kid I would walk behind my dad's tractor when he was plowing the fields and picking up artifacts. They got me a book and I started identifying them and it's just what I always wanted to do was archeology, and I got a degree in archeology and technical writing in UT and then we did archeology around the United States and then we came here. My husband was in the military and he was stationed at Fort Eustace and he got out when we were up here, and we just sort of stayed here. I've worked for Colonial Williamsburg and this is my third company. The other ones I had partners and I just kind of... it's hard to do partners sometimes and so we... I started this company in 2005 and haven't really looked back."[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "I started in 2006 and I acquired it from another person, from actually my uncle. I worked with him for about six, eight months, and then he decided he was going to leave the state and so then I just kind of took over from there. Didn't really have any experience."[#11]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "So I was working on my PhD in modeling and simulation then. And I figured hey, why not? The country's in a recession. Why not take a chance?"[#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "My brothers, I have three older brothers, and they all said, 'You've always wanted to have your own company, now would be a time. You can take this time, get it started while you're taking care of dad.'"[#17]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I had started a janitorial service back in 1986 or... I think about '86. And it grew to that pretty quickly into one of the largest janitorial services west of Richmond, actually. And I ended up selling that business but one of the last things we had, was a client for our janitorial services, asked us to put an epoxy coating on this new warehouse they had built. And I didn't know anything about epoxy coatings and told the guy that, and he said, 'Well, I do.' He was the General Manager. This was Orvis, the big sporting goods company, they have a big distribution center here in Roanoke. And so, he trained us janitors how to prep a floor, to etch it, so that the epoxy could lock on to the floor and provided the material and we did this 50,000 square foot warehouse, first epoxy job I had ever done. And it came out really cool and really nice and I started researching that industry and there weren't a whole lot of people that do it. And I now know why, 28 years later, but anyway. So, I thought, 'Well, that's a pretty cool business without a whole lot of competition at this point,' and I had a group that was interested in buying the janitorial service, so that deal came together. I sold it. And then I ended up needing to have something to do. So, I started researching epoxy flooring and urethane flooring and the more I looked into it, the more it intrigued me and so, I started Blue Ridge Coatings and didn't really know what we were doing but we've always been very honest and very forward, and if I do something wrong, I quickly admit it and learned the hard way."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Okay, well my father came to Franklin. He was actually the head accountant at Union Camp which is a paper mill here in town. He came here I guess in I think it was the 50's. And he and my mother, she followed, they got married, she followed. She's a schoolteacher. She was a schoolteacher for 48 years so it was primarily run by my father at that time but at some point when we wanted to be SWaM certified, he transferred ownership, the majority ownership over to my mother and she got more shares of the stock so it was woman owned. My father has since passed away, about six years ago. So, my sister came back after college, that's what she wanted to do was come back to Franklin and help dad. And I was not planning on doing that. After college I went elsewhere but decided I didn't like what I was doing, came home, kind of got hooked on dad why are you doing this? Let's do it this way. And I took a little printing in college, so I said let's do our own in house and that's how I got started in the printing. We bought all the printing equipment and I learned how to print on my own with the equipment and have been doing it ever since."[#29]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "I decided to try something new by myself. I was working for a company and then, I was like 'It doesn't look too hard to run a small business.' I was not thinking something big. I just was thinking just to keep food on the table and pay my bills."[#31]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Sure. I just thought there was a lot of opportunity out there in the security sector, in the private industry business. So, I decided to go ahead and venture out and pretty much start a company to get a share of what's going on out there in terms of security."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "We had a need. I have another company that I was with. I was the vice president of

business development for another company in Virginia. That company provides services for the federal government primarily. We had a client that needed something that was a little different from that, and something that we thought could in fact be a conflict of interest if we tried to do both. So, I opened up this company primarily to service a federal agency that needed this kind of support, and then we sort of grew it from there. technically, but then there's just an awful lot more that you have to do just administratively to keep a business floating."[#36]

- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "BLT Engineering started out as an engineering company purely. Northrop Grumman and several other companies who do design for military and government use, and they would say 'Can you build it for us?' and 'Can you install it for us?' So long story short, we started as BLT Engineering and then really quickly started another company called Homeland Fabricators. Hence, the name Homeland, because it was for government. And that was right about the time when Homeland Security was formed. So yes, I work for Homeland Fabricators or BLT Engineering. BLT Engineering does the engineering and design side of our work that the government would require, and Homeland Fabricators does the fabrication side and installation."[#37]
- The Black American male owner of an uncertified MBE professional services firm stated, "To be quite frank, when I retired, people kept calling me and asking me questions, so I decided that I better create a vehicle where I could get paid for all these answers, I'm giving them."[#39]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "I actually opened another business, Powerhouse Investments, about a year before we opened the dealership, and it was more of a way to start planning, how do I open a business? Powerhouse Investments is not geared to anything specific, but it was, I guess, me doing the steps to figure out how to establish a business. And I named it Powerhouse Investments because again, I had not decided what I wanted to do. I went through the process of establishing the business with the SDC, getting it set up. And that business is certified, it's SWaM, a woman owned business. But again, it was just going through the process. Still didn't know what I really wanted to do, but I did reach out to the local, I think it's Longwood University, which offers a lot of help in starting a business, so I've gone to a lot of their sessions on how to start a business, how to work with the commonwealth. And then of course a year later, I had a personal experience in buying a car and just started looking into, okay, what do I have to do to become a car dealership? What do I have to do to become a car owner? So, I took the class, they have a two-day class, I took the class. It didn't sound too hard. I started preparing, I took the class, you had to take a test at DMV, I took the test, got my salesperson's license, and they have a couple other requirements to high level, the main one was having a location where you can have at least 10 cars, getting your county or city license, and also your DLL license. So, I accomplished all that."[#52]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I was the executive in charge of International Disaster Recovery for Capital One, and so seeing where the market was going. That was back in the days when they gave these wonderful packages and asked people to volunteer to be laid off. So, I took the

package and they paid me for almost a year, and I was in business in spite of being married, not because we're married. I always like to clarify that. And I did browbeat him for a year to join the company. With that, because we're both practitioners, we were like, "Well listen, if we're sitting there trying to work these things out, then other people may be trying to fight these things out too. So, could we bring those solutions?" That's how it started, but this was always my dream and I've always been extremely thankful that he was willing to join and put his talents to use to expand my dream." [#60]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars. [#3, #5, #6, #8, #9, #10, @11, #13, #14, #15, #16, #17, #18, #19, #20, #21, #22, #23, #33, #35, #36, #37, #38, #40, #42, #43, #44, #46, #47, #48, #49, #51, #52, #53, #54, #56, #57, #60] However, most firms reported an upper threshold for contracts at around \$2 million or less. For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I mean, generally, we look at the state category D solicitations and term contract solicitations. We do look for capital projects that are probably in the range of a million-dollar fees or less, but not too often do we go after those. And those could be construction up to four to five million possibly." [#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Roughly anywhere from about \$10,000 to about \$300,000 is fairly typical." [#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Anything from 750,000 to 5,000,000." [#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The average is probably 50,000, 60,000. And then sometimes there's big ones like couple of million, but those are kind of rare and in between." [#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I would say the average size is probably \$15,000 to \$25,000 projects." [#9]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Anywhere from 60,000 a year to 200,000 a year." [#10]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Contract-wise, we had quite a few larger contracts in the \$100 to \$400,000 range that greatly helped that. A pretty large account [could be] anywhere from \$200,000 to \$300,000 in a year." [#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "From almost nothing, from minimum, to a million and a half per year." [#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Anything from things that are happening at the port from \$150 thousand to NASA opportunities in the hundreds to two hundreds of millions of dollars." [#14]

- The Asian American male owner of an uncertified MBE professional services firm stated, “I would say \$5,000 is the lowest, and then probably \$60,000 is the highest.” [#15]
- The Black American male owner of an MBE-certified construction company stated, “The low being anywhere from 5-7,000. The high being anywhere from 7-30,35.” [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, “Pre-pandemic it was probably somewhere between one to three million. It's up to a million.” [#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, “It could be a million up. I did bid on a couple state jobs that were I would say \$250, \$300 but I can tell you the problem I have found is the pool for SWaM is so big that I'm never going to get a job.” [#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, “Oh, \$1,000 to \$4 million.” [#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, “We have contracts of maybe hundreds of dollars all the way up to 70 million.” [#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, “We have performed contracts in the five and six and seven-million-dollar range, we prefer to do work or do contracts somewhere in the million and a half to the three million range. We just feel like that's how we're set up and the way we're structured that lends itself to a more efficient operation and something we can manage.” [#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, “We do only hold a class C light contractor's license right now, so our jobs have to stay \$7,000 or less for a phase. Even if we do a bigger job, we have to do it in phases so that we fall underneath that legally.” [#22]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, “So our lowest is 80,000 dollars a year. And our highest should put us around two and a half million a year.” [#23]
- The Black American male owner of an MBE- and DBE-certified construction company stated, “We are we could do very big contracts. But unfortunately, it's not very easy to get contracts. So, we generally get the low ones that nobody wants, or the ones that aren't paying any good money. And we struggle with it.” [#33]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, “It depends. Small ones are usually under 3,000, midsize could be 100,000 to 200,000, and larger ones can be up... We once had one go up to 350,000 for one project.” [#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, “We have some that are two or three million dollars. The ones I'm talking about right now that are on hold, are \$250,000 so they're not monstrous contracts by any means, but they're certainly substantial for our company and would allow us into the next step it allows us to invest more money.” [#36]

- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, “We bid on contracts up to, probably around \$700,000.” [#37]
- The non-Hispanic white male representative of a majority-owned construction company stated, “I think the largest project we've undertaken is about \$1.5 billion and then all the way down to very small contracts. We're more customer focused than we are project focused, so we do \$50,000 to \$100,000 projects as well for some of our customers and everywhere in between.” [#38]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, “So we frequently are sub to those companies, so our average I would say is maybe \$3 million, and in construction they'd go upwards to nine or 10 million dollars in projects. We currently have a couple of large IT projects that are like three and a half million, and we have a construction that's like nine million. For us, this time of year because it's government mine season, we may have 50,000, we may have 100,000, or we may have a few million. So, they're constantly working on proposals, and bidding. We have several GSA scheduled, so a lot of those contracts are not large contracts. Some of those come in and they just buy something for say, \$1,000, but some might be \$10,000, so it just depends on the need.” [#40]
- The non-Hispanic white male owner of a majority-owned construction firm stated, “I guess the lowest would be like a \$245 for delivery of some driveway material to a \$20,000 clearing job.” [#42]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “My smallest clients are 18,000 a year and they, as usually a part of their executive marketing team or business team. My standard clients are between 60,000 and 180,000 a year.” [#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, “The cheapest thing that we do would be a normal service call that could range from, our diagnostic fee is \$90, between \$90 and \$125 depending on the system, and then the most expensive thing we do is if we do change outs, installations, whatever like that, it could be up to \$50,000.” [#44]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “The most expensive probably that we've sold probably like 14, 15,000. And the cheapest is probably in the \$1,500 price range. Those are just the most expensive versus the least expensive.” [#46]
- The Native American male owner of an uncertified MBE construction company stated, “I did some small stuff where it might be \$5,000, and then I go all the way up to the largest thing that I have on the contract is \$1.8 million.” [#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, “Well, right now we've got about 15, 16 million dollars' worth of work. And that's pretty much, we don't exceed that very often. We'll average putting in place maybe six... This is in-place work now, building end of the year, maybe six million dollars, seven million. Something in that range.” [#48]

- The Black American male owner of an uncertified MBE construction company stated, “The tickets vary, they can be a one-hour ticket or it can be a \$50,000 ticket. They vary.” [#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Well, the dollar amount is almost from, you'd say probably a couple thousand dollars for a little one. Those are quickies, little, Yeah, I need an answer on this. And I mostly work by the hour. Sometimes it's a lump sum. I've had one project; the total sum was 30 grand. That's probably the largest single project, maybe a little bit more, maybe 35 or something like that. Again, that's probably the largest. A lot of them range in the \$10,000 to \$20,000 range.” [#51]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, “So this year we have sold... and we do retail and a little bit of wholesaling, altogether it's 58 cars. The price range of the cars that we offer, they're in a range where we can sell them to the customer between 10 to 15 thousand. We have a couple of lower priced cars, because we do have individuals that aren't able to pay that. They want to come in and pay cash for something and be done, not have to finance. So we do offer a couple of lower range cars, but mainly between the 10 to 15 thousand is what we offer.” [#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “For my services, I would say the largest has been probably somewhere around \$80,000 to \$100,000, somewhere in that range. Lows has been a couple of hundred dollars”. [#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “It ranges from, anywhere from \$500 dollars per project, to \$5000, because I'm doing... I do mostly custom home design or additions, and some small commercial projects for tenant sit ins and to retail spaces.” [#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, “\$100 to \$3 million.” [#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I've done everything from design a front door to design a 1,500 square foot plant conservatory.” [#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “For contracts, they can range anywhere from annual spend of 50,000 up to 150, 200,000 depending on if it's a mixture of tools and services versus just services. But that's probably a really good range, about 50 to 150,000.” [#60]

Twenty-four firms reported working on contracts solely in Virginia. [#3, #6, #9, #17, #21, #22, #27, #28, #29, #31, #34, #35, #42, #43, #44, #46, #47, #48, #49, #55, #56, #59, #60] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, “We travel all over the state; Northern Virginia, Tidewater, we've gone Harrisonburg, Shenandoah Valley. I mean, we've got clients all over the state, so. There's not a ton of work right in Lynchburg.” [#3]

- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Kind of within about a 100, probably 100-mile radius. That's on average. I would say it's within that little bubble about 100 miles. And then- Sure, yeah. I'll get down towards North Carolina border. Well, I'm not too close to Tennessee, but Maryland. We get up close that way. I occasionally go outside of that obviously for certain projects, but for the most part just on average I would say I stay within that 100-mile bubble."[#9]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We try to stay as local as we can because employees, they love to be home with their families, and they don't particularly like to travel. We try to stay as close as we can. We have been out of town a number of times. We've been as far away as Atlanta, Georgia. And we try to stay local, and we try to stay with hour's drive of our location here."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We normally go as far as Williamsburg, which is about a little bit over an hour away from where we are. Williamsburg on that end, probably Suffolk on the other end. That's about as far as we go. We try not to go outside of that area. It's not cost efficient after that amount."[#22]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I did work all over Norfolk, Portsmouth, Hampton, Emporia, Petersburg, Richmond, Chesterfield, Dinwiddie. I did work all over, the most of it I just go through the brokers or all the DDOE members. I would say I estimated a 50-mile radius."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Much of it is in Charlottesville, which is about 100 miles from Roanoke. We get nearly within 100-mile radius of Roanoke."[#28]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "I just stay in the Virginia area. Like Herndon, Great Fall, McLean, Falls Church, something like local."[#31]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "We're really fairly local and because we've been here for so long, a lot of our customers are repeat customers, not just them, but their parents, grandparents, other people are family with us. So, a lot of what we do is just all local."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "We tend to offer a statewide coverage. So, wherever the request may be, we can definitely accommodate that. We have accommodated requests as far away as Danville or on the eastern shores, which is toward Virginia Beach, or even the western point of Virginia and central Virginia and Richmond area. So, we cover those."[#35]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I would go all over the state. If they'll pay me to come out there to Roanoke or way out there in the foot of Virginia, I'd go for the work. So far right now, the furthest I've gone, like Gloucester, that'd be about the farthest from here."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We service all of central Virginia and Tidewater. Probably 75% of our business is the

Richmond Metro and Tri-City area which would include Hopewell, Colonial Heights, and then we're in Petersburg, stuff like that."[#44]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "For services it's mainly locals. People within just a 10-mile radius, maybe 20-mile radius, of us. We are located in King William. As far as auto sales, I've even had people come from Georgia, Pennsylvania and stuff. But the average is, I would say, within a 50-mile radius of us. Maybe we get a lot of Richmond, Chesterfield, Petersburg out that way too."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "We try to stay within 100 miles of the City of Richmond."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We're primary areas within 40-miles or so of Richmond."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "We generally don't travel out of the State. If we did, it would have to be a very lucrative project. Typically, the central Virginia area."[#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "I would say Richmond up to 75 miles surrounding the Richmond Metro area. So, we're talking Surry County going up to, I would say as far as I would go is Fredericksburg."[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "One-hour radius of Harrisonburg. That's about as efficient as people can think to travel."[#56]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Right now I'm just doing work here and basically within 30, 40 miles."[#59]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It is primarily in Virginia. We do work nationally, but I will say a good chunk of our work is in our own backyard."[#60]

Twenty-one firms reported working in the Virginia marketplace and with clients outside of the state. [#5, #7, #10 #11, #14, #16, #18, #19, #25, #30, #32, #36, #37, #38, #40, #45, #51, #53, #54, #57, #58] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The majority multi state, Virginia and North Carolina. That's where we are licensed. In both of those states. We outreach towards Chesterfield. The bulk of our work is Hampton Roads and then we have some work down in Currituck County and Camden County."[#5]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "We just started branching out to North Carolina. Everybody kind of respects everyone's territory in the concrete business, so we try to stay on the south side. We really don't go over to the peninsula. Like I said, we've just started branching out to North Carolina. I'm talking Currituck, not Nags Head or anything out that way. Just Moyock, Currituck, what's really close to Chesapeake."[#7]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Anywhere on the planet. Global. Yeah. Like that one I had was based out of Abu

Dhabi in UAE, so I'll fly anywhere. Almost every single one of them was remote, meaning I was working remotely."[#10]

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "We're all over the state and also out of the state. We have several companies that have expanded throughout the United States and they liked the quality of work that we do so we still do a lot of work with them even out of state. We've done stuff in Indiana, Ohio, South Carolina, North Carolina, Colorado, Florida."[#11]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "We have offices in Florida, Mississippi. We have folks in Nevada, we used to have folks in California. That all stopped in March and we bid on contracts everywhere -- Hawaii, California, Arizona, Alaska"[#14]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Okay, so I'll travel anywhere. I'll go anywhere. Work is work. I'll be honest, on a federal level, I was looking at doing work. It was through the agricultural federal and it was in the state of Washington."[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Nationwide. We can go out of the country. We're working on a couple of projects right now, a couple of submittals. We don't have them yet, but those would be our first out of the country. Mostly on the East Coast, from Mississippi East up and down, as far up as Rhode Island, and down to Florida and everywhere in between."[#19]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We do work Eastern Coast of the United States. Right now, we're doing some projects up in Rhode Island. We've done work also as far south as in Texas, and then everything in between. The majority of our work is the corridor from D.C. to North Carolina."[#25]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Mid-Atlantic. We found that the farther away that we go, the more difficult it is to be cost-competitive."[#30]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I have gotten business from Florida, New York, Pennsylvania, Arizona. Most, I would say mid-Atlantic is our service area. Then primarily, it's more than Virginia, the D.C. Metro area. But we've received business from quite far away, too."[#32]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Nationwide. My intention is to do stuff even internationally at some point. what I really want to do is one or two states and I wouldn't mind picking Virginia to be honest, where then other states would see what's provided and say, 'Oh well, we need that too.' And then if I ever had all 50 states, it would be a tremendous capability, right? I think to have an opportunity to provide states of a capability, but you have to get in front of them and show them what they're going to get for their money."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Well we just finished a contract in Alaska last year, so that's how far we've

gone. And sometimes overseas. We've gone to Abu Dhabi, United Arab Emirates. And I've been over to Taiwan. So, we've done things for them."[#37]

- The non-Hispanic white male representative of a majority-owned construction company stated, "All across the country. We've got 12 regional offices, I believe across the company, as well as a number of traveling groups that have specific industry focus that travel anywhere in the United States to execute that work for our customers."[#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I am licensed in Virginia, in North Carolina, in South Carolina, and in Maine. I don't know, I may not keep the Maine one, but it's a nice place when you can get work, in the summer anyway. So mostly my work has been... I just finished a project in North Carolina last year and I'm currently working in the western part of Virginia. This year, it's 100% in-state. Last year, I think it was 30/70 is what I had figured out when I did my corporate stuff for the end of the year, beginning of this year."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The City of Baltimore, North Carolina, and some other places, Minnesota. So, we do things out of state as well. I'm registered in Florida, Georgia, Virginia, Maryland, and Washington DC. I used to be registered in Tennessee and Minnesota, but I let those drop. I would say the majority of my work is in Virginia, but again, I had done several projects in DC, and Maryland, and in North Carolina. The other states, Georgia and Florida, are sort of left over from when I lived in those places, and I haven't really done much there since I've moved here."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I would say I do 70% of my work in the Richmond and surrounding counties. Richmond, Chesterfield, Henrico, Hanover. Chesterfield, Henrico, Hanover and Richmond. But I do a lot of work in the Tidewater area, Hansen, Newport News, Port Smith. I do a lot of work in the Petersburg area. And I've done work in South Carolina, North Carolina, and Fredericksburg."[#54]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I try to stay 30 miles radius around Charlottesville, but I've done work in Boston and in Kentucky and all over. It hasn't just been limited to Virginia."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "I'm located in Virginia, but I am open to contracts throughout the US."[#58]

4. Employment. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (50 of 57 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

The majority (34 of 57) of businesses had 1-10 employees. [#4, #9, #10, #12, #15, #16, #17, #19, #22, #24, #25, #27, #28, #29, #32, #33, #34, #36, #37, #39, #42, #44, #45, #46, #49, #50, #51, #52, #54, #55, #57, #58, #59] For example:

- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Just my wife and I."[#9]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Just me. But what's nice about that is I don't have to worry about paying myself a salary anymore. Is that now it's just, hey, if it makes them money, then I can cut myself a distribution check or keep it in the company and invest it in new servers and new hardware and things of that nature. And so, yeah, so it's a fun ride, but I'm glad that I kept it at one employee because it's a lot easier to spin down a company and change its status when you're the only employee."[#10]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We have three full-time and one part-time."[#12]
- The Asian American male owner of an uncertified MBE professional services firm stated, "Yeah, at the moment we have one full-time employee and a couple of part-times."[#15]
- The Black American male owner of an MBE-certified construction company stated, "Now I'm only running 6 now."[#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We are down to five."[#17]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "We have about 10 on the team now."[#19]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Eight of us total."[#22]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I'm by myself."[#24]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We have gotten to the place of we have grown a little bit, so we are right now seven employees total. At one point we had grown up to 12 but we found that in architecture to become viable you would have to really go from 12 to close to 20 in order to get the right size projects to grow. We were not able to do that so what we did is we went down. We would like to get back to maybe the ten-employee number. That would be a good number for us. We're trying to get that, but I don't know if it's going to happen."[#25]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Most of the time I always keep everything minimum, with me. Every now and then I probably grab two or three day-workers or something depending on what the job might consist of."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Including myself, nine. Two are part time, the others are full time."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "It's just two of us."[#29]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "It's up and down because of the COVID. We are at 10, right now."[#32]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "Right now, due to COVID-19 we've lost everybody. Right now, it's just me, my partner, my wife, and my family. I mean to help out. We need to make money to hire new people."[#33]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "Okay, we have four full-time employees, of course [one] is a mechanic, so he can't really cut his hours too terribly much, but my sister and I tag-team administrative duties with my father. My sister and I are much more flexible in our hours and we certainly cut our hours for about two-and-a-half weeks back in probably mid-February or early March, we cut hours significantly, almost in half, just to try foot business until we could find out if we could qualify for any type of grant or loan that the government was offering."[#34]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Officially we have three, but I have about nine consultants. My business model is one that I have a lot of part time people that we use just when we need them. So, we have three full time employees, and then quite a number of consultants that we use for particular projects."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I used to have four employees, it has dropped down to three: me, myself and I."[#37]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "One besides me."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Right now it's four full-time employees and then we have two guys. There's usually six of us. That's the number that we like. We have two guys that help us out part-time here and there."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "Well, we have three employees now because since we became an INC, I am currently considered an employee also, as well as the president."[#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "It's just us three and we're all full time."[#46]
- The Black American male owner of an uncertified MBE construction company stated, "We fluctuate. We fluctuate to the demand of work. At this time, it's really slow dealing with the COVID. So, right now it's just a couple of us, two or three and that fluctuates. When we get through this COVID pandemic, things will get more back to a normalcy which I normally keep two to three full-time employees."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Right now we are getting ready to hire another one. So, we'll have four. one full time and three part time."[#50]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It's a one-person company."[#51]

- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "It's just me and my husband."[#52]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Just one. She's basically like my helper part time."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "No employees, just me."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Right now it's just me. The size of the firm definitely plays into it. The size plays into who you want to be, in that, do you want to be managing your employees or do you really want to be practicing architecture? I think the larger it gets, the more it's about managing people and not about practicing."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "We are a small company, like me, my wife, and also there are two more employees on average. That's the because of the size of business we have."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Right now it's just me. I'm 80 years old and I've got to debate how much longer I want to continue. Actually, I don't want to quit, but I don't know. I think maybe with everything that's going on, maybe it's getting close."[#59]

Eleven interviewees reported that their businesses had 11-25 employees. [#2, #3, #5, #8, #11, #26, #43, #47, #48, #56, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "We have 14 full-time employees."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "There's 16."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "16. Bear with me for just a second. Four part-time and 12 full-time."[#5]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "I have 14 full-time employees."[#11]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "I would say about 15."[#26]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We've had employment as large as 22 and as small as one. Seven full-time and five 10-99s."[#43]
- The Native American male owner of an uncertified MBE construction company stated, "All of my employees are full-time, and I have 12 employees at the moment."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Right now about 20. We vary a little bit up and down, in that we are mainly, we are in the construction business."[#48]

- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I have 20 full time employees."[#56]

Five businesses had 26-50 employees. [#21, #23, #30, #31, #35] For example:

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Currently I have, I think 32."[#21]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "We're right around 50 employees."[#23]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Approximately 30."[#30]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "Maybe about 30, 31."[#31]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Usually average about 30 employees, 30 to 40."[#35]

Three businesses had 51-100 employees. [#6, #7, #40] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I believe right now we're about 60. All full-time."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "I'd go with 80."[#7]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Right now, 55."[#40]

Four interviewees indicated that their firm had more than 100 employees. [#13, #14, #20, #38] For example:

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Approximately 1,000."[#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Right now we're at 122 I think, but we're hiring like crazy."[#14]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "About 420 at my last count"[#20]
- The non-Hispanic white male representative of a majority-owned construction company stated, "We are about 7,500."[#38]

5. Business growth. Business owners and managers mentioned the growth of their firms over time. [#2, #4, #5, #6, #9, #12, #13, #17, #18, #19, #20, #21, #22, #23, #25, #27, #28, #30, #32, #34, #35, #36, #39, #40, #44, #45, #46, #47, #48, #49, #50, #51, #52, #53, #56, #57, #58, #59, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "It's been really interesting to watch, because we're just steady, absolutely flat line steady. And our firm has grown as big as 28 and as little as two or three. But we're a healthy size for the kind of consulting that we do. About 12 to 15 is an ideal size. And when we grow bigger than that, it seems to kind of not work that well for what we do. And so, with regard to the pandemic, if you kind of relate it to a recession, which no matter how much you try to not have it, you have one about every 10 years. Excuse me, and every 10 years, we've been hit pretty hard, because I believe the kinds of profession that we are in, the building industry kind of really takes dives at the beginning of a recession. And especially in 2008, it was a really difficult couple of years."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "At the moment it's pretty, I guess, stagnant because it's just me and I do work a regular job. It's dead at the moment."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "And our growth has been very steady. Even through the decline in 2008 and 2009 we sustained. We didn't have to lay anybody off."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "In the past few years, seem pretty strong, strong growth."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Our revenue is up and really the network is how I kind of I guess look at growth. My network is growing because when we established this company it was in a new area and so we had to really truly and honestly start from scratch in terms of building a network. And that's I guess looking at it from that standpoint. And financially it's growing too but, obviously that's another indicator. But mainly I think more along the lines of the network that that shows the growth."[#9]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Negative."[#12]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Our industry is undergoing tremendous change in the last decade. And what tremendous change means is that we're one of the remaining solely Virginia-owned, if not the only remaining, Virginia-owned firm that is capable of doing state-level procurements, because they're too broad for the average little person, or smaller and newer firm. And yet everybody else that we compete with is either super regional, national, or international. Our main competitors are billion-dollar firms."[#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Because there weren't that many women project managers when I was coming up. There was only three of us in the area when I was a project manager for others. Then to be a woman in business there were really truly only three others. When I started that was one of my things was I wanted to raise the bar for construction. I wanted to raise the bar for women in construction. We were going to be taken seriously because we are good at what we do. We're very detailed and I was going to raise the bar for safety in construction. 'Oh we go on so and so's job and we don't have to do that.' We're talking the big boys. It was like, 'Well then maybe they should.' Now you see all the other contractors wearing the vest with

their names on the back of them and wearing the neon vest. We were the very first ones to do that."[#17]

- The non-Hispanic white female owner of a WBE-certified construction firm stated, "What happened in the last few years was that I have realized that there's a lot of opportunity on the federal level for women in construction, so I decided, especially being a woman, that the government actually needed me. It wasn't I needed it. It needed me, especially for women that want to go into this industry. If it was not for him, I would have never gotten this opportunity and for people to take me seriously, I literally had to fight tooth and nail to be successful. It took me about eight years to figure out certain formulas for certain concrete, reading off my site work because the men in this industry would not give me pointers because then I would be able to check them, so what has happened is because of my minority status, it has helped me to where I sat through all the crap and now, I've got my numbers. I can tell if a contractor's legit. The older, experienced ones want to invest on me because they know I'm working hard. They don't care if I'm a female or male, or Chinese, Mexican, Asian. They don't care. They just want a good builder. I think it's average. Yeah. What I was really trying to do was get on the federal and women-owned... the federal stuff... so that way I could skyrocket above and beyond and take the averaging. I'm just waiting for the opportunity to come by."[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "2010, it grew enough where I got a showroom space. It's very important in this industry to have a physical space and have showroom and be able to show the products you're selling to the government, to major corporations. I had quite a few nice contracts, commercially and government, a lot of healthcare contracts. And that's where I started."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "We hit the home run. It's a grand slam. I mean, I don't think... there's not many people that have grown as fast as we have or as big as we have in the time we've grown. So, I think we're the exception rather than the rule."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "It's cyclical. I mean, the work comes and goes. And the economy, the good thing about this area, the economy is pretty diverse from the standpoint of different opportunities as far as work. There are two major universities in the area. There's industrial plants. So, we've tried to cater to people or businesses in the area that we can help, and so it's kind of what I was saying. Well, we don't run all over the country looking for work. We just, like I said, we try to stay local. And by doing that, and with the history we've gotten in the logs, we've been here. People recognize that it's a stable business and that they can depend on us and whatever they want us to do, we can help them."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We just stayed small. He started with himself and his brother as the only electricians. I think we were like that for a couple of years, about three years, and then his brother left, so we hired someone else and we stayed as just the crew of two for quite a while. Then we hired a guy who was a friend of a friend and moved to the area and was looking for a job. We took the chance and we hired him, and it worked out. After a year or so we, could afford somebody else. That's just how we've gone -- just as we get busier and

busier and we can't satisfy our client base, we hire somebody else, and so on. We grew from a crew of two and one truck to now we actively have three trucks on the road every day, each with a crew of two in it. Thank you. It's not huge, but we've actually chosen not to get too big. Again, we have a family. The company already encompasses a lot of our time, so we choose to stay where we're at. It allows us to give personal service, it allows us to keep our overhead down so that we can keep our prices fair. Definitely learned a lot of hard lessons along the way, financially and what not, but yeah. I think we're pretty much about where we're going to stay. We might add one more crew to the fleet in a few years, but that's about as big as we want to get. We definitely have seen, I'd say, 10 to 15% growth a year, for four years, which isn't too bad. I will say we've grown to the point where we used to get a refund from the IRS and we don't anymore."[#22]

- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Well, it was established in 1988. I would look at from then to 2007 as one block of time, and this is for a different company, just because our whole focus has changed from 2007 on. And actually, over the last, I'd say, four years, we were in negative growth, just because we've been moving from being the prime contractor to a subcontractor and having to give up, if you will, some of the work that we have been doing. It's really just us and another company that are performing those services right now. We do about 40% of that work, and they do 60."[#23]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I don't know how we compare to other industries. We are probably one of the smallest firms in the area as far as size, so we have not been able to grow like some of the other firms who are in our same industry. The firms we compete with are usually larger than us. It's been difficult to grow."[#25]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Actually to be honest, it's on a more like a flat or declining. It has been to the point where I've had to run my business and work another job just to stay out and to keep my head above the water. So I would say it's more on a decline."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I would say compared to the industry, we're kind of flat. We had trend for a rise, but generally speaking, compared to the industry, we're on an even keel. I can hardly get much bigger in terms of sales volume without adding people and I tell you, I just turned 62 and I'm just feeling like life is too short. And so, I'm real happy with the level that I've got right now."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "I'd say we're about the same as the rest of the industry."[#30]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have grown probably about... Four years ago, we started. I would say we're grown at least 50% in staff and gross sales in the last four years. We've doubled."[#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "For us, in our small area, we've been here for 15 years, so we're pretty well-situated compared to the industry."[#34]

- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Okay. The growth, it's been slowly growing with each and every year. We did take a little hit because of coronavirus, there were shutdowns, but typically it's growing each year as there's more construction. So, the more construction bids in Virginia, the more, I guess, assignments that we get, and we compete for assignments. So, it's heavily reliant on construction sites."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "The money that started this company all comes basically out of my savings, so I'm constantly putting in owner equity into the company to keep it going. The goal at any point is eventually have the company be self-sufficient where the money coming in, I can eventually start to take some of that owner funding back out of it. Now, I'm not doing that. I don't take a salary at all. I just keep pouring it in."[#36]
- The Black American male owner of an uncertified MBE professional services firm stated, "Well, I guess because we're new and we kind of came on board in the midst of this pandemic, it's really hard to measure the growth in comparison to what would be a normal year and also a normal environment. Right now, like I said, we're not aggressively out pursuing clients because some of the projects that they have are on hold and they're working their way through this pandemic. So it's really hard to compare with a normal year because this hasn't been a normal year."[#39]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "And then our two sons worked for us in the summer, like doing cable and things like that. And so, I really have become really sort of the person who is in charge of compliance. We're ISO certified to head that up, to be in charge of all of accounting, and all the HR that we need. And really just security. Security is a big part of our company, and so I'm also the security officer. So I always say, 'what everyone else doesn't want to do, I get to do.' Well, it's become more competitive for us. I would say that our growth has kind of plateaued a little bit. We're hovering around that 30 million range that we just can't see to get to the next large growth pattern. The part of the problem there is, I think a couple of things. One is government shutdowns have not helped overall. Because people are looking at where they're spending their money, and how much. COVID on the other hand may be a benefit for us has been, people do need to tele-work, people do need to have video teleconferencing, and audio/visual available. So we haven't seen a large request for that, but yet some of our customers are getting more money for the fiscal year to be able to spend more for those options So I would say that that's a potential of real growth for us. Because a few years ago, even with 9/11, the travel government agencies started looking at, what are we doing here, where are people going, and how much travel is there. So we have steadily increased our sales I think, by a few million, to support video teleconferencing. And some of the agencies, for example we do have a contract with Mind Safety and Health, and what they have done is add a lot of video teleconferencing to decrease the travel. Because some of the restrictions in coal mines, and things, and people they're trying to use more money, more funds for safety versus travel dollars, and traveling to DC or whatever. So we've seen quite a large uptake. They're in really remote places, so we've actually had some support through that contract that we've had that has increased. I think DOD definitely has more money than anybody, and so we definitely, as the area has changed who's more important, whether it's the European commands or the Asian commands, or the Pacific commands, we've tried to

strategically be in those locations. So that we support those areas. Hence things like we're trying to have a strong presence in Africa now, because Africa has become a big area for the US to concentrate. So I would say the potential is there, but it's just really a lot of it is really like the pandemic, and like the shutdown that has happened. In the past the shutdowns have not affected us as much as the last one. The last one did affect us because those agencies involved were large customers of ours, so I would say that we had sort of a holding pattern and the last 2018, '19, early '19, and so we had to recover from that a little bit."[#40]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I'd say we're 50/50. I could have blown it up to where it could have been huge. But I didn't want that. Now, my son might blow it up. We could blow this thing up anytime we wanted to. We usually run about a week to two weeks behind. Right now we're scheduling installs and everything about 30-45 days out. Yeah, we could open the throttle up anytime we wanted to. We don't want to do anything that we can't write our name to. We won't do the jimmy-jam jury-rig stuff. If we can't do the job correctly, we'll walk away from it."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "In 2018, we only had income of 4,879 dollars."[#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Looking at previous years for us, we have been growing."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "I'd say the first two years, it was slow-moving. We stayed pretty, we plateaued in the first two years. Over the last 18 months, the business has doubled."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Ours has been very steady and not too rapid. We're not out to get the most volume in the world. We are careful about what we take. So ours is maybe, it's certainly a whole lot less than some of them that just stretch out, grab everything they can get. We're more in the middle of the pack, as far as aggressiveness is concerned."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "I'm going to say we're steady. There are mega companies out there that probably do millions of dollars' worth of work. They travel all around the United States and various areas to get the work. I'm more family-oriented business. I know that as a technician I did not want to travel out of town on a regular basis, because family's need their fathers or mothers depending on who the technician is. I typically don't chase small jobs all over the area because it takes people away from their families."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "It's been pretty flat until this year. We've seen a rise in the sales volume, I think, because of COVID because people don't want to go to the bigger stores. And then we are just getting our wedding venue business going."[#50]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, my size, it will be single person, but I know several people that are doing kind of what I'm doing. And basically, everybody that I know that's trying to work and some experience, a lot of it has to do with your previous employment. And the people that I know

are mostly about my age or they're on their own. So we're all turning down as much work as we're accepting, sometimes. So growth, it's like you're holding back the reins on a horse more than you're say, 'Yeah, I want to.' Because, if I wanted to grow, I could get more work and I could hire people and I could figure out an office and all that, but I've managed people and had those joys most of my life."[#51]

- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "It is very, very slow for us, because of the situation, number one, it's just the two of us. Number two, we're starting a business, so we would love to go into and do it full time, but to be successful, meaning we have to have money to fund the inventory, the operation of the business, so we use a lot of our personal money, so we have to maintain or current job until we can get to that point where we can just grow immediately. But it's a process."[#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, I think as far as architects nationwide, 40 or 50% are just one person like me. I thought I would've grown more by now, but the recession kind of put a big dent in those plans. But I survived the recession, and probably almost as busy now as I ever have been since I started. Even though I lost some projects because of the pandemic."[#53]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "We are considered a mid-size construction company in this area. I would say we have kept suit with other people of like size in this area."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Much less. I never really aspired to be in a huge business. I like what I do, so I've really just stayed at three people tops, including me. So, kind of on purpose."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "I'm looking at the technology area, we are in a very niche area. That area itself is very demanding in the industry. Startup is options working through several layers, not just one layer of consulting, but several layers. Going through several layers, it's not really viable solutions. And pretty much you can't grow, and you can't pay enough to the employees. This is our situation. We were the forefront, we were the prime in the contracting, then we would be able to grow much better. So this is something that I feel that we are not there that we're supposed to be."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Well, up until we lost that big contract, it was going as big as I wanted to get. Since then, it's down and that's one of the reasons I got to make a decision whether to continue. At the present time, we're basically just covering overheads."[#59]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Overall our company, and I, knock on wood, especially during a pandemic, we are growing."[#60]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing. [#5, #8, #10, #11, #12, #14, #16, #19, #20, #21, #22, #23, #24, #26, #31, #34, #35, #37, #39, #42, #44, #45, #46, #47, #48, #49, #50, #51, #52, #53, #54, #56, #57, #59, #60] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think a lot of firms that do what we do are large, multi-city firms. Even though we have two offices, they're fairly closely located and logistically we've done that more for personnel. Many of the firms that we compete with are very large firms that have hundreds of employees. We've stayed local, which has been very beneficial to us I think."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "You mean just the growth or... I think we're kind of a little bit ahead of other companies that are our size. But then there's big companies like Aecom and those big companies we also compete against, but they don't really... We very rarely compete against the big companies because they're going for more the gigantic government contracts, which we haven't had very good success going for because they think our rates are too low. I think the organizations are so used to looking at large companies with large overheads and stuff like that. We have... our overhead is really low because we own the office building. We own all of our equipment, so it makes a big difference kind of thing."[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Oh, let's see here. I would say it is... compared to the industry, man, it really depends on what industry you referring to. Because if you're referring to the commercial world, I would say it's kind of tracking with that because the commercial world is kind of taken a pause with... There's some things they're doing well, but the kind of stuff I do, that's a lot of research and development and deploying new products and developing patents and things of that nature. And so, it seems to be pausing a little bit, which is to be expected with the virus, and they're just basically treading water. Right? And so, in that sense, I would say it's tracking. But if you say, oh, the security industry including federal state and local government, then I would say I was declining because federal state and local government business is ramping up, which is why I then just went and got a straight up normal job."[#10]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Mainly grassroots. A lot of it has been grassroots and then relationship stuff and we have a really strong word of mouth. That's how I've actually gotten a lot of the contracts that I have is the companies hear about us, contact us and want us to bid on the projects just because we're not very competitive on price. We don't compete on price. We compete on quality and value so we kind of stand-alone as far as that goes. So, the companies that like us and understand, and we have good alignment, we have great relationships with, and those that don't are more than likely getting stuff from other people."[#11]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Our history has always been that a great deal of our work is walk-ins, referrals, just people who know us or people who see one of our projects, and like it, and seek us out. We have a website. We have some contacts. We really don't market ourselves very much at all."[#12]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Yeah, well I mean I think the average business like mine doesn't grow anywhere near as rapid as we have. I think it's mostly the focus of the market. Cyber, obviously, everybody here is about it. We're experts in it. The other one is autonomy, building autonomous and robotic type systems, we're experts in that. And then the other one is the network services,

data centers, lead services and other types of services that everybody needs when it relates to e-commerce."[#14]

- The Black American male owner of an MBE-certified construction company stated, "I have two websites. One comes from a marketing firm that does lead referral, which we've been on that for five or six years, so the name is out there pretty good. Then I was with the Blue Book for a couple years so that got my name out there real good, so I get a lot of invites. The Blue Book is one of the contractor services that you can go to get leads, to get you name in with all the GC's all over the United States. So, we've got that, and now my own website, which we just revamped that, and now we're running a new campaign now with my own website over the next few months. Then I can cut loose from everything else and just stay with my own website."[#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Honestly, a lot of the marketing has been kind of bootstrapped. We're tied in very closely with architects and design firms. So, we work on very large projects. We're not transactional, we're not like an OfficeMax, Office Depot type. We are contract and project based. So, a lot of it is word of mouth. When I first started, a lot of clients that I was working with in New York came with me and I managed their projects from Virginia Beach. And it was a little bit more difficult back then, but not impossible. Technology wasn't what it is today. Our government contracts sort of do some marketing for us. The government needs to contact vendors who only hold these contracts. So a lot of these projects come to us. Now, whether we win them or not is on us, but the opportunities come to us. Commercially, we do some print ads. We actually have a radio ad going on now, we have for about a year. COVID has certainly slowed things down on the commercial side. We network, we attend industry functions, a few business professional groups, word of mouth, networking groups, referrals. This is the first year that we've actually... with the radio, the first time we've ever tried that. So, that's new for us. But yeah, email marketing. We do all that."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "We don't really have a marketing department. I think we just started having one about a year ago only because we're kind of marketing the civilian now. But I think most of our work is marketed by our employees. They love our company. They do a hell of job with what they do, they impress the customer, and the customer wants us back and they want us to do the work. So, it's all about our people."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We belong to a couple of organizations. One is the Association of General Contractors, and we belong to the local, or I guess we belong to the state Home Builders Association. And so, like I said, we are listed in their directories as far as the business that we're in. We don't do a lot of advertising because a lot of our work, as long as we've been doing this, people know who we are, and they know what we can do. And we're recommended by a lot of vendors and people that we've worked for. So, like I said, it's kind of word of mouth, is just, I guess, the biggest thing."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We don't. We're actually completely word of mouth. Yes. We've never really put advertising into our budget. We did actually just get a website a few months ago. We had a website a few years ago, but I didn't like the company that was running it. I didn't like the

way it was run. It was too expensive. I created one about three months ago. We finally got into that part of the digital age. We are on Angie's List, we are on Yelp, but we don't pay. They have services that you can pay for advertising, we don't. We're only on there because our customers have put us on there. They Google. We have Google Reviews because people put us on there. But we have been from the very beginning just word of mouth. Yeah, we started with the people that he was doing side jobs for that became customers, and we just grew from there."[#22]

- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "We have a director of business development. He primarily talks... There are a couple of others of us who take part in it also, but he directs our efforts to talk to especially the small business advocates of many of the bases and the uniformed services that we either work with or would like to work with and work through them to find out what kind of work might be necessary. And then, we're involved in a number of different business development groups, where basically a lot of other small businesses get together, share our different capabilities, and then look for teaming partners to work on these various contracts."[#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I network within the Hispanic community. Referrals, word of mouth. I get recommended, and I go looking for work. I just registered for the City of Virginia Beach, for their procurement program. So I've got a couple of people that, 'Hey, you need an interpreter? Here's Olga.' My business is more referral business right now. So, with the SWaM certification, I'm hoping to enter into a new realm or applying or soliciting. Looking at solicitations and doing paperwork to see if I can get in. So, I need that practice."[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Commercials, print media, digital media, networking."[#26]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "Mostly my service goes by neighbor's neighbor, so that I can do that more. And I just use flyers at the beginning of the season. And that was mostly it. It's mostly from a recommendation or neighbor to neighbor."[#31]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "We run ads on the local radio stations, I have created a Facebook page for it as well as a website that I update almost daily, our Facebook website I updated almost daily at one point. It almost markets itself."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I know there are other securities out there, but what we typically do is, we chase after the specialized contracts. So, usually the other security companies just get as many contracts as possible. But with our packet, we just do specialized contracts, and we make the same amount as if someone had 10 or 20 contracts. Mostly online and sometimes we do mailing. That's how we pretty much do our marketing. It's, mostly, like I said, focused towards the construction industry. So, we target construction companies or building owners that are building a new foundation or a new construction project."[#35]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Through the internet. And word of mouth. Actually, I have a couple store fronts

where I've worked for some people, and for a portion of what they wanted me to do, I have a few machines that can make signs and what have you, so I said, "If you let me put my sign up I'll reduce your cost." And sure enough, they do. And then I give them a percentage of whatever they sell of my work" [#37]

- The Black American male owner of an uncertified MBE professional services firm stated, "Well, we're standing up a website and also we use social media and it's primarily word-of-mouth and reputation." [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I put it out there on public media, Twitter, Facebook." [#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Several different ways, actually. Naturally, we use the media. We used a PR business to set up a website, and we also use a website firm that does that. We do some mailers, drop-ins, and stuff like that. Townsquare does our website for us, PR Business does our marketing across, what is it? 88 search engines or something like that." [#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "A lot of its word of mouth, just because people know me on the national level pretty well." [#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "It started by word of mouth. Started with just the people around the area that could see our shop. And then that person was happy with our services and our honesty. And then they told their friend, their friend told their friends. So now, like I said, it's like the spiral effect. We do have a website. It's mainly for auto sales that we started it because at one point we were financing cars." [#46]
- The Native American male owner of an uncertified MBE construction company stated, "My market is, I market my firm literally only by word of mouth. So, contractors contact me, I get invitations to bid their work." [#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "It's about 50-50 hard bid work in the open market, and negotiated work with clients we already have had, and also with people that are new, that know our reputation and call us and want us to talk about doing their work." [#48]
- The Black American male owner of an uncertified MBE construction company stated, "We have presence on the web. We have business cards, things of that nature. That's typically how our business operates. As you meet people, there are organizations out here that you can join that deals directly with the contractors. So the contractor will call one of the companies that I use is Blue Book. We use them a lot. We have a subscription with them yearly. As projects come up, instead of the general contractor going out and finding their own people, they'll subscribe to the Blue Book system and you have a variety of contractors, whether it's communications, plumbing, electrical, HVAC. All of these people have memberships. What will happen is, a blast will go out to all of the contractors." [#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "We're doing mostly online marketing right now through Facebook advertising." [#50]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "He did my first website. And you can look at that. I have to update the projects on it. I've got some write-ups I have to get to him."[#51]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "I will say some of it is from advertising, on Facebook. We are also signed up for Cars for Sale. Once you get a customer and you provide a very good service for them, they tell people about you. So, some of these people that are out of state, they are people that maybe my husband knows, because he's part of a motorcycle association that is worldwide. Also, he has a fraternity, so there he's reaching people not just here in the local community but all over. We advertise with a lot of different vendors, Cars for Sale, Car Gurus, all of that. And some of them, when COVID-19 hit, they reduced some of the costs over the first couple of months, but now we're going back to what it was, and it's just not there, the sales are not there to try to keep paying them their regular amount. Carfax alone is like \$400 a month, so we're having to cancel a lot of that and try to just make an informed decision about who we're going to keep and who we're not going to keep."[#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I don't know that I've had barriers for that. I have a website that I developed myself. I'm on lots of online platforms, get the name out there. Earlier in my career, I had a phone book and things like that. But I think most of my work now, now that I've been here a while, is just word of mouth, and stuff like that. I don't really have to do anything."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "My business mainly comes from word of mouth and I do a lot of work with contractors, for contractors. Just sometimes I would be in my car and I'd see a construction truck, and I'd walk over and hand them a card, and tell them what I do, and if they have customers that need my services, please have them call me. So, basically just word of mouth, and me handing cards off to contractors, or if I see work going on, construction work going on, I'll walk up and talk, and pass my business card off."[#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "We have a website and word of mouth, basic. Most of our work is repeat customers."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Most of my business ultimately becomes word-of-mouth. I'm on Pinterest, I have a website, I'm on Houzz. I really don't find that to be much of a Marketing tool, other than once somebody calls me, they say, "Oh, can I see some of your work?" I send them to the website or Pinterest or Houzz."[#57]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Mainly just repeat customers. I've got a website, but mainly just repeat customers. We get a few customers from the web. But mainly, especially if it's a small area where we live, I know everybody, and everybody knows me. That's mainly how we... There's only like 20,000 people in this whole area."[#59]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Through a lot of different ways. Let's start with conferences. There are various IT conferences that we participate in. We also do a lot of direct email and direct mail, and

then follow ups. We'll do that, we'll also just having been around for 13 and a half years, we are very keen to changes in the administration, new governors, things like that and continuing to maintain that relationship. But a lot of it is that outreach, and then the one-to-one follow up. A lot of work in maintaining those relationships."[#60]

C. Ownership and Certification

Business owners and managers discussed their experiences with SBSB's Small, Women, and Minority (SWaM) certification program and other certification programs. This section captures their comments on the following topics:

1. SWaM and other certification;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the certification process; and
5. Comments on other certifications.

1. SWaM and other certification. Business owners discussed their certification status with SBSB and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Twenty-seven firms interviewed confirmed they were SWaM certified. [#1, #2, #3, #5, #7, #8, #11, #13, #14, #16, #17, #18, #19, #21, #26, #27, #29, #36, #44, #45, #48, #52, #54, #56, #57, #59 #60]

- The Black American male owner of an MBE-certified professional services firm stated, "I got the SWaM certification. I never got anything out of SWaM. I've only been successful with local contracts. I've never been successful any state level contracts."[#1]
- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Yes. We have SWaM business, and actually in Virginia, we're also a micro business; we're both of those categories, yeah."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We're SWaM and Micro, so we're small and micro."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We were an LLC previously and we were SWaM certified. We allowed that to expire and then I guess about two years ago we became SWaM certified again."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yes, SWaM. Probably since 2005."[#8]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We are the rarest of creatures in Virginia state contracting. What that means is, we are a woman-owned SWaM. We do not fit within the parameters of small, but they do not preclude, in theory, minority and woman-owned firms that clearly fit. We're 100% woman-owned, so we clearly fit within the ownership portion of SWaM. What we don't fit within are the small parameters."[#13]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "I'm SWaM certified. I graduated three years ago from the Small Disadvantaged Business Program from the SBA and I'm still self-certified as a small, disadvantaged business."[#14]
- The Black American male owner of an MBE-certified construction company stated, "I tried to do SWAM a few years ago and talk to some people. I made some contacts and everything but nothing just resolved of it you know? The thing about SWAM is when you're doing government work, and you're a painting outfit, it is so hard to find paint as it has been for many, many years, that can get on a military base. Which was one of our problems, a lot of our guys could not get on a military base. So, I didn't pursue it as hard as I wanted to. I have a cousin that has came out of the military and now he does government contracting up in D.C. and he helped me do all of the certifications, get in there, get my name in there and all of that stuff, but nothing resolved from it just because of the employee issue."[#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "SWaM certified. We've been SWaM certified 15 years."[#17]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Yes. Small and woman owned."[#19]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The SWAM certification is all we have."[#21]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "I'm a service-disabled veteran, or a SWaM or disadvantaged business"[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yes, I have the DBE and SWaM."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "We are certified as SWaM and woman owned. Also, micro certified as well."[#29]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "We are SWAM and we're micro-SWAM and we are most importantly, DBE."[#45]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We are a small business. Yeah, I think we're a SWAM."[#48]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I have the SWaM certification."[#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "We are SWAM small business certified."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I'm a SWaM member, at least I think I'm up-to-date."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We have several. With the Commonwealth of Virginia, we are certified as a micro-SWaM business."[#60]

Three business owners explained why their firm sought certification. [#25, #48, #56]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "You know, for the longest time when we first started the firm, we did not go after any... certification, because we were like, 'No. We're going to do this based on the quality of our work.' Because you want to be judged on the quality of your work. Then we realized that we were just being incredibly naïve, because we were not going to be given a chance to prove ourselves without the doors being opened because of the minority programs." [#25]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "There are some that required it, and that's how we got certified. I think that started about five years ago, we bumped into one, as I recall, down at the College of William & Mary, and they required it. And so we got certified, and we had no, it really hadn't been of consequence since then. And we're already doing pretty much what they require." [#48]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "When I started, we started working for James Madison University, and they wanted us to become SWaM because it'd help them. We do a fair amount of work on the campus. For me as a SWaM, I've gotten zero benefits from it. If I could've certified as a woman-owned business, I would've. It certainly would've helped us." [#56]

Eight firms interviewed were not certified but were in the process of applying. [#6, #24, #28, #39, #43, #47, #55] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I am currently pursuing the Veteran-Owned Business classification and that's in small business." [#6]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I don't have any of the certifications yet. I just sent in my SWaM certification, and I incorrectly checked in the DBE box, and I didn't have the proper documentation. So I went back and fixed it, and I submitted it again. And I'm waiting to hear." [#24]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "We were SWaM certified and still are eligible for SWaM, but I had to change office assistants here and it fell between the cracks. Our SWaM certification has expired and I've actually done a file folder where I'm starting that application process over again." [#28]
- The Black American male owner of an uncertified MBE professional services firm stated, "No. We've only been in the business for a year, so we are in the process of pursuing those certifications, but we have not obtained them as of today." [#39]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, we have been SWaM certified two or three times. It's such a cumbersome process. We're in the process of trying to redo that again." [#43]

- The Native American male owner of an uncertified MBE construction company stated, "I'm working on, it's been quite a task. I hope that I'm getting close to the finish line to get my SWaM, as well as my DBE. Once I get that under my belt, I'm going for my MBE."[#47]
- The Black American male owner of an uncertified MBE professional services firm stated, "I used to have the SWaM minority-owned business. I have put in for re-application through that. I had it for three years and then it expired."[#55]

Fifteen business owners and managers explained why their firms had not pursued

certification. [#9, #10, #15, #30, #35, #36, #37, #41, #42, #46, #49, #50, #51, #53, #58] Many uncertified firms were unaware of the certification or its benefits. For example:

- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I don't. My cousin's an attorney and she recommended that I dig into that. But I just haven't done it, and I don't feel like I... Looking into it I could probably qualify myself, especially with my wife, but it hasn't become an issue to be honest. It hasn't kept me out of any work, not having those certs, so I just haven't pulled the trigger on that."[#9]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Veteran. I don't know if I'm certified with the State of Virginia. I never really went through the process because I wasn't seeking out Virginia contracts, but I am service connected, a disabled veteran, so forth, so..."[#10]
- The Asian American male owner of an uncertified MBE professional services firm stated, "Oh okay, we probably considered to do that, previously we didn't do it because we weren't targeting government project, public sector project. So, we didn't feel it's necessary but if we have chance, but the reason for not targeting also because we weren't sure whether we will be qualified or is it too difficult for us to get the project, things like that."[#15]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "We could qualify as woman-owned business, but we're not... My wife works here some, but she's not controlling. that's where we typically fail from the ownership standpoint. But I haven't been able to convince her to come in and take over."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "It's self-certified, I guess..."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "We are veteran owned. I'm a veteran, so we consider ourselves veteran owned small business, but not a service [disabled] veteran. We haven't really gotten too busy with trying to actually be certified as a particular veteran owned small business or something like that. Mainly because we kind of had clients, and it was a little complex to go through that process of what should be done, so we just never did. It's something we should do, obviously but getting the right information. I've not done much work at all really with small business administration we could help or anything like that. So we sort of built security on our own."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "We're registered as, but not certified as [a WBE]. Frankly, to get those

certifications the amount of paperwork, the amount of back and forth to do that, we're so small but I don't have the personnel to do it. It would take away from me trying to get my customers satisfied. My customers supplied, if you will. To get an ISO 9000 rating, by the time you get to the end of it the weight of the paper has to be the weight of the company. And then you get no work done. So, I looked into getting an 8(a) woman-owned, just a woman-owned, and it was so much paperwork that I had to keep up with that it wasn't worth it to me."[#37]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "No, we don't have anything like that."[#46]
- The Black American male owner of an uncertified MBE construction company stated, "We have had our SWaM certification. We are going through that re-certification process unfortunately. I let it lapse. I did not know it lapsed. So, we're going back through the process, we're getting ready to get back into the process of being re-certified. But I have my SWaM number that I've had for, I guess 15 years at least."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "No, but we're going to be working towards that in order to get grants in order to stay open."[#50]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I could get the small business one. I actually have SWaMs partially filled out, but what happened is I started getting calls for business before I needed to do it all, sort of, because people that were past clients heard that I was on my own. So, I haven't had to do it. I guess that I should do it, but it wouldn't bring me any more business than I can handle."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I guess I could qualify as a small business, for sure. Honestly, I didn't really know much about it. Only thing I saw about it was when I got prints run, and they are on the invoice it was listed there. That was a little logo. I guess for a long time I didn't even really know about it. But I probably should do it. I probably should. I mean, it wouldn't hurt anything. Why not?"[#53]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "We haven't pursued that. This is something... I don't know, we don't have much of resources to do all the certifications. It would be something that we would like to, but we haven't had much of guidance in those areas. And also resources to get someone to hire someone to do this. Maybe this is pretty straightforward, but we have to... This is something we would like to do. We haven't done that yet."[#58]

2. Advantages of certification. Interviewees discussed how SWaM certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification. [#2, #3, #5, #6, #7, #8, #9, #11, #13, #16, #17, #21, #24, #26, #28, #39, #43, #44, #51, #52, #54, #58, #59, #60, #FG1] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Oh, I think there's a great advantage to them. And I'll tell you a story. We had a college... Actually, it's Northern Virginia Community College. I don't mind telling you. They called

once and said, 'We noticed you're on the SWaM list. You're a landscape architect. I know you're a long way from Fairfax, but would you be interested in this project?' And I'm like, 'You'd better believe it. We would love to do this project.' So anyway, we went through all the process of drawing proposals and stuff. And so I believe... He told me, 'That's the reason that we hired you. We really try to meet those guidelines.'" [#2]

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I mean, I think it's beneficial, especially if you're looking in the public sector, because a lot of times they are looking for small businesses to fulfill their needs. So I'd certainly say there's advantages. I mean, we have... and it's not just state, some of the local agencies want to know if you're SWaM certified. I mean, on the private side they really don't look for that, but on the public side it's definitely important and advantageous to have that capability." [#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We've been given a lot of opportunities to go after work because we're SWaM certified. We can't always take those opportunities, just because of the number of tasks and the amount of work that we have, and I don't have, like I said, a full-time person dedicated to marketing." [#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Personally, I think opportunities should be afforded to veterans and SWaM and MBE, but I have found over the years, it's been at a cost to the non-veterans and non-DBEs. But I do understand the purpose, and I do support it, but it has caused me not to be able to bid on projects that I think I was suited for, that would fit my company well. But that is the system and that's the programs that we have in place. And so I just, instead of resisting it, I've embraced it. And actually I've taught classes and opened up my offices to those individuals to come and look at plans and help them with their bidding and other resources." [#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "I'd like to think it helps because we are [a] minority. We're able to get certain jobs that minorities are only allowed to bid [on], or the contractor has to use a minority company. So, we're selected." [#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Well, there are some requirements where they ask for SWaM certification to work on projects, so I think that has made some differences." [#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I think it's good. I really, truly do. I think there's a place for it, and I don't think it needs to be, maybe, the end all be all. But at the end of the day, I do think that it's important, because it keeps people honest. Because I personally like competition, I think that they keep you sharp, and I do think a lot of people feel differently about that. They want to eliminate competition, and I think competition is good, it keeps you sharp, keeps you open minded. So in my opinion, a lot of those certifications and programs can be really, really helpful because it brings people into the equation that maybe wouldn't get a look if those things weren't required. So I think they're good. I think they're positive." [#9]

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Honestly, the only reasons we have them is to maintain the HRT contract that we have and to be able to bid on projects that are similar, that we would like to be a part of. When it comes time, we're set up and ready. So we really don't put much of a focus or try to bring in that business because, like I said, the private sector is better understanding of what we do." [#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "I think there was an advantage when we were small, and I think right now a woman-owned, non-small [status], unfortunately it doesn't currently offer any value." [#13]
- The Black American male owner of an MBE-certified construction company stated, "I think [with] SWaM, you would have an advantage. The reason I say that is because you will have a lot better access to drawings and stuff like that with SWaM certifications. [With] the SWaM certification, the drawings for projects [are] a little bit easier to get to than [for] anyone else. I think you can get to those drawings for free. Everybody else is going to charge for the drawings. There's a lot of projects going on in SWaM. If you take the same projects and somebody else got them listed in their invitation, it is hard to get to it now. Now, contractors now are going to an app called HUD, HUD app, which you have to pay a membership now to get in there and get drawings which [are] free. Then they've got one that is called Isquare. Isquare is hot, you've got to pay for them." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Yeah, they have SWaM projects. The project with the Port of Virginia, that was a small business set-aside. The state doesn't do really too many women-owned business set-asides. They do SWaM." [#17]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "If you're SWaM certified, have SWaM certification, you're not charged as much through eVA for the work you do. That's one benefit. I think most all of these contractors now that do major projects on the campuses, they're required to participate with women-owned [firms] and minorities, and it benefits them if we're SWaM certified. That benefits them of meeting their goals or whatever. That part of it has the potential to give you an opportunity to do some work." [#21]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "If I'm interested in growing my company and having interpreters work for me, then that would be the best way to go because you can go direct and try to get those contracts yourself, and then just build from there. So you have to grow. So it almost forces you to grow your business, but it's also, I think, a good opportunity for someone who already has a business, and has employees, and has everything in play, and is just waiting for that chance to grow, to get more income in. I think, again, the certifications are beneficial to businesses, especially when they're looking to grow." [#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "I got a call from Poquoson for the van over this summer. And they were doing some things for COVID as well. And I may be new here, but I've heard some of the stories. Poquoson has historically been known as a pretty racist township. And [they] asked me to give them a bid to move furniture around for them as well in their schools. And it

worked exactly how it was supposed to work. They did a great job. And, as a matter of fact, they said that one reason why they picked me is because they wanted to have more inclusion. And they were trying to change their perception, and... They wanted to work with a minority." [#26]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Quite frankly, I didn't see any great advantage. And so [there was] only [one] time that I feel like I've been caught with the expired SWaM certificate. And heck, I didn't even know it was expired until this happened a couple of years ago at the New River Valley Community College. We were in there and did four bathrooms for general contractors. They came out really nice, they loved them. Then the Chief of Maintenance up there called me. I went up and met with him, [and] he wanted to give me more bathrooms direct for the college, for the State I guess, and then he said, 'But your SWaM certificate has expired.' I said, 'Oh? I didn't even know that.' He said, 'Yeah.' He said, 'So, you'll need to get that reissued before I can give this work to you.' So that's the only time that's caught me, of not having SWaM, at least to my knowledge. It might be there were people... that we got a job and they said, 'Well, he's SWaM certified, we're okay.' I don't know." [#28]
- The Black American male owner of an uncertified MBE professional services firm stated, "Well, like when we get into a normal environment, there may be opportunities that get sent our way because of those certifications. There may be a benefit to some of our clients, that they would likely engage us regardless, but the fact that they've engaged us with those certifications, they may have some benefits in their reporting that they would want to take advantage of. So if we qualify and it's not too much of a burden to get certified, I don't see any real downside to that certification." [#39]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I have subcontracted. It's not often, but it's one of the reasons I want our SWaM certification to be current so that we can participate like that." [#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The advantages, for one, I think would be to interact with more small businesses. To create a network of small business minority owners where we could all work together, and communicate, and help each other out. Two, to give us access to the state and federal agency jobs versus all the big boys. That could be phenomenal. And it might also help with the employee retention. Being able to retain employees and actually achieve getting qualified personnel." [#44]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Yeah, it's definitely an advantage. Like I said, after I opened the doors, I went online. I said, 'Well, this is the form,' and I downloaded it. I said, 'Yeah, fill this out and get it in.' And then the phone started ringing, 'Can you do this? Can you be on our team?' 'Okay, I got to get the contracts I got.' So I became busy right out of the... 'Okay, now I got to buy a computer. Now I got to do this. Now I got to get out okay, because they're going to send me out again.'" [#51]
- The Black American female owner of an MBE- and WBE-certified goods and services firm stated, "I'm looking at the opportunities that are coming through. They do have a lot of requests for vehicles, trailers, a lot of things that are auto-related. So there's definitely some

opportunities, once I get that certification, that I want to try to apply for. And I know I can apply for it now, but some of them, the preference is someone with certification, so I am working on that." [#52]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Because it lets people know your status. Like, who you are. You know, you are small, you are a woman, you are a minority. It does let other companies know that. And if that's a requirement of their contract, at least they know they can go directly to that person to fulfill that requirement for their contract." [#54]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So the amount of opportunity available for those who are with the certification is also limited. That's number one. But if you go to [a] larger pool where there are other, bigger players, then you don't have a chance yourself in getting that." [#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "I think, by and large, there are advantages to that. I know when I had my other company, we did a job for them down - and a minority company hired us to do it - a job down in Homestead, Florida." [#59]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Well, I mean, there's a lot of advantages to certification. I mean, if anything, your eVA fees are capped at 500 bucks. I think the bigger picture is that you get access to a lot of things through Supplier Diversity. At the beginning, I was like, 'You know, years ago, I was not going to get certified.' Why? I wanted to be treated like everybody else. What I came to realize was that it's because of this that I can get treated like everybody else, because it gives us an opportunity to have exposure where we otherwise would not. Agencies appreciate it because they can get credit for using a SWaM and it's a win-win." [#60]
- The Black American male representative of a business development organization stated, "I tell a lot of minority-owned businesses [that] certifications, those are important, regardless of what kind you decide you want to go with ... When you are dealing across the table from those major corporations, especially if you're [a] minority-owned business or a woman-owned business, it's important to have those. I tell them, 'Get as many certifications as you can, because you'd be amazed...' But having a certification will put you in a better position... And some of them are free as well, too. But it puts you in, in my opinion, in a better position to negotiate... I tell them, 'Get as many as you can get applicable to what you're trying to do.' So that's something I stress right there a lot, too. Something else I tell a lot of other minority businesses, and I say this during my presentation, 'The golden rule is not what you know, it's who you know.' Okay, that's pretty good ... Now [if] we go into [a] different level, and I stress [this to] my people, 'Let's go [to] that Platinum room. It's not who you know, it's who knows you,' which kind of circles back to that networking piece right there. I tell them, 'So you can know everybody you want to. But if they don't know who you are, you're the Invisible Man or the Invisible Woman in the room.'" [#FG1]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#5, #7, #11, #13, #19, #21, #27, #31, #33, #39, #56, #AV, #WT21]. For example:

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Here's the real distinction, the whole reason for the conversation is this particular point. The Virginia Department of Transportation, the DMVs, the community college systems, things of that sort, they give credit in their RFPs for people who are SWaM small [businesses]. As part of the Governor's 42% small business initiative, they do not give any credit for being woman- or minority-owned. We get the same number of points, which is zero, for being a SWaM woman-owned [firm] as a \$9 billion company. Because the gubernatorial 42% does not protect small woman-owned and minority[-owned businesses] - it only protects small business - firms like ours end up losing to the billion-dollar firms. We don't get any more points than they do, even though we're Virginia-owned, pay Virginia taxes, and have the historical ownership that has greater challenges in the form of being female or minority." [#13]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "I think there's no advantage. I can't say in the Commonwealth that I have won anything because I've been woman-owned, and that's a shame. think they don't award enough of them. I think because, like I said, they're putting them out as small business, SWAM certified. They're not issuing enough with strictly minority- and strictly women-owned" [#19]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I'm not aware of any. Like I said, I'm assuming that the program was set up to benefit the small businesses and I think it has. I think it's been operated like it was intended to be operated. Let's put it that way." [#21]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Those who are not DBE and SWaM, it's more difficult to get on with them because they know you're DBE or SWaM or something. They're thinking that you're going to take the work from them if they find out that you're a DBE or a SWaM or something. Seem[s] like they get a little irritated or whatnot because they know that most of their jobs, when they give state and federal jobs, that they got to have so many DBE and so many SWaMs on their jobs... But I haven't gotten any support from it, do you know what I'm saying? It's maybe that I don't know that I'm not going out, or I'm not doing something right or whatever. But I [have] never been awarded anything from the prestige of being one of the SWaMs and DBE." [#27]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "When I had slow work and the people, then I thought I would get more work. But, at the time, I didn't want to do that. I didn't want to get in both parts." [#31]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's too much paperwork. You see, I meet a lot of people who are not very educated who are contractors, lots of them in the field. You meet them and they want to work with you because you have a license. But none of them want to get a license, and they don't want to go through that process because they are asking too much paperwork. So there has to be a way... that when you are a minority and Black, you qualify automatically ... There is

paperwork that you sign, and they have access to your tax returns from the IRS to show that you did not make millions of dollars... and you [should] get approved right away. They should do that." [#33]

- The Black American male owner of an uncertified MBE professional services firm stated, "I've heard, and it's anecdotal, that some people feel that there's a ceiling on opportunities. And it's well-intentioned to say that we're going to have a 10% minority woman-owned business goal as a part of that contract. But then when that goal is achieved, 11%, 12% and 13%, they don't seem available to the minority- and women-owned business[es] because they've reached their goal. So it's well-intentioned to have a goal, but that goal should not be viewed as a ceiling." [#39]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "We've not been heavily into the state... like I said, other than SWaM, and SWaM really for the most part doesn't help us at all. We basically get no benefit out of being a SWaM contractor." [#56]
- A respondent from the availability survey stated, "Although I have been certified by eVA and qualify to have products listed for buyers, that has not happened. Buyers have not seen my products." [#AV]
- A comment from written testimony submitted to the study team stated, "In other words, it is not clear to us what the advantage is of being SWaM certified, or if Virginia agencies and the like have the incentives to utilize VA SWaM companies. Even a measure that amounted to a threshold % of dollars spent with SWaM companies would help the cause. It is difficult to determine what VA entities are seeking to do business with SWaM certified companies. [#WT21]

4. Experiences with the certification process. Businesses owners shared their experiences with the certification process. [#2, #4, #5, #6, #7, #8, #11, #22, #24, #26, #27, #29, #30, #48, #49, #52, #55, #56, #57, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "I found it very reasonable. And in fact, out of our 14 employees, we have one employee who's one of their primary responsibilities is make sure you keep us on all those rolls, because some of them expire after a while. You have to make sure you update them every year. And so that's her job is, do not let us fall off of that roll, because we really want to keep that up-to-date." [#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I am on under those categories, but I think when I started out, the Small Business Bureau, I believe there was a time requirement the last time I tried to actually get certification." [#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Being SWaM certified hasn't achieved us winning jobs, but it does give us the opportunity to go after jobs. It's a bit daunting, but it's not difficult." [#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I'm just in the initial stages, I've gone through the initial webinar training, and now

we just need to start compiling the owner's records. Yeah, I have thought about it. The owner of my company has a number of companies and I think it's probably a lot of legal hurdles to make us qualify as a SWaM."[#6]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Once you get into the system, it's not too bad to re-up every time you have to."[#8]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "It was a little daunting the first few times, because the paperwork. But I understand that it's necessary to get the certification, and to make sure that the right people are being certified correctly. So, I don't have a problem with it. It was a little bit of an intimidating process, because you were going into a deep unknown, until you get there, and then looking up, for example, the classifications or what you do. It just takes a while. It's kind of cumbersome."[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "There's a lot of paperwork. They don't make it easy."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's kind of a little difficult. At times I have to get other people to help me, because like I said, I don't have computers and I'm not a computer literate and stuff like that. So, I have to get all the people to come in and help me get set up with different things, making sure my, what you call it, is updated and my certifications, they're in and everything. So yeah, it's kind of a little difficult. Because of the fact that everything is on computer, so it's really not too much they could send out in the mail to me that I could fill out and send back, because everything is on the computer now, you know what I'm saying?"[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "It was fairly easy, you just had to get your paperwork together and send it in. What made it difficult was the time it took for them to certify me."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "We qualify under the federal guidelines for self-certification. The Commonwealth SWAM requirements required some original documentation. It's hard to explain. It's a little bit convoluted. But we had to re-certify, and a lot of the documentation was not a problem. But my mother is... They required basically documentation of my mother's identification, which wouldn't be a problem in most cases. She's 82, and her driver's license is expired because she's blind. And then, COVID happened. We haven't yet been able to provide her identification sufficient to complete this SWAM certification for small. It's not that we don't qualify, but it's a technicality or some of the documentation makes it more of a challenge."[#30]
- The Black American male owner of an uncertified MBE professional services firm stated, "My partner who was pursuing it in one case, and I can't quite remember which one she was looking at, there just seemed to be a ton of information that was being requested and it seemed like a bit of a cumbersome process. So, I'll have to defer to her to see if that was

with the Commonwealth or if that was at the federal level, but the more you can streamline the process and make it easier, I think would be the best. It would be better."[#39]

- The non-Hispanic white male representative of an SBE-certified construction firm stated, "It was not difficult. It took a while, but no, it was not all that complicated. We cruised on through it. Just took a certain amount of work to do it."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "SWaM, I guess when I originally got it, it was pretty easy. We're talking about way back when, when my hair wasn't as gray. Back then it was pretty simple. They require a few more documents now. Where I think I would really like to see a lot of change is in the DBE side of it. The DBE and I don't know if you're referring to 8a. There needs to be an easier process for that because they just require so many more documents. I'm really glad to have gotten my DBE but if you get a DBE, SWaM automatically falls underneath it. The DBE requires so many more documents to become DBE."[#49]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "I have a folder, I've printed out the checklist of everything that I need. I think the only pending item that I have is... my husband has to add the dealership details to his resume, and it was one other thing that they wanted... oh, they wanted a list of personal monies that have been provided for the business. So, I'm getting the documentation for that, bank receipts and all that stuff. I think those are the last two things that I have, and then I can submit it. I consider myself the exception, again because I'm a business systems analyst, and this is what I do all day, it's easy for me. I'm always putting together spreadsheets, gathering the information that I need, so I think I'm the exception, it's what I do every day, so it has not been hard at all."[#52]
- The Black American male owner of an uncertified MBE professional services firm stated, "When I did the process the first time it was super-duper simple. I don't mean like it was easy, anybody can do, but it was streamlined. I remember dealing with one young lady. I can't remember her name at the moment, but it took less than 60 days. When I reapplied this time, however, I was denied because there was a bunch of information missing, and it's all through this website. However, a person did follow-up with me, and I can't think of her name. She did follow-up with me. This is pre-COVID. And we actually went through all the items that I have to obtain. I thought that was very helpful. I don't want to call it contract specialist, but that's exactly what she did. So, I have to reapply. The only thing that I would say in comment to that is I haven't really done a whole lot of business in three years, so I don't have business tax returns. I just have my personal tax returns, things like that. A lot of the documentation they asked us for, I'm like, 'This is like a corporation that's been doing business for years and years and years.' So, it's a little daunting, not impossible, again. The paperwork that they're asking me to have that I, frankly, might not have. I just received my class-A not more than three weeks ago. And one of the reasons I had to resubmit the re-certification was because of that reason because I no longer want to be certified as a class-C. I want to be a class-A contractor"[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "It's gotten harder, I will say that. When we had to re-certify,

it was more complicated than the original certification. So, the process has increased in complexity in 10 years. I think we did it just two or three years ago. I remember the paperwork that we had to do was about three times as much than the original certification. I don't remember. It was more documents is what we had to produce. I don't know if that was because being in business then they wanted more... because they wanted financials and things. Starting out, you obviously don't have financials. There was different documents that was requested, that was not requested the first time."[#56]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I know that I reapplied six months or a year ago and I think I went through, but I'm not quite sure. I must've had some confusion there. I had gone through and answered all the questions and submitted it and I don't know whether it was a computer glitch or whether I am registered. There must be something there that's confusing, but I'm not sure."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It was good. I can't say enough nice things about the agency. I know people have had their own experiences, especially with our DBE certification. I dealt with an advocate. Like I told you, I listed off all of our certifications. I deal with a number certifying organization. And each step of the way if there was like, 'Hey, this isn't what we're looking for,' or, 'Hey, we need you to adjust or make some alterations here.' She was doing it from the perspective of, 'I want you to be successful.' I think that the certification folks, I don't think they get a lot of love, but pass along my comments that I really... I've always appreciated the interaction that I've had with them."[#60]

Nine businesses owners described their experiences with the certification process in negative terms. [#21, #28, #33, #43, #47, #AV, #WT4, #WT6, #WT14] Their comments included:

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "What I was frustrated with was the fact that a lot of the information that they wanted for the pre-qualification or renewal, I guess. It was stuff that I just thought to myself, 'As long as we've been here, why are you doing this? What do you need all this stuff for?' I mean, they wanted the history of how did you become an owner, how did you gain stock in the company and what are you paid an hour? I mean, it went as far as they wanted birth certificates. I thought it was just over the top from the standpoint of what all they were asking for. I understand if you're a new company, that you could do that. Well, this renewal was difficult."[#21]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I still haven't resubmitted a new application. It was starting from scratch, it didn't matter. This is what irritates me about the State. It didn't matter that the lady there at the SWaM office, I can't even remember what bureau that's under, said, 'Yes sir, we have all of your original documents from your original application, which included the first corporate books, okay?' I said, 'Well, if you've got that, why do I need to send corporate minutes and original incorporation papers if you've already got it?' 'Oh well, that's required,' she said, 'You let it expire, so it's... you're starting anew. It's not just a matter of...' I'm a pretty busy guy, and so it just got shuffled to the bottom of my stack and it's still at the bottom of my stack. You would think I would've been [doing] that, after losing some bathrooms at New

River Valley, but I just haven't gotten to it yet. I can't find my original incorporation papers, and there they are scanned in on the State computers. But no, no, she needs new certified copies of our original incorporation."[#28]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "[Improve] renewal time and make it faster, or automate the process, especially for someone who is renewing. When you are a first timer, it's different. Just like to renew your contractor's license, you just go up there and pay your dues. And after a few times of going to renew it, you can do it automatically. But unfortunately, with the SWaM, it doesn't work that way. You still come in as if you are doing it all over from scratch. Then they ask for [everything]."[#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It's cumbersome. For a small business, especially in a competitive market, you don't want to give that information out in the first place. If you're a one-person shop, it's easier. If you employ, if you're bigger than that, it just, it's a cumbersome process. And for a small business... let me tell you why it's cumbersome. We're about a two-and-a-half-million-dollar-a-year shop, and we're paid for our time. If you pull time... Oh, and every one of our folks, including my other two business partners, we spend our time servicing clients. And having three hours to do this piece of paperwork, and then three hours... Oh no, 43 hours to shop healthcare benefits, and another 40 hours to do retirement plans, that's not what we signed up, and client service gets lost in the process."[#43]
- The Native American male owner of an uncertified MBE construction company stated, "I've missed a lot of opportunity, because I've been trying to get my DBE and SWaM certifications since I went into business. So, four years later, I still don't have it. That process is brutal."[#47]
- A respondent from the availability survey stated, "Virginia has lots of opportunities for us but the state minority certification process has taken over a year and is much harder than in other states because of a lack of clarity and guidance throughout the process."[#AV]
- A comment from written testimony submitted to the study team stated, "Our business had done business with the Virginia Department of Aviation for years. This year we decided not to renew our SWAM certification because the whole thing was a joke. How can you ask a long-term vendor to provide the things you asked for? We could understand showing that we were still a small business etc. but all the other things were just too much. Why should I spend hours and hours of my time, gathering things that meant nothing but an exercise in government paperwork."[#WT4]?
- The male owner of an MBE-, SBE-, and DBE-certified professional services firm stated, "My challenge is the surrounding the SWaM Program; the process of collecting multiple and extreme documentations is limiting for small business. The level of support is slow and at times not very helpful. It discourages SB from pursuing VA contracts and relationships."[#WT6]
- The male owner of an SBE-certified construction company stated, "I relocated to VA in 2016. At that time, I don't recall the details, but the small business certification process was fairly simple. When I was recently asked to use the online system to re-certify, I was overwhelmed with the laundry list of documents required. I completed as many of the

forms as I could. However, I'm a one-person corporation. As much as I understand that I'm technically required to have shares of stock, minutes from stockholder meetings, minutes from board of directors' meetings, a stock ledger, etc. I do not. As I suspect many small businesses are very similar. I'm trying to understand why ALL of those documents are required to determine that I'm a small business, when looking at my tax return and payroll records (ONE employee) should suffice? Frankly, the burden of me spending time to essentially make up documents only to satisfy your needs is a waste of my time while I could be working on other things that produce income. It is counter-intuitive to put such a burden on a small business!"[#WT14]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process. [#2, #5, #8, #11, #19, #24, #26, #28, #29, #33, #36, #43, #44, #45, #47, #49, #52, #53, #54, #60, #FG1, #FG2, #FG4, #PT1] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "There's another more intense process that VDOT runs, which is... I wish I could come up with it. Maybe somebody else that you're interviewing will help you with this, but VDOT runs a process that is all about getting clearance on your ability to eliminate barriers for others, which is a really interesting idea. And I don't know what they call that process. It has a federal number. But for example, if somebody walks in the door that speaks a language that none of us can understand, how do we have a system in place that will help us to communicate with that person? Or you have to prove that you don't have physical barriers in your office, et cetera. And so that's an enhanced level of SWaM is making sure that all your firms are proactively trying to make it better for others as well."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "They require quite a bit of information. I don't know that it could be less or better. Obviously, they need to prove what they need to prove or gather the information they need to gather. So, there's not a complaint. It's just an information and record keeping that they're looking for."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think it's pretty good. It doesn't tell you... I mean, you have to go on to know when you're expiring. That's something I think if they could send out emails or something to let people know that they're expiring because I think it's like three years or something. But it's just one of those things that it's not always easy to remember."[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Yes. Having more people on staff that are willing to help walk through and explain more of the opportunities of how you can get more out of it. I probably would utilize it more if I knew more about it, but it's a very robust, complicated, the whole process, even finding, when it comes to finding jobs and then bidding on those jobs and things like that. So, it can be pretty complicated for sure. I think that would be one thing that they could definitely help with."[#11]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Well, I think it should be a requirement. You shouldn't just be a small business. A small business is based on 500 employees or less. That's not small business. So, it might be on the federal level, but on a Commonwealth... when you're looking at various commodities,

I mean, you may find that with, I don't know, a supply house another industry may have. But in our industry, and a lot of this was the IT and accounting and other small businesses, there are very few in the Commonwealth that have close to 500. So, they need to narrow the pool and make the solicitations be women owned or minority owned, not just small business. Because small business is really not that small. If you're going to tell me a 500-person company is a small business, it's not in my eyes. Oh, I think that the minority- and woman-owned I think is fine. Veteran-owned is fine. I think small should be less than 500 employees, maybe under a hundred or less."[#19]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "If I could make it simpler, now I'm talking about someone like myself who's bilingual, but I'm always looking with that additional... that third eye, with someone who is not as strong as the English language. So, finding information in Spanish to be able to complete the information, I don't even know if that exists. But finding the classifications, I don't really know how to say it, but you really have to be willing to be like a private detective to find the information. It's like it's there, but it's not. How to go after the kind of work that requires that certification. And they don't that, because you mentioned something earlier, and I'm totally on board with that, a mentor or protégé program. When someone is certified, someone should be contacting them, saying, 'How can I help you best use your new certification?'"[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Payrolls. It's a pretty rigorous application process and we discussed it many times amongst ourselves. Well, they make it hard because they want to make sure that there's no fraud in it. But also, two, they want to make it harder for you where you just give up. There should be more. There should be a unified, I'd say marketplace where you should know just through technology if this company is a minority-owned business, a disabled veteran-owned business. That should also be accepted by different agencies. You shouldn't have to register with all these different agencies. It should be just one. It's like my driver's license. I have a Virginia driver's license, and if I move to New Jersey for three months. I wouldn't have to get a New Jersey driver's license. If a police officer stops me, he could see I have a valid Virginia driver's license. VDOT, you have to register with them in some way as a minority owned business. And there's just a lot of agencies you have to register with. Or if you're SWaM certified. if you're SWaM certified, why do you have to get certified as a DBE to with the VDOT, or the DOT."[#26]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "It seems to me, now I'm just a layman here and I'm just a simple country boy, but it seems to me, that to be certified as SWaM, it goes to the issue of what your gross receipts are. And so, it seems to me that a more simple application, with perhaps three years of profit and loss or balance sheet Statements, so they can see that you're under the... I think it's a \$5 million dollar a year cut-off for SWaM, I think. I think it's \$5 million a year. I've always laughed and rolled my eyes and thought, 'Hell, I can't break a million dollars, but they consider this guy down the street that does \$5 million a year, a disadvantaged small business.' But anyway. So, it just seems to me, that a gentler approach on that, to verify the company is legitimate and to verify that its annual receipts are less than what the threshold amount is. Why would they require all this other jazz, especially when it's already in the system?"[#28]

- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Well I tell you the Commonwealth, their idea of a small business is somewhat skewed and I say that because they list a small business as having 500 employees or less. 500 employees is not small business. Small business is 10 employees, 20 employees not 500. So, they could do more by focusing on the much smaller, in my opinion of course I'm one of them, much smaller companies which are more widespread than the companies that have 500 employees. Some of the paperwork they required to be certified was kind of ridiculous. They had to have, I'm a corporation. So, they had to have the minutes and the copy of the stocks that were divided up which is fine, I have that. But they needed to have the minutes and the... what was it? There was something else recently and I can't remember. It was something that had to do with the board of the corporation. We're such a small company, but my dad did corporation many years ago, set us up that way. So, we were at one point we were applying for re-certification and we were denied. We had been certified for 15 years and then all of a sudden, they denied us and it was because they saw in some of the paperwork, we sent that my sister and I were on the board, my mother was on the board, and they said because she's the owner but we could out vote her or something? So, we had to go through the process of getting ourselves removed from the board so it was just her. To me it was ridiculous. There's three of us, mom doesn't work, there's two of us. It just seemed absolutely ridiculous and it delayed us for months and months on getting certified again, which means we potentially miss jobs because of it and to me that was just kind of ridiculous."[#29]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I think the approval process for the forms, they should make that automated. It is very difficult to even get those SWaM. My SWaM certification expired. When I think about the headaches of renewing it and the difficulty of getting work. It expired a few months ago and I do not feel like renewing it. There is no incentive. There is no reason. You're not going to get work; you're not going to get nothing. So, one of the concerns that we have is a white woman is also SWaM minority, but she always has a white husband who might be rich helping her. But most of our brothers and sister that I see, and we talk, it is not happening. They need to fix that. I know the old saying that you want to avoid fraud, but anybody defrauding the Commonwealth is at risk of going to jail and they know that. So, they review the paperwork, but they should have a way to renew easily. The time to file all that paperwork and all of that and then submit it, and then call, call, call, wait for a long period to know whether they approved it or not. Then even if they approve it, you don't even get no business. That is what makes us just give up on it. It's a very good program that they have. But they... The fact is, it's a headache."[#33]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "There's a broader definition for small businesses in my mind. There's small businesses like me who have three or four employees who are paying a lot of money for things like insurance and benefits and stuff. Then there's the small business that's \$38 million a year, over his three-year running average who's ready to graduate to large. Whether it's we go from really small to large, small, to then large. The difference between the small business and a large business is just tremendous. You can't compete with large businesses for sure, and a really new or really small, new start company almost can't compete with the more traditional small business that's been around. In other words, a woman-owned small

business that's been around 10 years or more and whose a woman-owned small business but stays under that \$35 million threshold is very difficult to compete with too. We talked earlier about 'Well, are you a socio-economical or economic status?' That's a good thing, right? Because you may get better fast, to minimize your competition, but for me, where you're just a regular guy trying to make a living, you do have the luxury I guess of being considered small business and that's helpful."[#36]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "You know, there's a company by the name of Iron Bow, it's considered a SWaM. How do you consider Iron Bow a SWaM? There's nothing small about Iron Bow."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Some kind of class or some kind of forum. 'Hey, we're going to have an open session today. These are our plans; these are our programs. This is how you enroll in it. I'll actually give you a hand.' And I realize everything's done virtual now, nobody's meeting, and that's another thing too. This 'Join Me' meeting, 'Hey, this is how you do it.' Some kind of... And especially with the way the virtual world is set up now, because like our time schedules are tough. A lot of our office work and billing and stuff like that are done at night because we're working during the day. We're small, so we... I go out in the field and world. I'm in the field probably 80% of the time, and I get into the office 20% of the time. To where, since all this virtual training and learning is available, to where you can sign on the computer. You can do it the evenings at night whenever you're... Instead of sitting down at 9:00 to watch a movie, turn the computer on take your virtual learning class on, 'Hey, this is how you do it. This is how you get this certification. These are the programs we set up. This is who you contact.' Stuff like that. To make it workable. Because a lot of times it's impossible for me to be at a class at 9:00 in the morning when I've got to be on a job at 8:30, or something like that. If I'm not there the job's not happening or it's not getting laid out right. So, access to the information, I think, would be the number one key thing. And to where you could do it online and do it in some kind of forum."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "It's a pain in the you know what. Make a note, a big fat note. But I don't know how you can change it. I mean, what I don't like about it, and this is a serious concern of mine, is security. I feel like there are people always trying to hack into the database. We're always getting notices, don't open this link, and somebody's got this or that. And it's very nerve-wracking to think that every income tax filing for the last three to five years is sitting in a state database that somebody's trying desperately to hack into. I also think that you need more people, because I put in that renewal in April, and I didn't hear anything back as of two weeks ago. You know, because I don't know if you've got enough people hired to kind of get through the paperwork, and that's it."[#45]
- The Native American male owner of an uncertified MBE construction company stated, "I honestly don't know, because I don't know how much. It shouldn't be a case-by-case basis, but I feel like it is. It seems like some contractors go through there, and they're almost like a shoe-in. Then I'm trying to get in, and they just keep dragging their feet on me. Processing time, processing time, processing time. Over the last year, I'd say that I've missed out on probably \$4 to \$5 million worth of work by not having it."[#47]

- The Black American male owner of an uncertified MBE construction company stated, "It's not as strong as it should be. As I talked to my representative in the city of Richmond, I tell him all the time, you guys got a great program, but you don't have any teeth. The first time I said that he was like, 'What do you mean we don't have any teeth?' I said, 'You got a bunch of great policies. You can't enforce it because you don't have enough power to enforce it. So, if you find somebody that's doing something wrong, what's the penalty?' There really isn't any penalty. It really isn't any penalty. I think it's ease up off the SWaM requirements or documents. If you are a minority, you are a minority. Anything else that could improve. I would think if they could just the time you could set aside X amount of work for minorities, just minorities."[#49]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "The sessions that they have to show you how to navigate how to get your SWaM certification have been awesome. They are offered every month, several times. I've actually been to a class three times just to make sure... there's something different every time you go, but I like the fact that I can sign up to listen in at any session, I think that helps. So, having those classes and having them often has helped because I learn something new, and each time I hear it, it sticks. And then as far as actually going into the application, into eVA, to navigate, they have made some improvements in that system that have been very helpful. When they give the classes, they show us how to pull the reports to see who in the Commonwealth is looking for business that's related to what we do. So, I think it's been really good, everything that you guys are doing right now, the classes, all of it is awesome. I think for me, it's more of a personal challenge, like I'm seeing these opportunities, specifically like someone in the Commonwealth wants a vehicle."[#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I guess it's something that needs to be publicized more, I guess, to small firms like me. Because we have so much on our plate, it's hard to keep track of everything. I guess if there was something sent to me, or you know, 'Did you know that you might be eligible to do this?' Something like that. And somebody like me might say, 'Oh, no, I didn't know about that. That's cool.' And I would probably do it. I would say something mailed. Something like that would be better than an email or something like that."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It was arduous. It was a lot of paperwork. It would be great if they could keep all of the paperwork that has already been submitted, and only request updated W2s. You know? Your previous last two years of taxes, or something like that. Because the amount of paperwork is just ridiculous to me."[#54]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "The personal financial statement. If I could take it out into the parking lot and beat it with a hammer, and make it go away. And I understand. Listen, they have to because there are so many people that try to introduce fraud. I don't think they're ever going to be able to get away with that. It's just a pain in the butt to fill it out, but no. I mean, I think they have to do it."[#60]
- The Black American male representative of a business development organization stated, "The majority of the small women in the Commonwealth of Virginia, you can be doing a billion dollars in business, have 225 employees and still be considered a swam business in

the commonwealth in the Virginia. You can be doing 2 billion, as long as you got less than 250 employees, you can set a slash. So those numbers in the column which is skewed, when you really peel it back and look at the minority numbers."[#FG1]

- The female representative of a business development organization stated, "What we find is that, especially with more minority businesses, there's a comfort and likeness. So, they tend to feel that comfort and likeness, rather than thinking the numbers, which is the numbers are, if you have a diverse customer base, you can do 35% more in business or if you have a diverse leadership team, you could potentially do 15% more revenue. It's just educating the minority businesses throughout the region and non-minority, that the more diverse you are, the more revenue you can make. I think the disparity between small business and what a small business means in southwest Virginia, is very different than what those small business means in Northern Virginia. I don't know how you equitably make that adjustment across the Commonwealth. But the disparity exists. When you look at a business in southwest Virginia and say \$3 million, that looks very different than a \$3 million business in Northern Virginia. I would say, you got to pick a number, but how do you equitably apply it across the state? One solution to that might be when we've been involved with USDA, or with the GO Virginia grants, they're in regions, and it's sort of like with AmeriCorps, AmeriCorps members got a stipend depending on where they live, those who serve in Arlington, Virginia, get much more than those who serve in Floyd County, Virginia, because of the cost of living and so forth. You almost have to segment these into regions and define it that way. Because a \$3 million business down in Floyd County, it's like, oh, wow. But a \$2 million business up in Arlington is like, meh. That's the only way I could see to make it fair."[#FG2]
- The non-Hispanic white female representative of a business development organization stated, "You can get SWaM certified, and what does that mean? You have to be this, and you have to be that. It's so overwhelming, I think. It's partly... I think, well, what other words could I use that would really lessen or be more realistic about what those things are? It's really hard to tell people what eVA is. Well, eVA is the system that the government uses to buy stuff. I don't know how to make it more simple, and it's partly because, I live so much in that world of those acronyms. A, it's easy for me to start using those. But I also think there's a lot of misconception, yes, about that it's complicated, but also about who can be on the list? Once they go, and I say oh, click here to see this transparency, and they see that Panera is winning bids, and they're like, wait, what? How is that happening? They know they can't make a sandwich more cheaply than Panera can. They can't do it. So, what's the point? Who also say that the concept of SWaM Small Women and Minority, the simple fact that A, there are two sides of misconceptions about that. One is people think it's some kind of special program just for women and minorities, or that you get extra points for being women and minorities. When we explain that, you have to be that really, it's not W and M that's the big deal, it's really the S part of that. There's also some, wait a minute, how does that really level the playing field for my business as a woman or a minority? It's already faced a lot of barriers. Somebody else who's really pretty well funded can also be SWaM certified. A system in which Jeff Bezos could go and be a consultant as himself and get SWaM certified is a little wacky. There are just a lot of communication issues with trying to help people understand the value of government contracting. I think if we could really think about

language surrounding and eVA and SWaM certification, it would probably help a lot. I don't have any solutions for that, but if we had new words would be better.”[#FG2]

- The female representative of a business development organization stated, “I have had members that on the flip side, have had some issues with the governor’s executive orders that have come down that have created, I guess you’d call them set asides, and the new micro business definition, and that kind of thing. Just because there are some industries where they get caught in the gap, I guess, is the way to put it, and usually that comes into play, if you’re a business that’s dealing with goods, products, because your inventory counts towards your gross revenue. The micro business definition is less than 25 employees, and 3 million or less in revenue. Well, if you’re a fairly successful retail business that is selling products to the state, you probably are over 3 million, just because of your inventory. But you don’t necessarily have 25 employees. You’re probably in that 15 to 20. So, you’re clearly small business, and you’re pretty small business. But because of the way that the... Basically, any purchase under \$10,000 has to be assigned to a micro business. Somebody who’s just outside that definition is now stuck in the small business definition, which is pretty big, and you’re not even getting called. In fact, I have a member who had enough state work that she had, I guess an employee and a half who did a lot of state agency work, and she is. She definitely has under 25 employees, but because of her inventory and stuff, her gross revenue was about \$7 million to \$8 million a year. She automatically lost all her state work, because she was not micro. But it was clear that one, she’s woman owned too, but she was small and small. I think where the executive order gives a little bit of a, I hate to call it a loophole, but a little bit of flexibility to agencies if the price is fair and reasonable, but I don’t think there’s really been any good education to procurement officers on what that means. They’re too afraid to push the envelope on that. With someone like my member, they’ll call her and they’ll ask her for an estimate, and then they only come back to her if they can’t find a micro business that will match the price.”[#FG2]
- A female respondent from a focus group for trade associations stated, “I think that the SWaM certification is helpful and the programming that surrounds that, like how to do business with the state, those types of webinars. I think those are helpful.”[#FG3]
- The Black American female representative of a business development organization stated, “When I was talking about [our representative] earlier, he is our local representative from the SBSB. So, for each region, they have one person, but their regions can be so big. They offer a lot. Right now, they’re doing a bunch of webinars on a variety of subjects, everything from basically getting your business started, getting registered with the state, how to deal with vendors. I spoke at one of their conferences they had on Tuesday for sales, for people who were in sales. So, they do all kinds of amazing things. As I was saying earlier, I just feel like they need to double in resources. I don’t say that lightly because part of the thing was even in getting your SWaM certification, they were really backed up. They’ve recently only just gotten to the point of being... I think they’re fully staffed now, but that took years before they were fully staffed, even to help them get people SWaM certified, let alone, do the rest of the work. Then they’ve had some turnover as well, but you have one person who’s covering two or three cities or an entire region. So, they have somebody who’s Northern Virginia. You probably have somebody who’s Tidewater. They have the person here from Richmond to... I just forget his whole region, but there’s flit all over the place. I think they’re doing exactly the work that we need, everything from that those one-on-one consultations...

Whenever I'm dealing with a new client and they're talking about, even finding out what codes they should be registered under, or who do I speak to, or where do I go? What do I do? They're the ones making all those connections. So, considering they're doing the work, it would be so much more beneficial if there were two [representatives]. Not that there could be two, but two people like him for at least two for a region."[#FG4]

- The owner of an MBE- and VBE-certified professional services company stated, "I still haven't figured out what is the value of SWaM? I see no value in it over the last three or four years down being out here as a business. It might help Virginia's records, but it absolutely does nothing that helps me get business."[#PT1]

5. Comments on other certifications. Interviewees shared several comments about other certification programs. For example: [#4, #5, #14, #17, #23, #27, #36, #44, #45, #47, #59, #60] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I was trying to get the Disabled Veteran [certification]. [I don't have it,] not at the moment."[#4]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "I did that small, disadvantaged business 8(a) program and graduated within the first four years because of growth."[#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We're a graduated 8(a) and we were DBE at one time, but I'll be really honest with you, we never got any... we never saw an advantage, any feedback or anything from the DBE."[#17]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Right now, the only thing we can compete as is either a small business, or if it is not an 8(a) but a Native American or Hawaiian native-owned company. But the 8(a) program is limited either in time or the amount of money that the company can earn within a year. And so, once you outgrow that, and the contracts come up for a re-compete or [are] re-competed, you can no longer compete for those specific contracts. The idea of the program is to help the company get experience and find a niche in the market, but once you grow out of that part, you can no longer compete for those specific contracts with those specific customers. I think they work to help get a company started, but sometimes they have challenges or bring challenges in trying to sustain that work. Basically, as I said, we have grown out of or aged out of the 8(a) program. Once you get to that point, you really have to find all new customers, build all new relationships, and sometimes work into new lines of work in order to keep the business going. And that is a challenge, and we've heard that the success of the companies graduating from the 8(a) program is not always very good. Usually if you make it, it's three years or so beyond... You're kind of exceptional and beating the odds. Right now, we're into that fourth year beyond. We're confident that we'll start winning work on our own, and we are still teaming with others and finding other work. But it's definitely challenging."[#23]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yes, I have the DBE and SWaM."[#27]

- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Then even the veteran-owned, that just happens to be lucky that I'm a retired marine. You get some benefit from being [a] veteran-owned small business as well. The real benefit [has been] it's just the taxation thing of being a sole owner and the way an LLC works." [#36]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The SBA, yeah. She is registered with the Small Business Association. I don't know the number or anything. All of that was done years ago." [#44]
- The Native American male owner of an uncertified MBE construction company stated, "In all fairness, I don't want to beat up on the people at the SB - the SB - the Small Business and Supplier Diversity program. Anyway, SBD, whatever it is, the people that I'm trying to get my DBE certification from. I think that they've got to be understaffed, because their processing time is out of this world. I mean, it takes literally, when I say that I've been working on this since I went into business, I'm being very honest with you that I have been working to get my minority status for four years now. They request information, I get it back to them as fast as I can, and six months goes by and I haven't heard anything. Then I contact them and they're like, 'Oh yeah, we were supposed to do this. Can you give us this, this and this?' Come on." [#47]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Whatever certificate I had from SBA, I needed to be able to do work from VEC. I needed to qualify as a small business. It was very time consuming." [#59]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "We are SWAM and we're micro-SWAM and we are most importantly, DBE." [#45]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We're also certified through the Virginia Disadvantaged Enterprise DBE Program. We are also certified through Washington DC and their offshoot of the DBE Program called the Local Disadvantaged Business Enterprise Program. Then we hold two national certifications. We are independently certified through the US Women's Chamber of Commerce for what's called Economically Disadvantaged Women in Small Business or EDWOSB. And we are certified through WBENC as a Women's Business Enterprise. That's a lot." [#60]

D. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section D presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting and doing work in the public and private sectors;
4. Differences between public and private sector work; and
5. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work. [#7, #14, #18, #20, #21, #32, #37, #38, #56, #60] For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "I think when you get closer towards the end of the year, the public kind of dies down just because I think of the spending towards the end of the year. I would say we see that kind of drop off." [#7]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "At first it was all 100% was government. Just the last couple years, that 20% became non-government." [#14]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Yeah, okay, yeah. I'm really trying to get away from private. I don't like the cutthroat-ness. I don't like everybody cutting corners. I don't like just the economy affecting everything. When you go to public, it's solid. Once you get in, the government will always be there, they'll always need work and they're legit. I don't have to worry about I'm not going to get paid, my crew's not going to get paid and we all get paid what we should get paid and we have a nice living being honest doing good work. That's what I'm trying to get out... It's almost like you get ahead in the private sector by cutting corners because they're so cutthroat in price margins, profit margins." [#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "We're trying to develop private sector work right now. We'll do a little bit better this year, I think would do another couple percent in the commercial sector." [#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Changes from year to year. I would say this year, we've probably 65% private and 35% public. Well, it's not so much that, it's just what's available. And like I said early on, is this COVID thing has slowed things down from the public perspective. And so, like I said, there is still some private work out there that we've been working on. And like I say, you have to take what's available, I guess." [#21]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "There's a trend away from in the last, since the COVID. So I would say turned away, from the private sector. Even though driving is critical and necessary for people... One, we have people who are staying at home and working. I think looking at this as a perhaps discretionary for the time being. So saving their money and waiting to see how the economy turns out." [#32]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "It is, let's say 2015 to 2018 and into 2019, I had a lot of government work. It was really...and I had, at that point it was probably 70% government work, 30% private. After that it went back to private, to the point now where I have almost no government-related work. Probably some of it has to do with me needing to bid on some jobs, for the government, which I have not done. And when you get down to the place where you're one person or two people, the scope of some of the projects...actually I have another guy who

works for me who's ready at a moment's notice, another engineer. But when the scale of the project...first of all do I have the manpower, I have the knowledge to do it, I have the experience to do it, but do I have the manpower and do I have the money to back it up. Say it's a \$2,000,000 job and you've got \$10,000 to the company name, you could have the best proposal but when they do the financial audit, they're going to say, "you don't have enough financial horsepower for us to feel comfortable giving you this job." "[#37]

- The non-Hispanic white male representative of a majority-owned construction company stated, "I wouldn't say over the last two to three years, no. The one thing I would maybe add to that, is that our government market can tend to run a little counter to what the private market is doing. Certainly, it's been a very busy and successful private... commercial market, so we've probably seen less competition and interest in some of the federal government work as a result of that. Now that COVID has certainly put some challenges around that, we're seeing more competition and more competitors move into the government space." [#38]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "It does based on jobs, depending on year to year. Some years I've done more, and some years I've done less." [#56]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Actually as we have grown, we've actually reduced some of our government footprint and we've picked up more private businesses. But for us, it's a good thing to keep it right at 50:50." [#60]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

Fourteen business owners or managers explained that their firms only engaged in private sector work. [#5, #10, #22, #24, #26, #29, #33, #34, #35, #42, #44, #54, #57, #FG1] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It'd be 99% private." [#5]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "If we're talking exclusively about my LLC, it would be 100% private sector." [#10]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Even the businesses we work on are usually small businesses. We've worked on malls a couple of times or whatever, but pretty much even the businesses we work on are small mom and pop type of places." [#22]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "99.9 is all private." [#26]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "All of my business comes from private. I don't get hardly any public at all." [#29]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "We don't see any need to compete in the public sector. The disappointment is heartbreaking. No matter how low we go on the price, we lose. They say it's transparent, but I still don't get it."[#33]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "It's 100% [private]."[#35]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I'd say we're about 85 to 90% residential. 10% light commercial."[#44]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It's always been private homeowners, or private business owners. I haven't received any contracts with the city, or the state."[#54]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Right now I just am doing residential work."[#57]
- The Black American male representative of a business development organization stated, "In general, my experiences in business has been minimal with state, I would say 95% of everything that I do is personally, is in the private sector."[#FG1]

Five business owners or managers explained that their firms only engaged in public sector work. [#18, #23, #36, #40, #55] For example:

- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Last two years I 100% stopped residential and decided to put all my focus into government. Strictly government."[#18]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "It's 100% federal government."[#23]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Well I would say 100% of our work comes from the public sector in the sense that at some point it's related to your state or federal government. The funding ultimately comes from the taxpayer, but frequently we do subcontract to another company who has the primary. In at least two cases, that's the point. We have two companies that we subcontract to that comes from the government."[#36]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "And about really 99.9% of our business is with the federal government or federal suppliers of the government"[#40]

For twenty-two firms, the largest proportion of their work was in the private sector. [#7, #9, #11, #12, #13, #15, #16, #18, #21, #27, #28, #29, #31, #37, #38, #43, #47, #51, #53, #56, #57, #59] For example:

- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "But it's kind of a mix... more private, working for general contractors in the private sector or homeowners and that type of thing and developers."[#9]

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Probably like 90 is commercial and the other is personal. And personal, we're just really doing cool graphics and things like that. Businesses have a lot stronger of a need and a repeat need, because they're buying more vehicles, they're adding to their fleet, their fleets get retired and new fleet coming in and all that kind of stuff. So that makes for a lot more business, a lot more of a repeat customer. Whereas the personal side, they're getting it done one time and then you might not see them for four or five years."[#11]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Right now, we have one small government contract out of maybe 30 in all."[#12]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "No more than a third government. And government for us means everything from municipal, quasi-regional, Commonwealth, and federal."[#13]
- The Asian American male owner of an uncertified MBE professional services firm stated, "I will say mostly private sector."[#15]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I would say 95% from private."[#18]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "[I] would say I would get more, I would get 50% of private stuff. Then maybe every now and then 10% of public. The other 40 would be just nothing going on."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "2020 is a bit tainted with that big VA job, which we'd certainly consider public sector. And so, like for 2020, that's going to be 33% of our receipts. But generally speaking, I would say 40% public sector, 60% private."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Well we don't have a whole lot with, we don't pursue a whole lot with the federal government or the state. We have state customers that have offices here and they'll call us up for office supplies occasionally here and there. But we don't get a lot of business from the government at all."[#29]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I'd say 90% from the private sector at the moment, maybe 10% from government."[#37]
- The non-Hispanic white male representative of a majority-owned construction company stated, "Here locally, 100% of our work comes from the public sector. Nationally, I would say it's only about 10% of our company is public sector focused and probably 90% is private sector focused."[#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "About 35% of our business are state or local governments or authorities."[#43]
- The Native American male owner of an uncertified MBE construction company stated, "I would say that I'm 70/30, 70% being private and 30% being public. I would say it varies by year. I would say this year has been the largest year for public work."[#47]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Either 30/70 or 60/40, and the higher percentage was private."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have very few public sector projects. Mainly because of my size."[#53]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "This year, probably 20% public work, 80% private."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I would say up from '82 to 2000 again, it was probably 30% or 40% public and the rest private. Since 2000, it might have been 10% public and the rest private."[#57]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "I do very little government work. it's probably 25% public and 75% private."[#59]

For thirteen firms, the largest proportion of their work was in the public sector. [#2, #4, #6, #8, #14, #19, #20, #21, #30, #45, #49, #56] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Yeah. I would imagine from a work perspective, right now we're about 70% public sector, 30% private sector. And that's up from two or three years ago when we were 95% public sector. We enjoy working for the public sector so much that we kind of forgot that there's a whole private sector out there. So we've intentionally tried to bump our mix up just a little bit with private."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I think, for me, it would be 60% to 70% public and 30% private."[#4]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "We're now doing more of government work. Probably 80% government. Mostly municipal."[#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We do one-quarter of the pie is for energy projects. We do a lot of solar farm work. One-quarter of the pie is federal government, one-quarter is private and one-quarter is localities, utilities, gas companies, that kind of stuff."[#8]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "80% is government 20% is private."[#14]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Currently? Because of COVID, I'd say we're very high in the 80 to 90% government. And we've had to sort of pivot, like every small business has, and grab every contract we can. And we're thankful for the federal government and municipal work. Prior to COVID, there have been years where we have been 90% commercial. When we first started out... I mean, government. When we first started out, we were probably 80% or 100 really, because we didn't have contracts for commercial and healthcare. Prior to COVID, we really rounded that out. And I would say we were probably 60% government, 40% commercial, But like I said, COVID has completely shut the commercial world down. And we are very heavily government right now and getting through COVID, and hopeful that 2021 we can

start to round things out and go back to more commercial work and have a better balance."[#19]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Government contracting makes up about 95% of our work. 5% about is commercial."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Most of our work is either working for some type of government agency, whether it be a local government agency or the federal government or whatever"[#21]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It's probably 60% public."[#30]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "Most of mine is public."[#45]
- The Black American male owner of an uncertified MBE construction company stated, "I'm going to say, we are probably 75% public, 25% private. It fluctuates every year. We had projects that are bigger for private sector versus public but public is the bread and butter. If you reach out for the big project and don't get it, you're sitting there left with nothing. So we use the other sector, the non-private sector as the bread and butter that keeps the money flowing. When we get the bigger jobs for the private sector, we can jump into those, get those done real quick and then go back to our regular work."[#49]

Eleven firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy. [#3, #8, #17, #25, #32, #36, #37, #39, #48, #58, #60] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "It varies from year to year, but probably a general rule would be 50/50."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yeah. Well, during the recession the pie became more... because it was kind of like we were working on mostly private development and that kind of left us high and dry. So, I'm trying pretty much trying to keep the pie the same so that if one sector dries up, we've got work for the other sectors."[#8]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Probably pre-pandemic it was probably 50/50."[#17]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "Our clientele is commercial and industrial mostly, and a lot of federal work. We try to maintain a 60/40 so it's split. Right now I would say we're at 60% public work, actually no, right now I would say we're 70% of money from public projects, like government, any type of government agency projects and 30% commercial, but that changes, it fluctuates. It's just, that's where we are right now because of the way the economy is."[#25]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We're at about 50/50."[#32]

- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Well, it's a catch-22. I do work primarily for the public sector, but there's another survey that's also in New Jersey. That one we subbed to another company who actually has a prime contract with a core of engineers. So this is a case where one company worked for the army corps of engineers, and the army corps of engineers needed something that was a special item, so another contractor solicited us for them. So in other words, I have a contract with one company and that company has the contract actually with the government. So we're not really a subcontractor for the government, we're actually a prime contractor of another corporation that has work for the government."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "One thing I did find out, I was doing a lot of work for the government, and you cannot put all your eggs in one basket. You got to have some balance. Even when I had a really good contract to do a bunch of remote surveillance work up in Alaska, very nice contract, even then I had people call me from down here in Virginia, 'Hey we need blah blah blah,' and I would place their order even though it was the middle of the night up in Alaska."[#37]
- The Black American male owner of an uncertified MBE professional services firm stated, "So I was a bit of a hybrid. It wasn't completely private, and it wasn't completely public. Most of the work that I did as lump sum, so once the contracts were awarded, I managed my budget and the risk of going over budget or under budget resided with me and the only thing the Commonwealth or the State was looking for was that I delivered the project and on time and within the budget."[#39]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "It's close to 50-50. Well, they go up and down all the time. We could have a year where we'd be 80 percent public. And we could have another year where we'd be 80 percent private."[#48]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So it's kind of different from year to year. So last year, as I said, I had one contract, subcontract from the government, federal contract through Accenture. Then right now the contract is from a private company. I don't have anything from federal or state. So this is kind of every year is different. Yeah, I wouldn't say there's a specific pattern, but there is a... there's just a... whatever project comes. We don't have anything lined up yet for next year, but we are working on one contract right now."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Currently it's a 50:50 split public, private."[#60]

3. Experiences getting and doing work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the Virginia area.

Eighteen business owners expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#2, #3, #8, #10, #15, #20, #21, #25, #27, #35, #47, #48, #49, #54, #57, #60, #FG4]. For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Private sector tends to be more relationship-oriented or referral-oriented for us."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's easier to do the proposals."[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "Oh, actually I would say the private sector was better because the private sector was much more flexible about hiring folks remotely, whereas the public sector is very traditional and basically it took the pandemic for them to even consider allowing remote work. And so now it's kind of pivoted. Now the public sector has had to swallow the pill and try remote work, and now they're getting access to more talent. And so, yeah, I think it's a great thing. And I'm certainly enjoying it because you can tolerate a lot more silliness, which unfortunately the public sector does have its share of it. You know, the private sector has silliness, but it's a different type. It gets filtered out by the company failing a lot more readily, whereas public sector really doesn't get that feedback loop. Right?"[#10]
- The Asian American male owner of an uncertified MBE professional services firm stated, "Right now we have more new business compared to repeating ones. When business with us, we do probably 60% residential, and residential clients, they are homeowners, so they usually don't have multiple projects to coming back for us. But they do refer their friends to us. And then for commercial clients, we're starting to have more repeating business. When they do another project, they come back to us. Just mostly it come to us, most of our clients, they find us online or through word-of-mouth and they approach us, and we discuss their projects and then I will provide a proposal. They probably are looking at different architects, they will compare and then they will see, okay we are going with you. We didn't do any bidding on any projects, like the public projects, they usually will issue the bids and then you'll provide... What do you call that? IFP? RFI? And then submit it to the client, we didn't do that."[#15]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Exactly. So, as you know everything in life is about relationships. If you don't develop a relationship, you're not going to succeed in any part of life. And especially when you're in business. If you don't have that relationship with the customer, and it's hard to develop. It's hard to develop exactly like you dating a guy or dating a girl. It's the same way. You don't develop that relationship and keep developing, working on it. It's not going to happen. It's going to end in divorce, but if you nurture it and basically get in there and do everything you possibly can for the other person or that customer, you're going to be successful."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "A lot of the private work that we do is negotiated, either people you've worked with in the past, or the engineers or architects you've worked with and they recommended you it's one of those things where you sit down and get to know the people and they tell you what to do. Sometimes you even get into what's your budget and you know how much... You end up trying to accommodate them from a standpoint of saving them money or whatever the case may be. When you get into public work, it's pretty much... It's a hard bid, so you give a price on doing the work and they either do it or somebody beats you or whatever. So that's the big difference there, is private work you, even though, I think I mentioned it, even though

you may not be the low bidder. We've had cases where people come to us and they said, 'Look, we know what you can do and we don't want to have any problems, so we're going to pay you more money, but we understand and we know that you're capable of doing the work.'"[#21]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We do commercial and industrial work. I have tried to market those markets even by contacting a lot of the economic development agencies in the different cities, reaching out to them and letting them know that we're available and that we have experience in that. I've never been referred by an economic development agency. The work that we have gotten, interestingly, has been with foreign companies coming into the area that we are referred to by either people that we have worked with in the past or people that actually I meet and that sort of say, 'Oh you might be good.' This is one we're working on right now, we're working at a Spanish firm that came to the area and they know it's Hispanic so they were like, 'Oh you should submit your qualifications to them.' Well yeah, they hired me. And we're doing work with a German firm. We're doing work actually with two German companies in the area. We had a project with another industrial firm from, what was it? He was a Latin-American firm that had different offices. When it comes to actually getting work with American firms, they are usually referred to the local established firms, so our name is not thrown into the ranks, and yet we can show that we can do good work for all these other firms. It's very hard to get an opportunity with the established companies in this area. Even though we stayed in this area for, actually have lived here for other 30 years, we're still not considered local. So, you know, that has been interesting. We have developed some good relationships with several clients that, most of our work is repeat or very satisfied. So a lot of the commercial work we do is actually with repeat clients. It's very hard for us to get new clients in the commercial industry."[#25]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Private a lot of people know I already have the equipment, so they'll come and get me or ask me could I do it. Versus the public, they know I have the equipment, but they'll look at a big firm or somebody that got 12 or 13 trucks and three or four backhoes and those or whatnot."[#27]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "No, it trends absolutely towards private sector because that's where pretty much all the money's at and favorable work conditions. It's a lot better because the private sector, what happens is, the customer doesn't just look at the price. They look at the overall quality. They look at the technology the company's capable of. For example, we do online invoice, take online payment acceptance. We do online security officer reporting. So, the customer get the reports online. The customer gets their own, I guess, client portal they can go to and see their account, and they can get the tours for the security officer. So, pretty much everything's all integrated online, and that's one of the features that the customer likes. With the public sector, that's not really a big concern. The concern is more driven to the overall price of the quote. But with the private sector, they look at the quality, and then 35% to 45% would be the price."[#35]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "I would say, when things are normal, and there's a lot of private work, it's easy to get the

private, because the public is always more competitive. Typically we'll see, on the job, for instance, we're bidding this Friday, which is about two and a half million-dollar job, they'll be at least 10 contractors bidding it, maybe as much as 15. So you can see the competitiveness there, versus so much of the private work. We might have, it'll be a select group of bidders. Might be three or four competitors there. So it makes it, we got a better shot at it. Let's put it that way. And then maybe half of it just comes through the door, and the people want us to do the job for them" [#48]

- The Black American male owner of an uncertified MBE construction company stated, "It's easier to do in the commercial side. It's much easier. You don't have to deal with a ton of different bosses. If you're doing a residential, you're dealing with a different boss every day, because your customer is our boss. If it's a private sector, you typically have one, maybe two people you have to communicate with on a daily basis as far as what's needed. So, yes that's an easier structure for our company." [#49]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It's direct contact. You know, they get to see my face. We get to interact and talk. I get to show them my past experiences by showing my portfolio. The state system is so impersonal." [#54]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think that private clients depend more on word-of-mouth." [#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "You know, it's interesting because it is easier to get the contracts through in the private sector. I mean, we are contractor without [REA]. Now, there is no greater hell than trying to go through legal and contracts without REA, and it's still... Because they have so much scrutiny and government regulation. It's still easier than going through the Commonwealth of Virginia. Unfortunately, it's very difficult, and especially if you are a small organization without a lot of resources. It's going to take even longer to get through there." [#60]
- The Black American female representative of a business development organization stated, "At least to the extent that my interactions or my clients, the people that I deal with, normally in the private sector, it's a really straightforward conversation. So either they're interested or they're not, and they don't play around with telling you that. It's a very quick deal, so you know that you need a warmly, you know the process, you know that you have to connect with them through someone else so that they can validate you. You're going to get in the door, they're going to tell you yay or nay and you're done. Whereas I think because of the fact that statewide and federal in particular, they know they have requirements. And so they have to go through the hoops no matter what, when that what they really might want to say is, 'I have a vendor. I love my vendor. I'm not really interested in anyone else.'" [#FG4]
- The female owner of a WBE-certified professional services firm stated, "[Getting work] in the private sector is very straightforward. If you have a capability, great, and possibly take a look and see what you can provide, if not, then we'll move on. And maybe there'll be something in the future. But as far as for the state or the public sector, I agree as far as, you have your regulations that you have to go through very, a lot of steps, even though in the

background, they may already have their preferred vendors, quote, unquote, to utilize and not just being straight forward with you."[#FG4]

Sixteen business owners elaborated on the challenges associated with pursuing public sector work. [#3, #5, #7, #14, #15, #16, #19, #22, #26, #35, #37, #47, #53, #58, #60, #AV] Their comments included:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "The public sector is definitely a little more challenging, it's more competitive bidding. The documents have to be a little more defined. And also, on our end, I mean the state issues the permit out of Richmond and the building officials are very particular, so the document has to be very complete. And then that's not to say that what they're doing is wrong, it's just they're more challenging and they're a lot more thorough than the local building official, typically. But on the state side, the building officials out of Richmond check that, so getting them through that process sometimes can be a little bit challenging. But that's a small part in the overall diversity equation, I think, or disparity equation."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Not specifically, no. We've gone more after local work with either counties or our local cities here. It's the breaking into the public sectors been our biggest issue. We've had some success in teaming with other groups and that's on more the local government side or because we've forged relationships with some of the local agencies municipalities. They've actually hired us... to work on work, but I think that's because of relationships."[#5]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "No. We may get... No, it's more the cities that will reach out to us, if they're doing a project. They'll call us directly. A lot of cities have their own concrete finishers, so if they need concrete, they just call us directly. I'll be honest, in the public a lot of our contractors don't like to do work with the government as far as the base, because of the rules of the convicted felons. It's hard to get their employees on the job site. I know some of our customers won't even bid it because of that."[#7]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Yeah, well especially with the port of Virginia, you know what I mean? A lot of the type of things that we need, we haven't been that successful. Actually we haven't been successful at all. Every single bid so far that we've put into any SWaM required requirement or bid, we've not won one. We however, and this is with the city, with the city of Portsmouth have won a couple of bids, obviously leveraging our SWaM, but it was because of the relationships that we had within the city. And we have no relationships at the state level. Which we should, we should jump into that and figure out how we can provide our services to the state."[#14]
- The Asian American male owner of an uncertified MBE professional services firm stated, "I think Virginia's page has a system, we are in that system. Every time they have a bid, we can check on the website is there's any new bid and we also get regular email notifications for those. I guess it's because we worked for ODU for a small project and that's how we are in the system, we didn't really know until we got an email notification. Yes, yeah because we have enough private sector work and again, as I said before, because it looks very difficult to try, so we didn't try."[#15]

- The Black American male owner of an MBE-certified construction company stated, "Most of the private work being done is from contractors from out of state. I've bid at work for every contractor here locally, matter fact I know I have, and sent them all letters. I even hired a person to send every contractor within the seven cities around here a letter, and introduction letter, never heard anything, nothing out of none of them. And I bid at work with all of them. Most of the government work around here, here's what they do, here's why I stopped doing it, if it's a [prevailing wage] job, each city has its own prevailing wage. Say for instance I place my bid from anywhere from 15 to 20, and you get a prevailing wage job, say you get an enforcement, now prevailing wage jobs pay the enforcement \$11.06. I'm not going to get none of that work because I'm not going to have no painters to do it, because my painters make more than that. And you've got to show that they make a prevailing wage at that amount. You go on a Navy base, you get an enforcement, the prevailing wage may be 18. Contractors get in trouble with prevailing wages, they really do, they get in trouble with it. I don't want nothing to do with it if it's going to get me in trouble."[#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "But our direct to government work, we're the prime. And to the state, we're the prime. As far as state solicitations, quite honestly, we don't respond to many of them. We don't win too many of them. And the reason that we don't do a whole lot is because of their bidding process, because of their award process. Because of the financial responsibility on a small business. The state wants SWAM certified businesses. So, you pretty much have to be SWAM certified, which we are, to respond to a submittal. The state will always, always go to the low bid, which is... That's great for everybody. But what most of us feel is not right, is the State of Virginia, for instance, will award a project to a company in New Jersey, to Texas, because they're a low bid. Then they don't get the service that they get. So, they're not supporting their own. They want us locally and they want to support small business, but really, they're not putting their money where their mouth is, because they're not. Not locally, not statewide. We don't win nearly any with Commonwealth. We win a lot federally."[#19]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Yeah. Again, the government contracts, the big agencies and whatnot, for us, it's a lot of paperwork, it's a lot of time consuming, pieces and parts that you normally wouldn't bill for. Your guys have to go to classes to get clearance, to get on base or to get into these buildings or that buildings. You have to renew those certifications every year and that kind of thing. I mean, it's costly because then you're paying your guys basically for not doing work. They're not earning money, but you're paying them and whatnot. I respect the security measures and whatnot of our government, but it's just... Honestly, for us being a small business, we are not the most cost efficient for government jobs or public jobs because they can get a huge company that can send 20 guys out there and knock the job out in a week. Whereas you're going to set my six guys out there and it's going to take us two months. We're not even cost effective for big contracts, government contracts, that kind of thing."[#22]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Well when you're not a big name and a historic name of Atlas Van Lines or United Van Line, Mayflower, you have to prove yourself, one. But half the times you don't even get called because they don't know who you are."[#26]

- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Current, I guess, strategies in the security... our industry. So, if the Commonwealth can focus... if they can mediate between accepting the lowest bidder, versus accepting, I guess, the better modern technology, modern, I guess, teachings and training, and all that, I think that would be better. Right now, what I'm seeing is that... I don't want to say they just accept quotes that are pretty much low-ball quotes, they're very... you can't really compete against. But, like I said, back when we were, I guess, bidding on assignments and projects, the requirement was, once you reach the requirements of a certain assignment, you're pretty much unqualified to begin with. By the time you see the award, I guess, statements and the pricing, it's pretty much impossible to compete I mean, back then, a few years ago, we were looking at one of the awards and it's was a company out in the south Virginia area. Everyone was bidding 18, and they would underbid everybody, and they were doing it at cost. So, their service was 12 an hour, which is impossible to compete, because there's zero profit margin. Pretty much you're just passing all the money to the employees at that point and doing the project for free. So, we were competing with those companies, and companies that were just a one-man operation. It's impossible to compete and make any profit when you're bidding against that."[#35]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Well, I've been in the midst of bidding processes for the federal government. And I've bid on a couple things for Loudoun County. One thing, actually. And I got the bid but it wasn't any big deal. Wasn't any different than me doing another contract for another individual company. But for the federal government, if you're up against other vendors, sometimes when they give you a requirement, not only do you have to give them a bid on your technical expertise, and that gets graded, your answers to their requirements. How are you going to answer this, how are you going to answer that, how are you going to do this job, how are you going to take care of this problem. What do you intend to do here? After that, it's the technical side. On this side, why is it that would be the best way, and why are you the best company to do this? So then comes the sales portion of it. And sometimes the way you present your technical side pushes out your reason why they want you from the sales side. And some companies get very dry in their bidding process, and it's kind of like you're speaking Chinese to somebody who speaks German. What you want to do is make your language not only understandable to the technical folks, but on the sales side, you want it to be understandable to the EEO."[#37]
- The Native American male owner of an uncertified MBE construction company stated, "The public sector, to me, has gotten a little bit more, what's the word I'm looking for? Almost lack of a better term, it's almost gotten more encrypted to where it's harder to navigate the different municipality systems to even know about the work going out for bid"[#47]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The amount of paperwork and things that you have to go through to get public work, and the specialization that you need in some things It's very difficult for me. I'm more of a generalist, just by the nature of my firm. So it makes it very hard to compete with those type of firms for those projects"[#53]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Mostly we wanted to start with government because government will have

some ways and means for businesses like us to get a chance to come up to a certain level where we can establish a good team. If I'm to go an' talk to a private sector, they will look at okay, what is your team size? And how many full time? And it's just a waste of time even going to them. So many companies, they already got the project. They need people and they'll just reach out. Actually they reach out to us, and it's easy for them to reach out through LinkedIn or some other place. So that's why we put our business on LinkedIn, and that's how they reach out to us. And we get that pretty quickly, because we have pretty... technically very sound. And that process is working out very well."[#58]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Overall length of the sales cycle is a big one. I mean, in the private sector it may take three to six months to sell our services because people have to get to know you and things like that. If you don't understand the game and the Commonwealth and you don't understand how VITA has it rigged and to try to work around it, then you're at 18 to 24 months. I'm lucky because we have survived, but I've seen so many talented businesses give up and stop even trying."[#60]
- A respondent from the availability survey stated, "It's been a little difficult trying to find jobs being a small company. It seems like if you know somebody it's easier to get bigger jobs. We would like to get more government work. Small businesses who are not very experienced and don't know the procurement officers are not getting public work. We should be given opportunities in the government sector. We don't get work. The process is a sham and is not working. We need mentorship. It's very difficult to obtain government work through the procurement process. Some organizations have already chosen companies before they send out RFP's which makes the process unfair. It's just tough to break into municipal and county contracts, not so much state, because companies have circled the wagons around these clients and it's hard to get through to them. There should be opportunities for relationship building with these clients. It's always the same thing - the established players get all the contracts and when we get a contract it gets canceled. Small and Micro businesses need more support from the State. It would be nice if we were able to get more contracts based on our work ethic and ability to do a job, but it is difficult as the state of Virginia gives priority to woman-owned and minority-owned businesses."[#AV]

Seven business owners and managers described public sector work as easier and saw more opportunities in this sector. [#2, #4, #6, #9, #28, #48, #55] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Public sector does require a rigorous and formal process. And so for us, it's easier to work public sector because if there's a project or RFP, it's going to be out there. A lot of times, I find out about private sector work only after it's been awarded and I thought, well, gee, we could have given a proposal if we'd only known about it. So to me, the public sector is an easier place for us to practice because it's less about who you know and it's more about just being energetic enough to respond."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "Because the public, you tend to have to compete more on the private, it's more networking. The public has better criteria and bidding procedures you have to follow."[#4]

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I don't because most of my work publicly bid, so I don't have a marketing department. I don't have an antiquated Facebook page, if you will, that rarely gets updated. Municipalities and all of government agencies have to advertise for bidding opportunities. I get that, Sunday paper, the Builders and Contractors Exchange, Fed Biz Ops, the number of federal agencies state and local that advertise. Different platforms."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "We get on some government stuff but it's more municipal-level stuff. Most of the time. Most of the time. Obviously with some of the municipalities and things like that there is a bidding process, and you submit a formal bid, which it's similar. You're still going through the same process, but you submit, they announce, you do your homework, you put together your process, you submit it, and then it's a competitive bid at that point. Typically, low bidder gets it, but sometimes common sense prevail, they kind of help people not make huge mistakes."[#9]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Now the Blue Book is just a middleman clearing out. And so it's really rare to get a private inquiry through the Blue Book, but most of the public bids for State, local, federal, all of that, tends to go through the Blue Book."[#28]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Well, we are in what they call the hard bid market, meaning we primarily survive on what comes on to the market, such as that job for the State of Virginia, Division of Blind and Disabled. And that would appear on the market, advertised by the State of Virginia. We would bid against other contractors to get it. So our marketing is primarily through the hard bid market, and we get what we are able to be very competitive on."[#48]
- The Black American male owner of an uncertified MBE professional services firm stated, "It's easier to do government work. Because it is what it is. The government side is, 'This is what I want. Here's my specs. Here's my drawings. Here's my RFP. This is what I want.' Private work is more negotiated, and it can become gray, and it can knock you out of the box really quickly. And government work, when you do the work, you get paid. And that's the biggest thing for me. That's the biggest thing for me, if you do the work, you get paid."[#55]

One business manager noted that it is not easier to get work in one sector as compared to the other. [#30] For example:

- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It's about the same. You're ultimately coming up with a number that you think, one, that you won't lose money, and two, that will get the work."[#30]

Nine business owners or managers discussed doing work in the private sector. [#6, #8, #14, #20, #27, #35, #37, #56, #FG4] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's easier to do the work And if there's design changes for private, they call you right away

and say, 'Hey, we made this change. Can you...' and there's not as many changes in the private as there is in the public."[#8]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "Private sector customers are easier to deal with and they're easily return customers."[#14]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "The commercial sector will change their mind every other day, depending on what they want."[#20]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Most of the work that I've been doing in this pandemic has been a lot of private work. I haven't been getting anything, public work or anything. It's all been little private stuff. Driveways or something like that or something. Or somebody just wants to tear down a house or level some land or something. It's nothing."[#27]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah. It's just more favorable out there with the private sector, the terms and conditions and the payment [amount], like everything else, it's more favorable."[#35]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "On the private side, working with private companies, I've done work with a handshake. The best thing I've done with most companies is give them a quote, they sign at the bottom and that becomes our contract."[#37]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I'll always take a private job over a public job."[#56]
- The Black American female representative of a business development organization stated, "On the private sector, for a while, I worked for... I worked for [a large firm] for a while. And how many times I had to go down to the accounting department to say, 'My small business owner over here, who I got to come provide this project for us has not gotten paid yet. It's been six months, pay them.' And I had to stay on top of it. But for them, the whole thing is, and they say it quite honestly, they get more interest on their money in the bank or in their investment tools than what they pay in penalty to that vendor. So, for them, they literally pay bills, like really pay bills twice a year. So, the difference in private is that there's no guarantee on when you're going to get your payment."[#FG4]

Seventeen business owners or managers described what it is like doing work in the public sector. [#6, #7, #8, #10, #14, #18, #20, #37, #40, #43, #47, #49, #53, #60, #AV, #FG2, #FG4]
For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I wouldn't say it's restricted. It's just a lot more administration."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "Oh, we have a lot of VDOT jobs. VDOT, they have specific concrete mixers they have to have, certain guidelines. We do a lot of VDOT work with our contractors. That's road improvements, things like that. We do some COD work with the states and the local cities, and they're actually very good. We do have a contract with the City of Norfolk right now. They have their own mixture trucks, so they come here and get our concrete and then they

pour their own concrete for sidewalks and stuff. We have that relationship with the City of Norfolk."[#7]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We are doing... we do work for state agencies that don't require the audited rate, like the Port Authority. We do a lot of work for them and things like that. And the public processes just are... there's so many levels of contracting that when designs are changed and stuff like that, sometimes they don't get to you. I mean, one time they changed the whole road and nobody gave us the correct maps and we surveyed the wrong area, you know?"[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "How many times have you ever seen a government agency, federal, state, or local actually go under and cease functioning? Never. And so they don't get that feedback loop that the private sector does. And so they tend to build up quite a bit of what I call silliness. If you're trying to build a joint strike fighter or you're trying to build a fusion reactor, and it's all research and development, you need process, you need paperwork, you need support infrastructure, you need procedures, you need safety when you're writing a code for a project. And that project is going to last a year. You don't need as much of the bureaucracy on the backside, right? Because things only going to last a year. And so obviously you want to do quality controls to make sure it's delivered as requested, but it could be considerably more simple. And that's one thing the public sector has difficulty with. They never found a rule they didn't like to add."[#10]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "And I loved it because I was like, 'Now, I know I'm safe. I don't have to worry about myself walking away and my guys' tools.' I feel safe. I like it. Yeah, and I think the government, there are checks and balances so if I am treated unfairly, I have a right, or if it's fair market value and they're going to give it to the good ole boy, at least in that avenue, in that arena, I have a leg to stand on and I can search through my flags and things can get overturned. In private sector, it's not like that. They can do whatever they want. I'm not a fan of dishonesty. I don't play that. I don't like that at all, and it's like, 'You know what? If I can go to the government stuff, I'm out of it.' And then I can help my crews establish themselves to where they don't have to be in any of that. Most of them aren't black. They're not... They don't have any minority statuses so they can't get work in government. I think also if y'all put other people in place of a mentorship, y'all will get good contractors. Every contractor I've talked to, they don't want to government is because they think there's no money in it and I believe the reason why they think there's no money in it is because they're not organized and the jobs are all out and they're over the deadlines because they don't know how to run a tight ship, which that's what I'm looking for."[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "The government sector, you're given a job, you know what the job is, you're given a statement of work, you know what you're going to be doing and you just complete the job."[#20]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "The government work, there is a lot of certifying, which entails a lot of paperwork by forms, a lot of...a lot of certifications. Can you do this and that. So, a lot of paperwork involved, and then once you do get the contract, there is a lot of requirements

just to get paid. You have to have this form and that form, this amount by this time, etc. And accompanied with this. So, there's just a tremendous amount of overhead paperwork required to do work with the government. And you're working for the government, so you know what I'm talking about."[#37]

- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "They're really looking at the lowest price. And so that means then we may have to have our folk certified and trained in many different kinds of materials. Whereas this way we can just with the government, we have them be knowledgeable of everything, but have their certifications in maybe say the four most common manufacturers who are used in the premier AV, or premier IT, or whatever. The government really [always pays] us, even when there's a shut down, even when there's any kind of a problem, you will eventually get paid, right, by the government."[#40]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, I've been working with the public sector so long, Virginia has gone from one of the best states to do business in with government to one of the most difficult states to do business with government, from a self-standpoint."[#43]
- The Native American male owner of an uncertified MBE construction company stated, "I actually prefer public work over private work, just because there is more security in your money. But other than that, public work can be a little bit more of a pain, just because of the process and restrictions, and requirements that they have are a little over the top, but that's just the way it is. It discourages a lot of people from bidding public work because of how hard it is to deal with, just say VDOT, I'm going to use VDOT, or the city of Richmond. It's much harder to deal with them than it is to go build a site privately. They're still not the fastest paying, but you know your money is coming. Your public money is coming."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "I'm going to say they're probably even; I mean for us. The work is still the same, whether it's private or public."[#49]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I just know that a lot of projects that are public work are specialized types of projects. Not all, but they tend to go to the larger firms. Because they tend to have a lot of paperwork involved. And not just getting the job, but even when the job is, when you've got the job. Compared to private work. There's a lot more requests for payment and things like that, that you have to do for the contractor, and keeping track of all the monies and things like that. I know this, because I've worked in big firms, and on public projects at big firms, so I've done those things. That would be difficult for me to do all myself. I wouldn't have time to work on that design. I'd need help to do that, to do the accounting, the paperwork, and stuff like that, and I don't have it."[#53]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "That being said, the positive is that the state is consistent. The state pays their bills. And the state is, especially in cybersecurity, where the private sector for small and medium sized organizations is starting to wake up and go, 'We really need to protect our data because we can get hacked.' They used to think it was just the Targets that got hacked in the world, but now they see it's them to. Government organizations have known for a

long time that their constituent data is very attractive. So, there's a lot of benefits in doing work with the Commonwealth of Virginia organizations or localities."[#60]

- A respondent from the availability survey stated, "[Virginia] is a difficult state to do business in because it is paperwork intense. There are times working for the government is hard; the bureaucracy is difficult to manage, there's tons of unnecessary paperwork. We did a county project, and there were too many cooks in the kitchen- too many people making decisions, that should not be making decisions. In the trucking industry there are a lot of burdensome regulations. The safety regulations are great, but the other ones are kind of cumbersome."[#AV]
- The female representative of a business development organization stated, "What we hear is it's feast or famine, right? I have members that they do it, they work the system, they work it well. I have members who don't do state contracting, and exclusively do federal contracting, because they say state, it's too complicated, it's not enough to bother with. I do get quite a bit of that, and then I have the famine part of, it's just complicated, I don't have time to do that. Then not have the return on the time that they feel like it takes. We have a little bit of a mix, but I think the latter of those is probably more frequent, at least in our membership, that not many of them are doing a lot of state contracting... I think it's perception, right? The perception was, it's too complicated. That was their reality."[#FG2]
- The Black American female representative of a business development organization stated, "I think the part that's advantageous is to, because normally, if you have a contract with the state or federal government, you're going to get a pay, although, in some instances it might be delayed, you can at least take your invoices and get a loan on them. You have options because it's guaranteed money. It's going to get paid. It might be three months from now, it might be immediately, but there is least something you can do with your invoices to say, to help yourself get through the situation."[#FG4]

4. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Many business owners and managers highlighted key differences between public and private sector work. [#1, #4, #8, #10, #17, #20, #25, #30, #31, #32, #5, #38, #44, #48, #51, #56, #57, #58, #59, #FG4] Their comments included:

- The Black American male owner of an MBE-certified professional services firm stated, "And that's the catch. The government jobs are big jobs, and if you can't get work on the private sector, you're sort of box out of the government jobs. And the only way you can get the government jobs is if some other big contract gets the government job, and then there is a quota for a minority business to get in, and that's the only way you can get your way in."[#1]
- The Black American male owner of an MBE-certified professional services firm stated, "Generally, I think the public is more, I want to say, flexible and the private isn't flexible in the fact that they're okay with moving dates around and times around while the private, there's not that much flexibility."[#4]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The private is much easier than the public, much easier."[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "I've talked with some folks and generally it would be they're the prime and I would be the subcontractor. And so, and then they would just pay me by the hour. But that's where... This is one of the particular rules that was a reason why I originally left government contracting, is because if I have, say, 10 years of experience and a bachelor's degree, there's a pay band that I fit in. And even though I'm a salaried employee, they can only charge the US government per hour for my labor in a certain window. And so, guess what? They're not going to pay me more than that. Whereas if I go to the private sector, if I can help them create their base patent portfolio to get their company off the ground, they are willing to give me a percentage ownership stake in a company. They're willing to pay me bonuses. And it ends up being like triple and quadruple what a salary as a government contractor would be. And so the government's inability to recognize contributions that aren't hourly and recognize that in a financial way, really, I think, hinders it a lot. And nowadays you're competing, for all these young kids and these kids coming out of school, you're competing against Silicon Valley and all these private corporations. I mean, this contractor I'm going to work with, they're going to pay me very well and according with that pay band, but the way they're trying to compete with the Silicon Valley folks that pay 200, \$300,000 a year. They're giving me 100% paid-for healthcare for me and my family. Copays and everything are completely paid for. But when they are being offered \$300,000 a year in Silicon Valley versus, say, 80 to live in the DC area, guess which one they're going to choose? And so that's a huge talent drain for all federal, state, and local government. And it shows, when you look at the caliber of security posture, innovation, which I'll be blunt, there isn't any, that's the core problem."[#10]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It's really funny, there is major difference between the sectors. It's so hard, you really have to have two different mindsets to be a commercial contractor and being a federal [contractor]."[#17]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "In our industry, I don't think so. I think it's kind of business as usual. There's not much difference between what we do for the Navy and what we do for the commercial customer. Everybody has some kind of equipment they need to maintain, whether it be a truck, a bus, a plane, or air conditioning or anything like that. Anybody that has fleet or equipment that has to be maintained and used all the time, that's where our business comes in. Yeah. There's quite a bit of difference. It's again, we've got done [more work] for the government sector, so we know it better, we don't know the commercial sector as well. So we have to kind of tread lightly in that area. Again, in the UK that has specific ways to work, they have laid out plans where the commercial sector will change their mind every other day, depending on what they want. They'll pay you for it, but again, it's frustrating to the employee where the government sector, you're given a job, you know what the job is, you're given a statement of work, you know what you're going to be doing and you just complete the job. It's pretty easy as far as following directions, but in the commercial sector, it's a lot different. You've got a lot of changes, you can work for five days on a project and all of a sudden, because the customer doesn't like it. So you got to, he

doesn't even give you the roadmap that the government employer would give you to the job, let's put it that way."[#20]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "When we do a lot of work for the government there's more bureaucracy and there's a lot more rules and regulations. We're very familiar with it so we're used to it, but working with a commercial client it's a lot easier to run a project, other than when you have a difficult client, but the actual project itself is a lot easier to have things happen. You don't have to... the government has a lot of regulations and rightly so, as to how things are run, so it is different."[#25]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Doing public work, there's always a certainty of getting paid generally. At least that's been the experience so far. So with private work, there's always that risk out there that you won't get paid if something goes wrong."[#30]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "For me, it's the same. I used to work for the state VDOT on a team doing grass cutting on the street and it was a huge contract. It was easy and I was able to buy and I was able to get approved and everything, but the only thing I had to do was I just had a great team. I was not able to keep doing it because some of my workers, they had to go back to their country, because they were here with Visa. So, they were not able to stay, but so I decided to go back to VDOT. Only on small remote work."[#31]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "In the private sector, it's fantastic, because you don't have the bureaucracy. If I have something I need for my business, I go get it. As opposed to working in the public sector, you have to go through so many hoops and loops and making sure that you're going through it... There's no rules. It's much more flexible, being in the private sector."[#32]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Okay. So, yeah. With the private sector, there's definitely a lot more business, and there is definitely a lot more money out there because of the plans and stuff like that. With the public sector, there's a lot of competition, and when you get on the contracts, you're underbidding and underbidding and underbidding. So, you might get contracts, but it's not that good of a price that you're getting, and there's not that much reward in it."[#35]
- The non-Hispanic white male representative of a majority-owned construction company stated, "Typically, those proposals are very qualifications based early on. The selection period is usually very narrow, less than a month in most cases. In our federal government side, work acquisition tends to be much longer. can sometimes be a year-plus for our government work. Often times we can submit proposals that may not get awarded for six, nine months, or longer."[#38]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, the private sector naturally is easier because you're dealing usually with hands-on, real-life people. You sign your contract, get your money, do the job, it's done. With the public jobs, with any state agencies or anything like that, there are always so many forms, regulations, permits, everything like that. It is a lot more difficult. And working with the

state agency jobs or whatever like that, it's having to wait so long for your money, too."[#44]

- The non-Hispanic white male representative of an SBE-certified construction firm stated, "All the public stuff has all the boilerplate on it. The private stuff typically has very little of it. We have a simple American Institute of Architects form contract that does, probably 90 percent of the construction work in the country is done on that form, and we simply come up with a price that's agreeable, and we use that form of contract. And it goes through the process of submitting a pay request every month, on the same form that AIA specifies. And it's considerably... So the private work is considerably less over here demanding."[#48]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "With contracts, there's less flexibility with the public sector because the way things happen in public sector. With the private sector, it's still more like you're on a team with the owner, and I'm not sure how you put that into words. Sometimes in the public sector there's less of that. There's more of an antagonistic kind of a role, even though you may not have that with the individuals you're working with."[#51]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Private sector is always easier. It's 100 times easier, than working for the state. Too many layers of bureaucracy, too many different people to answer to. That if you work for, say the city or the Commonwealth, you have layers of, you have local people that you'll send emails to. You'll have people and their bosses, and you'll have people in Richmond. There's entirely too many levels of bureaucracy and public work. That's why it costs more for public buildings to be built, than private buildings."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Paperwork. Yes. I think that the public work, which has been primarily the University of Virginia, requires more documentation of minutes and decisions and price changes and all of that than the private. Again, I try in the private work to kind of always get in writing the decisions that were made, but it's not like I have a form or somebody telling me to do these things. Again, I think that in the public sector, your PR machine has to be a lot better in terms of being able to present the RFP's and go to the meetings. In the private sector, it's probably more unwritten and more personality driven. People will come to be because they had a friend who used me 10 years ago or they bought a house that was designed by JCG in 1960. What bolsters me in the private sector is very different than what bolsters me in the public sector."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "In case of private it's a little bit more easier and quicker process. There's no... If we're to get it's quicker process. There's not a lot of requirements. In case of government, a lot of requirements to go through and still you probably end up with nothing."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Paperwork. The public. Oh, just all kinds of documents. It's just all the paperwork that you have to keep filled out. And what little bit I'm doing is minor compared to the larger jobs."[#59]
- The female owner of a WBE-certified goods and services firm stated, "The private sector feels no obligation to meet with you at all. So there's not going to be a resource fair like the

city puts on where you get to go meet all these buyers. In the private sector, they're very transparent about that. If they've got a provider and they're happy with that provider, they tell you that over the phone, and you can tell that they're not interested, they're happy. Whereas some of the cities, they do have a provider, City Norfolk, I can't get an appointment. I live here, my business is here, we bought a building. We've made the decision; we're staying in Norfolk and I can't get an opportunity to win their business. So I think they're just happy with who they have, so they don't have to go look for anybody else. So it does feel like it's the exact same thing as what's happening in the private sector, yet they go to the vendor fairs and they want to meet you, but then it doesn't translate to anything. So I think it's the same, it feels the same, trying to get in with the city versus trying to get in with a private business for me."[#FG4]

5. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Four business owners perceived public sector work as more profitable. [#4, #51, #54, #FG4]
For example:

- The Black American male owner of an MBE-certified professional services firm stated, "Yes. The profit margin is bigger on public."[#4]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, if you can get a big federal contract, they're usually long-term. And a lot of times they renew them. So those are good to get. Probably, if you look at it like maybe a 10-year lifespan of the company, probably you're going to have more profitability out of public contracts. If you look at it, okay, from individual years, you definitely, with the private contracts, you can do a lot with one job or one contract, but it may be a six-month long, it may be a two-year long. So if you're looking for that stability, probably government contracts are more profitable over the long term."[#51]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "The public is more. Private, most of those jobs are small."[#54]
- The female owner of a WBE-certified professional services firm stated, "In the public sector, there's a little bit more opportunity and a better ability to profit from the opportunities that there are within the public sector compared to business to business or the private sector. The only issue with the public sector is that even though there's more profitability and opportunity, you pretty much have to pay to play. There's always some regulation that's being incorporated every two years, every five years that puts a little bit more strain on these small businesses to be able to keep up with and be competitive with the large businesses in certain industries."[#FG4]

Twelve business owners and managers perceived private sector work as more profitable. [#2, #8, #13, #20, #28, #32, #35, #44, #48, #49, #55, #56] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Yeah, no, our margins are probably better on the private sector work."[#2]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yeah, we do some work with the state. The state requires you to have an audited rate, and our audited rate is super low because, like I said, we don't have a lot of overhead. I mean, I think it adds a multiplier of 4.5. I mean, it's super, super low, and I don't pursue a ton of... one, the audit is very expensive, it's about \$7,000, and we actually... I feel like we lose money because they have our... the field team is considered non-benefited. We're one of the only companies that pay benefits to the field teams. So they don't allow us to write off the benefits as part of the thing, so we actually kind of lose money when we work for the state, or some of the states like VDOT's, Virginia Department of Transportation and some other of the programs that require the audited rate, so we just don't even go after those opportunities. [Private work is] a little bit more profitable because you don't have the audited rate."[#8]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Sure, so one is stability work, foundation work. You make less money on the governmental side [but it is] a stable part of your workforce. So they each have their pluses and their minuses"[#13]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "You've got the roadmap in the government sector, and you have nothing but open space in the commercial sector. When you go, you can make 10 to 20% in the commercial sector easily. But it's really hard to make four to 5% the government sector. It's interesting because the competition is so great. The government always pays its bills."[#20]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Well, the public work a bit tighter, because it's going to be more a go to the lowest bidder or the lowest quote responsible bidder. Private work, I try to gauge whether any of my competition is going to be doing a bid as well. And so, my competition on public bids really doesn't make a difference to me. I'm going to bid it about as tight as I can and still turn, hopefully, a profit. Private work, I'm going to bid on the high side, and cross my fingers and hope for the best. So profit margin on private work is greater than profit margin on public work."[#28]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I'd have to say that the private sector profitability, you have the potential to do, again, better. Because you don't have the barriers and you can be more creative."[#32]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah, it does extremely. The profit level with the sector is almost double what it is for the public, simply because with the private, you can scale up. So in terms of service, add more for the service. With the public service, you can only scale up the bare minimum requirements of the contract and therefore there's not much you could get out of it in terms of profitability or in terms of you can't give as much service as you'd like."[#35]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Usually the profitability on, I guess you would say, the public sector is not as good as it would be with private individuals. But it's about the same. It's not a huge difference. It's not

a huge difference. But I would say the private sector is more lucrative than the public sector."[#44]

- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Private, typically private work is more profitable, mainly because we can roll over more private jobs faster. They don't require as much process that is unrelated to getting the work done itself."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "The private sector is more lucrative than the government sector in certain arenas. If you're dealing with military, the profitability is much higher. If you're dealing with local government, profitability is much lower. The private sector, they're just, hey I want the best price and then they have some leeway. In the government side, they look at as the city of Richmond says, the lowest, how do they say it? The lowest response to the bid. Not necessarily the best bid but lowest response bid. Unfortunately, when you do that, that is accompanied with low quality of work."[#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "There's not as much profit on government side for bigger projects. The smaller jobs are nice. They turn over quickly, so you can gain profit through your job there. But, again, the government side you get paid. On the residential side, people, they play with your money."[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "[Public work is] less profitable."[#56]

Eight business owners did not think profitability differed between sectors. [#3, #27, #30, #37, #43, #57, #58, #60] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I'd say they're similar. I mean, profitability is again, we want to spend as minimal time on it as we can, but yet convey as much as we can to make it a complete job. So it varies. So sometimes we guess them wrong, that can't be the state's fault, that we guess it wrong."[#3]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's about the same."[#27]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "And as far as in regards to profitability, it's probably the same on both side for us. Generally, we're having a hard bid public and private works."[#30]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Yes and no. Yes, there is a bit of a difference, but it depends on how you bid the contract. Sometimes the private sector...you can get paid for not making a whole lot. But work for companies isn't a whole lot different than work for government."[#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The margins are probably fairly close."[#43]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "That's very variable. I think that smaller projects in the private sector don't earn you that much money, but the big projects can. Whereas, in the public sector, you pretty much know what you're going to earn. There are already the maximums put out there and it's based upon percentages. I think it's more controlled than comparable one to the other."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "For businesses like us, it doesn't really make much of difference. Yes, there are specific rates the government has, and in general it may be more profitable for private. That's what the companies who have gone through this craziness, when I talk to the CEOs they say, 'We're not doing government contracting because it's just a... We're not making a lot of money there. It's just like break even. Where if we go to the private, we get lot of... a good profit and a good growth.' And that's what they're saying. And that's kind of in general experience that I can share from others, but it's not my experience."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "You're not as profitable in government, but you're more consistent. But on the other hand it's equaling out, at least in our industry because we try to keep our rates consistent. But in the past, there's so much more of having to get through the barrier to entry that it costs you a lot more to go after government work than it does in the private sector. But overall if you do well, then you can continue to do that work in the future."[#60]

E. Doing Business as a Prime Contractor or Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors;
4. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Thirteen firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. [#8, #9, #14, #20, #21, #23, #24, #27, #45, #47, #55, #58, #WT22] Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise. For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's not set up that way for our industry. We're set up to be part of a team. The archeology is just a little subfield of all the other tasks that they're asking for."[#8]

- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Yeah, [I] typically [work as a subcontractor]. I have general-ed on a couple but I'm in more of a subcontractor category to be fair. A lot of people don't... They don't typically want to jump in this arena. I don't know why that is."[#9]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "A lot of our contracts are mostly subcontracts."[#14]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think we have six major primes right now that we're working. And I think we have probably 10 to 13 subcontracts that we're working. So it's probably a two to one margin maybe."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I'd say we work probably 70% as a sub and 30% as a prime. It's just developed over the years that way. And again, this goes back to what I said, is just general contractors are looking for someone that they can depend on, and they ask you to quote up and bid a lot of work. And at the same time, particularly if it's a larger job, it takes a lot of the management out of our hands. In other words, if we're a prime contractor on a big job, there's a lot of management involved in that, with managing subs and that type of thing. So it's a lot, I guess, a lot less management involved in sub work. So, like I said, it's just kind of one of those things where... And we we've done a lot of general contract work. It's just, right now, the way the things are, it's more the subcontract work than prime contract."[#21]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Actually, we used to be a prime in most things. Right now, we're subs in most things. But now, we're at the point where we can no longer do that work, so we have to give another company at least 51% or come behind another company that is doing at least 51% of that same work. So now, all of the contracts that we have been working are as a subcontractor, and we are working or trying diligently to work on our own winning contracts."[#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I do, because I'm by myself. I'm individual. I don't have any employees, I work from home, and right now, I haven't been working the business in such a way that all I did was interpreting work, for example, or translation work, because I've been so diversified. I don't know what it all takes, but I get the impression that, to be a prime, you have to be a big company with staff and all types of things in place, to be able to process."[#24]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "100% of our work is as a sub."[#27]
- The Native American male owner of an uncertified MBE construction company stated, "I've done some of this work as a sub, my company hasn't gotten to a point where I can fit this work as a prime quite yet, but we are getting to that point fairly quickly."[#47]
- The Black American male owner of an uncertified MBE professional services firm stated, "I have not worked as a prime as of this date. I've done most of my work as a sub."[#55]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "The only luck we've had so far is to subcontract from other bigger contracting firms."[#58]
- The female owner of a WBE- and SBE-certified firm stated, "We largely serve as a subconsultant to architecture and/or construction firms, which in turn contract with Virginia state (and local) government entities. In other words, while we contract with Virginia state (and local) government entities once in a while, the vast majority of the time we are contracted through the 'prime' contractor as a 'sub', leaving us more vulnerable to mixed business practices on the part of our primes, without any legal recourse or enforcement from Virginia state (and local) government."[#WT22]

Twenty-two firms reported that they usually or always work as prime contractors or prime consultants. [#3, #5, #6, #10, #11, #16, #17, #19, #29, #35, #36, #38, #40, #42, #43, #44, #48, #54, #56, #57, #59, #60] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Rarely do we work as a sub. We sometimes do, but primarily we're prime. We'd probably be working for maybe a civil firm or a larger firm and supporting them locally, or with a client that we know. Well, typically it wouldn't be how that would work, but we really like to be prime because we like to interface and talk to our clients and have the relationship."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Most of the work is as a prime. Probably 85% as a prime."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I prefer not to work for prime contractors. I prefer to be a prime contractor myself."[#6]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "I do [all the work] myself."[#10]
- The Black American male owner of an MBE-certified construction company stated, "I'm always the prime."[#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "For the most part with state work, we are the prime. With our federal work, most times we're the prime. The very, very large contracts, the Navy award contract to general contractors. And then, they have to reach out to sub to construct the building, and [supply] furniture, fixtures, and equipment. That's part of a general contractor. So then, we become a sub."[#19]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "I wouldn't know how to go after a job as a sub."[#29]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Probably a prime contractor would be like 85% to 90% of the time, subcontractor about 10%, 15%. So it depends on, you're getting the company name, you're getting the customized service level. You're getting a lot more features with our company and a lot more quality than a subcontract. A subcontractor is basically someone telling you, 'Hey, I

need a security officer here at this location from this hour, this hour,' and that's it, it's like the bare minimum. And it's just that minimum payment. And there's not much to it. But if you get a prime contractor, you're trying to impress the client with the service levels and you're trying to offer a better service out there because it's your company name that's out there and not another company's thing. So a prime contractor's definitely 100% better and you can be their customer better as a prime contractor than a subcontractor."[#35]

- The non-Hispanic white male representative of a majority-owned construction company stated, "We are definitely always in the prime role. Very, very seldom would we ever do a subcontract scenario. We would prefer to have control of the project. Usually we have the qualifications and bonding capacity necessary to do that."[#38]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We never work as a subcontractor."[#48]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "100% prime."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Mostly prime. I would say I've worked as a subcontractor, if you look through the years, maybe 5% of the time."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Especially for our contracts, we're all primes. In the beginning, oh man, we got screwed so many times as a subcontractor, and I feel bad. I try to warn people because SWaMs totally get taken advantage of."[#60]

Eleven firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project. [#2, #4, #8, #12, #20, #25, #28, #37, #40, #49, #51] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Probably about half and half I would imagine. We have intentionally tried to be more prime. Well, what we've had to do is to over the years, it's really easy for us to be sub-consultants, just when somebody calls to say, 'Hey, will you join this team?' And that's okay, and it's still, it's very good work. But the problem is that we are a victim of the prime consultant's schedule so often that if we go completely as sub-consultants, we'll work some 80-hour weeks, and then some weeks we won't have anything to do. So we've discovered we have to be prime consultant enough that we can affect our own schedule. So we're about 50/50 on that."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I would say it's 50/50. [Depends on] the size of the contract."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "When we do private work, we usually work as a prime. When we do public work, we usually work as a sub."[#8]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We do both. Because of our expertise in the libraries, we've done a number of

projects where we were the consultant for another firm that was well-qualified, but they didn't know anything about libraries."[#12]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "That all depends on the contract and depends on what you can do and what a customer needs and the availability of a vehicle for the project that contractor is on. Now government has contracts that, it's usually a five-year contract that you want. Now if you wanted to add somebody to that contract after you win it, it's extremely hard to do. And there's a lot of barriers to that, to adding subcontractors to the contract. So you've got to go out and find another prime contractor that will be able to add you to that role to get to that customer. Say a customer wants our subway product. We can't basically go in and just say, 'Hey, we got the subway that you want.' We've got to find a vehicle to put that buy on, and it's hard for him to do that. And that's a huge barrier to companies like mine, getting that contract vehicle."[#20]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We do both. Actually both in commercial and in... but in commercial we're usually prime, we will lead the project. There are times when we will get government contracts ourselves and then we will have consultants working under us. So we will deal directly with whatever government agency or state agency or whatever."[#25]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Sub on most large projects that are like new construction, I would consider myself prime with my clientele like these factories, so it's a clear split. And I would think to assign a value to that, I would say probably 50% prime, 50% sub."[#28]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "For the government, for the most part we've worked as a subcontractor. For the private sector, we work as a prime for the most part."[#37]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Well, it would depend on what the work is. Sometimes there's maybe a billion-dollar contract, we obviously don't have the wherewithal to do that. So we may be on the team and so maybe a few team members, or there may be like, we're a team member who supplies the people, or we supply the material, or something like that. So frequently we have strategic partners who we partner with, and we may become their exclusive subcontractor for certain contracts they have."[#40]
- The Black American male owner of an uncertified MBE construction company stated, "Well we are a prime, every day, all day for the city of Richmond. That contract, my company is a prime contractor for the city, that's not through a sub. We're subs often, quite often. There's very few jobs out there with any real size that will be just communication unless you're working under another prime. You're kind of a hand off."[#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "For 2020, I'm 100% prime, so far. Okay, for 2019, that was probably, I can't remember if I told you 30/70 or 60/40, but it was that percentage. The smaller percentage would have been prime and the larger percentage would have been a sub. In 2018, it was maybe about 10% prime and about 90% sub."[#51]

One firm explained that they do not carry out project-based work as subcontractors or prime contractors. [#7] For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "We actually don't do bid contracts. We're the supplier, so we get our work from a general contractor or a subcontractor."[#7]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Twenty-six firms that serve as prime contractors explained why they do or do not hire subcontractors. [#2, #3, #4, #5, #6, #8, #11, #13, #14, #15, #16, #20, #21, #22, #26, #28, #30, #35, #36, #40, #46, #48, #49, #53, #54, #60] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "We sub out work a lot. Yeah, we sub-consult engineers and other specialty consultants."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We do subcontract some work, definitely on the civil side because we don't have that capability in-house. And if we need to hire an expert because of something special that is involved on the project, we definitely hire that expert to meet the needs of the client."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's relationship, experience. When we hire consultants, they're working under us as part of a larger project."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Yes [we hire subs]. And suppliers. I have to certify that I've actually solicited quotes from those businesses, but a lot of those businesses will not quote it. And it's unfortunate and it's sad because there's so much opportunity out there. I don't know why; I know the state has done a number of initiatives over the past 20 years or longer to try to stimulate this growth in the small minority-owned businesses. But it never seemed to take off and I don't understand why."[#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Very rarely do we sub out work."[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "There is a minimum mandatory that set aside that we have to do through a list of certain types of businesses that they're trying to, I guess, make sure that they're getting work as well. We have to or we can't maintain the contract."[#11]
- The Asian American male owner of an uncertified MBE professional services firm stated, "Not really. I don't think they are minority firms. It's not really we are looking for minority firms or women-owned firms, it's more based on the relationship and quality of work and of course their fee, whether it's reasonable."[#15]

- The Black American male owner of an MBE-certified construction company stated, "I don't sub out work."[#16]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "You have to have the right mix of people on here. You got to have the right small businesses, everything's got to be perfect to win that contract. I mean, in the private sector there's no teaming that I know of. Maybe a little bit, but everything, when you go in the private sector, you go in alone normally."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Oh, no, we hire subs. A lot of the work we subcontract is concrete work. We sub seeding, landscaping, that type of stuff. We just, we don't do it ourselves."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We do all of our own work. We do not sub our work out at all."[#22]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "No, I don't sub. When we go out there, we go out there not to just win contracts but to also do the work. if I were to be in a position where I could start subbing out work, I would be more fair and realistic in the process. So if I would've sub to someone who, let's just say, doesn't have the resource to execute like I do. I would understand that I can't take 40% of the profit. I can't take 45%. That's just unrealistic. I would have it where we're working on maybe say a 75/25 split. Or even if it was a 60/40 split, I would have more skin in the game and more liabilities. So that my partner could make money as well. Because we're all partners whenever we subcontract."[#26]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I hardly ever have used subs. It's very rare. There are occasions that I have, but generally we handle everything in house."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "There's certain trades that we have to sub out, whether it's mechanical or electrical or specialized trades that we can't perform."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I generally keep that all in house, so you're not subcontracting work out."[#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I do bring partners on where I can help provide expertise, and sometimes gain recognition. I've partnered before. A lot of the pretty well-known companies have helped me with getting recognition, especially at the client level. The client wants to make sure that whoever's going to do this can do the work. Even my consultants, are all world class . I only bring in a partner if I need them for a couple of tasks that maybe I can't hire to. Certainly, it's finding the expertise. I have a number of subcontractors. They're usually a developer or a [manufacturing] company."[#36]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Sometimes they're known to us, because we're working together on the job. Sometimes the customer knows somebody who they would like to see have a chance to do some of the work. Sometimes they know somebody in the past who's done something."[#40]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Upholstery work, which there's a shop down the road that we take the cars to if they need a headliner redone, a seat fixed and stuff like that. And windshields. Those are the only two things that we get other companies involved." [#46]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Almost with every job. As I was telling you, we turned into a broker. And back in the '90s, we had about, oh, 80 or 90 employees, because we were doing so many things that we now subcontract out. But that's just the way the business has evolved. There's so many specials that... For instance, we used to do all of our concrete work, every bit of it. Poured the floors, poured the foundations, and all that kind of thing. But now there are people that can do it cheaper than we can. That's all they do, day in and day out." [#48]
- The Black American male owner of an uncertified MBE construction company stated, "Probably two percent. We self-perform everything." [#49]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I do subcontract out work to structural engineers, mechanical, electrical, plumbing engineers, lighting designer, different things like that." [#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Sometimes I'll need maybe an electrical or civil engineer, or if it's project that I need to have an architect's feel on, I'll work with the other architect and he'll review what I provided, and feel it for me. Put his feel on it." [#54]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Most of it, yeah. I mean, most of it we do ourselves but there are times that we use subcontractors, and we will use other SWaMs." [#60]

Twenty-four firms that the study team interviewed discussed their work with certified subcontractors, and explained why they hire certified subs. [#2, #3, #5, #6, #13, #14, #17, #20, #21, #25, #30, #35, #36, #37, #38, #40, #43, #44, #48, #49, #53, #54, #56, #60] Their comments included:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Now, what I have had to do, it's interesting you mentioned that, because the few times when we've had to respond to an RFP that says, 'Now, we want you to have 20% SWaM businesses on this project,' or... It has forced me out of that comfort zone of just calling my friend and saying, 'Why don't you join us?' I have to go search for a new consultant. And actually, it's great, because after you work with that person, then they become your go-to person for the next assignment. Ironically, the only thing that I find is that some of the SWaM firms that I sub-consult are so busy that they have trouble getting to my project. So the advantage is a system that actually is so helpful that these people don't have time to work on a project." [#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We do look for that. We do look at that, in particular if we're doing state work or local government work, because sometimes they want us to have that capability. So we definitely do. Yeah, I would say in the middle of those two somewhere. Again, it depends on the project needs. I mean, we have civil consultants that are SWaMs that we work with

routinely, and they are often on our teams just because we have the working relationship, we know how we work together. Sometimes, if we're working in the Tidewater region and we have a civil component, we sometimes have to look for one in that area that's closer than Lynchburg, or this area, and say, 'We'll look online in different ways to find them again.' State contracts are a good tool sometimes to find some of the smaller subs that we would need."[#3]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "That wouldn't be our prime reason for selecting a firm. I do know some of the consulting firms that we work with are SWaM or WBE, but... I'm actually stopping and thinking. Many of the firms that we subcontract are both. Are those that you mentioned, but that is not the reason we seek them out."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Yes, I have to do a number of things. Any project I bid publicly, I have to advertise in a newspaper. I have to get the list of those contractors from the DMBE website, solicit them through emails."[#6]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Sure. We had a state award that we proposed to SWaM, and we do commercial work where SWaM is not relevant, so both cases."[#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "And then what I do a lot of is I mentor newly started, veteran owned small businesses. So I'll bring them on, throw them a couple of positions here and there to get them started."[#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We keep a matrix of who is certified as a SWaM, a DBE, veteran owned, that whole thing. We keep a log for in house and for bidding purposes, a lot of times we have to record that. When we bid on the Department of Transportation projects, we have to be able to show when we bid what effort we've made for DBE's and things like that. We keep a real sophisticated matrix on that, yeah."[#17]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Oh yeah, absolutely. Yeah. I would love to have an ADA on the team. It just enhances your ability to diversify and show the customer that you're willing to help other small businesses succeed, whatever their issue is."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, it's like, for instance, the seeding contractor that we use is a DBE, and we use him all the time for private work. If we're bidding highway work, and it's a DBE requirement on it, then we will go through the process of soliciting above. The WBEs or DBEs, by and large, they're a lot better than they used to be. Back when this program first got started, there were people out there trying to do work that they weren't capable of doing. And the reason they were doing was simply because they were certified as a DBE. And so, like I said, that's changed to the better. And these SWaM and DBE companies, I've not had any issues with any of them. Like I said, everybody we've used or worked with, they've been capable of doing what they said they'd do."[#21]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I try to do it to woman-owned or minority-owned. We're like okay we need a [certain type of firm], so we try to, like the last time we submitted to the [a city in Virginia] actually we did a totally woman-owned package. So we were a woman-owned [firm]. We found [3 woman-owned subcontractors], and we submitted that package. I was like, 'How often do you get that?' We still didn't get it, but that's okay. Yeah, I try to do that. I try to find out when I go to events, find out who owns minority firms, and we try to include them when we do the proposals, if we are going to be priming, absolutely."[#25]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "We're actually using one [for a current job] having some pavement type work. I wouldn't anticipate it. Especially with regard to VDOT, if someone's used to doing VDOT work, they're used to the bureaucratic added requirements, so if they've already been approved as a VDOT qualified contractor, I generally don't have concerns with regard to them. They've gotten that far to be qualified."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "It's just basically phone calls, emails. I just send them out some information and pricing in regards to what they offer as services, and I just go with the one that offers the best features and the one that my customers would like, having that specific service in addition, or that tool or that equipment. One that will benefit my office people and all that stuff. So with the small businesses out there, the minority owned businesses and women owned businesses, we do deal with them. One example would be our training schools. Some of the training schools that we send our security officers out there are women owned, some of them are minority owned. And with that we do get more a custom tailored than the larger schools. The larger schools are pretty much just stick to the scheduling, here's the price. With the smaller companies out there, they're much more flexible. If we have 30 officers that are available only on the weekends, the smaller companies can tailor to train them only on the weekends. And then the bigger companies will have a set schedule. I guess we all started off with smaller companies because we do a lot of printing and they service copiers and fax machines, and they're small business owned and minority owned."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Not specifically. It just happens to be that most of the companies that I sub to are women owned small businesses. The company I used to work with, well who I still work with, I'm a sub for them, they're a woman-owned small business. So we're very cognizant of woman-owned small businesses. We do solicit them, and not only do we solicit them, but we actually in the case of the woman-owned small businesses, we team with them. We try to make that well known, because often that is appealing to government or state folks, because they all have woman-owned small business quotas for goals that they need to meet. So we try to let them know that this will help them if they were to come to our team. We try to use it to limit competition in some degrees. I prefer to compete with other women owned small businesses, other than large businesses. You know, cut down the competition."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Mostly stuff, like I said, I get my work word of mouth or via the internet. I haven't gotten anything where I need to just go out and do a solicitation. This is the...like I said, we're very small."[#37]

- The non-Hispanic white male representative of a majority-owned construction company stated, "Every project. You say solicit, there's two different efforts. There's certainly our outreach efforts and how we're identifying, qualifying, and getting to know those businesses. That happens through any number of ways. It's outreach events, it's working with local PTAC, it's word of mouth, it's a lot of different ways. Once the project comes out, then we have a database of firms that we would go through and decide who we think is qualified and capable on our project. Then we would go out to specific firms and depending on solicitation, location size, complexity, et cetera."[#38]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Yes, sometimes we do. Especially for construction. So through the way that our construction it is a bit different than IT, what I kind of described to you earlier was IT, but construction they have some different mechanisms. So if there is a construction project that they're bidding, the project assistant will post it on a site that we have given access to bidders. And so she has a list of people, and she will send them out a mass email and say, 'Hey, we've posted this, if you're interested in bidding', and in that business includes minority and women owned business. But we will solicit from there and say, 'Would you be interested in submitting a bid?' We have in the past, especially in construction, we have had minority small business who we've worked with. IT honestly in this area there just aren't as many minority-owned [businesses] to be honest. We did have one group we worked with, but we actually heard that they've gone out of business, so I'm not really sure. But construction definitely, we have a lot of minority-owned businesses."[#40]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, you want SWaM because you get points for SWaM. The more SWaM you got, you get the points and most anybody that I'm going to look to contract with on the work I would do. In reality, all of the people that are contracting to me are there because of there is no qualifications, and I'm not going to tell you it's because they're SWaM. They're there because of their qualification, they're uniquely qualified for the roles they're in."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "They're just like us and that's why we like them. They won't do anything they can't write their name to. You can take a picture of anything they do and it's all above the board. The small minority-owned contractors are real people just like us. They're always 100% better to work with because they're real. You get to working with the big companies and from what we're seeing, big companies don't care. They don't care if they crush you, if you ever get paid, whatever like that. They don't care. 99.9% of the time I would prefer to work with a small business, especially a minority-owned company, than work with the big boys. Because the big boys don't care. They don't care."[#44]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "To be honest with you, not as often as we would like. Actually, there's just not that many. And a good number in our marketplace, but they don't typically bid the bigger work. They're mostly smaller companies. And we do have minority participation I'd have to just say occasionally, because it's not on every job. Because when the bids come in, you look over them, and they're simply not there. In the category of bidding we do, in the larger jobs. There are a good number of them in the small jobs. But not when you get beyond a certain point, they're just not bidding the big work. There are probably financial reasons for that in

most cases. Well, we typically simply make it known in any of our advertising for bids that we welcome minority contractors. My feeling, and just in general, is that people want to go out of their way to find somebody that is woman-owned or minority to deal with. They welcome that, because there's not half as much of it as, let's say, would be ideal. And so therefore you look for it. But no, I don't think it's been, I think it's been just the other way. Couldn't be a better market for people who run a good business and are competitive in it." [#48]

- The Black American male owner of an uncertified MBE construction company stated, "I don't want to say all of [our subcontractors are SWaM], but most. I would say at least 95% of them." [#49]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I don't know if any are certified or not. Like I said, this lighting designer is a woman-owned business, that I have used. And my interior designer, I don't think she's certified. She should be probably. I know the company that does my blueprints is certified as SWaM, and I send all my printing to them. I don't really subcontract with them. I think they've all been good. All of them that I've worked with. The lighting designer is great. I would use her all the time. Yeah, no problem there." [#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I don't search for specific for SWaM. Most of them just are. I would say maybe 15% are SWaM businesses." [#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I'll use them any time they're available. In our area, there's not a lot in the construction field, not in what we do. The highway industries got more than the general buildings side. The ones that I've used have done a fine job. We just don't have a tremendous amount of SWaM or woman-owned businesses. Minority or woman-owned businesses in this area, in the construction industry." [#56]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Most of it, yeah. I mean, most of it we do ourselves but there are times that we use subcontractors, and we will use other SWaMs. I would say probably about 10% of the time. We're a little bit more restricted by our errors and omissions insurance because of the nature of what we do. They then have to be insured, so it limits how much subcontracting we can do. But we try to do it wherever we can. I will tell you that they tend to care more. They work harder. They tend to care more. The only time that I have ever seen it not be that way is when we were in the federal space. You would see a lot of 8As that were gaming the system as a pass through. They were like, 'Pretty much when our nine years in the program's up, we're going to go away.' They really didn't care about the... They really weren't in control of the quality of the work. In Virginia, especially at the state and local [level], the other SWaMs that I deal with are very committed. They work extremely hard. Obviously if they don't, we're not going to be dealing with them, but I noticed by and large the people that we deal with that have weathered the storm, I mean, they have such fantastic reputations. But you have to be so much better than the big companies." [#60]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors. [#3, #5, #6, #8, #11, #20, #21, #30, #35, #36, #37, #38, #43, #44, #46, #48, #49, #53, #54, #56, #57, #59, #60]
For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "A lot of times we'll look for local experts online, or we'll even sometimes look for other people. If it's on a state job, we'll look for people on state contracts and things of that nature already who might be an expert in that region or in that area to help us fill that gap. A lot of times we would do a search for particular areas. I mean, one time we needed [an expert for a project] we were going to do for the city of Lynchburg. And I think my office manager/marketing person online said, 'We've got to find somebody.' And so she went looking and we found a consultant out of Chicago, and she found an architect out of Kansas and they did a lot of work on those types of facilities. And they'd worked together, in fact, but we brought them both to the team, didn't know they'd worked together until we got them on the team together. And put together a winning team and a really good team for the client. So I mean, really just Googling is one mode of looking. Again, we can go on DPOR if we're looking for someone in Virginia, we can go on DPOR and find different people that are registered. And if we're looking for specific trades or expertise, we can go on a state contract sometimes and find those."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The firms that we select to work on are based on relationship and performance, so there's no difference."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "If there's a sub, I wouldn't work with it's because of quality."[#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It depends on what we're looking for. It's usually some very specialized subfield of [our industry]."[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "We typically don't have very many subcontractors, like I said, but when we do, it's typically by the job. So, we typically have in my industry, it's pretty standard square foot wise that when you install or do something like that, it's a certain square foot, depending on what type of material it is and things like that. So it's pretty generalized. And as far as that goes, the install only side is very competitive"[#11]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think experience is a big, the contract always has specifics to it on what they really need. You want to find the best companies out there that can do that specific job. And if you put them on your team, you got the prime, you put them on the team, then you get the knowledge with that from experience in industry. So when I started my own company, I knew who the top of the line was and that's who we would select to bid on a contract."[#20]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "If we can't find anything out about them, we're a little reluctant to start the work, depending on the amount of work and what they're going to do and that type of thing. So it's just a matter of knowing them. And like I said, by and large, you can pick up the phone and call and you can get some information on these people readily. And, like I said, over the years, this thing has improved to the point that... I feel, by and large, that most of these minority companies now recognize that they can't be in the minority in name only. They have to do some work. And I think that's been a big benefit."[#21]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It's normally relationships with people we've worked with in the past."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I'm helping local businesses. And a major factor is, unlike the bigger stores, if you were to call a local small business owner, he'd respond virtually 24 hours a day, because that business to them is more important. And they don't mind the phone call. So it's a lot better quality, it's custom tailored, and they care more about the business and the quality"[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Some of these guys are really special in their own world, and not only do they provide me technical expertise, but some of them have been very high up in their own companies, and many times they almost act as a board for me where they can give me advice and stuff that they've done in the past that worked well. They've been a tremendous asset."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I have a network that I work with all the time, and I just go to them and say, 'I need this or I need that, do you know of anybody to do this or that?' And they'll...that's kind of the way I get my work too. You have a network of folks that know who can do this kind of work better, and that kind of work better, and if you've got somebody, they suggest then you'll give them a shot. And that's how I find those folks."[#37]
- The non-Hispanic white male representative of a majority-owned construction company stated, "A number of different ways. It's capabilities, it's past experience, it's price, it's statutory requirements, certainly with the largest volume of our work being government, there's a small business subcontracting plan we have to follow. That dictates some of our procurement."[#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Usually it will be in the area for research or communications and I've got an inventory of companies that I'm looking for. We've got a strong network. I do look for... I looked for minority with SWaM businesses, I'd like to say for the right reason because we should have a diverse marketplace of who's doing the work. My qualified base in these areas is very, very difficult."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "How I select my subcontractors is just by knowing them. Their reputation, their work, and what they can do. We only usually use an electrical company as our subcontractor to do panel change outs and stuff like that. It's all about work-related experience."[#44]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "It's people that we've met throughout the years in the automotive industry."[#46]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "[We choose subcontractors] on a competitive basis. Typically, we'll have at least two or three bids on every item in the job, like electrical, mechanical, concrete, structural steel, and you name it. We'll get several bids on it. Sometimes as many as eight or 10, although it's gotten so competitive right now that it's not atypical to get 10 bids on one discipline. We send out an email to 500 subcontractors, almost every significant job. And there are lots of minority contractors on that list. And so they get notice of it. They know it's on the market. Anybody that has an interest in our market will know what's on the market. You don't even have to advertise it in the paper, as a matter of fact, because if they're qualified, if they're in that type of market, they're going to be there. That's the way it works. It's not our list. It's one we subscribe to."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "I have subcontractors that I've used for years. I get comfortable with a subcontractor and that's who I'll use because I've built a relationship with them. I know their quality of work and I know typically what their rates are. My sub, I can almost bid the job for them because I know what they're rates are. I got an idea of how long it's going to take."[#49]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have used the structural engineer before, and they're very good, and I know them. I found out about them sort of by accident, because a residential job I was doing, the owner knew them and wanted to use them. I hadn't used them before, and I really liked their work, so then I started using them. Mechanical, electrical, they marketed me and another architect here a long time ago, and five years went by before I had a project that I could use them. Then I called them up, and ever since we've probably done four or five projects together now. My interior designer I knew of her, so that's how we brought her in."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "[We hire subcontractors] based on their past experience. It's just that I've been the business so long I know a lot of people. I know a lot of contractors, engineers, architects."[#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I usually use the same subs over and over again. I have a select group in each trade- of three to four subs. I try to keep the same. I know another reputation of what type of work they do. It's easier. You get a better end product for everybody. Less headaches."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I usually start with firms I've worked with before for the structural engineers, for the HVAC. If there's nobody like that available, then I call people I know in the area to find out about other names. From my vantage point, people have to be competent, but it also comes down to do you like working with these people."[#57]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Mainly from experience with people that I worked with."[#59]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We tend to use folks, obviously that we have established relationships with because there's not that many people out there that do what we do. You have to have industry certifications, you have to [have specific certifications] or something like that, so it's not like you could just go out and find any firm to do that. You have to have people that are qualified. It's like finding an architect that doesn't have a license."[#60]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors. [#3, #4, #13, #30, #35, #47, #51] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I'd say [the sectors are] similar."[#3]
- The Black American male owner of an MBE-certified professional services firm stated, "No, [the sectors are] the same."[#4]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We've never really done any government subcontracts, but we have subcontracted to small woman and minority-owned businesses, yes."[#13]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "So from our standpoint, the owner might be different, but dealing with the prime is the fundamental relationship from our standpoint. And if we're working for a prime on a private job versus a university job, there's no difference on our standpoint."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "In the private sector there's more of it. For example, you can get an assignment literally right now for a subcontract, and it can be like, 'We need a security officer at such and such location for the whole month.' And you'd get it on the spot. With a public subcontractor there's a lot more requirements, and you may or may not get it. It's not something that is, 'Hey, we immediately need this done.' You got to wait and see if you got it."[#35]
- The Native American male owner of an uncertified MBE construction company stated, "One contractor that I've been bidding a lot of work to, they do a tremendous amount of public work, so I started working with them in the private sector. They liked my work, and thought I would be a good candidate to work in the public sector with them, so they've been using me on a lot of their projects. I think it's all in my quality of work, and my work ethic. They know that I do good work, and that I can keep it scheduled. Those two in combination is pretty valuable in my line of work."[#47]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It depends on how big the public project is. The private projects generally have less subs, so you're more directly related to the prime. If you're on it with a big team then a lot of times just getting in touch with the project manager, getting questions answered, takes a little longer. But generally, it hasn't been too much [of a] difference."[#51]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually

have a long-standing relationship with the prime and are responsive to the needs of the project. [#2, #3, #5, #8, #14, #21, #36, #38, #44, #48] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Most of our work is relationship-based. Yeah, and so, because it just makes it easier. Although frequently, what will happen is I'll approach a prime and say, 'Can you pick us up for this project?' And they'll say, 'Well, we have some other relationships that we're trying to keep those strong, but thanks for calling.' So yeah, I get turned down for dates a lot. Primes will have a relationship with a company, and we do the very same thing that they do. And they'll just say, 'Well, thanks for calling, but I've got this there.' But the thing is, you call them in two or three more years, and that will have changed. If you just live long enough, you'll get a chance. That's how it's been with me."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Obviously if we know them and we've worked with them in the past, we would like to continue that relationship. We usually go to those first, unless there's a reason to go to someone else. Or specialized consultants. [...] Once we know someone, we know they do good work, we try to work with them again."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Typically, relations. Sometimes cost. Quality of work, yeah."[#5]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Just history with them. I have three partners that I work with."[#14]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, in some cases, if we're bidding as a general contractor, they will bid to us. And there again you've got a relationship with most of these people and they will... you call them whatever, just say, 'Look, you know, we're going to bid this job and looking for a price [...],' and they get in touch with you. So how we work is a little different from the standpoint of the way they publish the bidder's list and all the people in it. So, like I said, you get a lot more activity from subs and suppliers on highway work than you would do in private work."[#21]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "14 of my consultants are PhDs, so they bring tons of name recognition and expertise. These are the kind of guys that really don't want to work eight-hour days anyways. They just want to work for extra money to travel, or something. So it works out very well. It's a very good business model I think."[#36]
- The non-Hispanic white male representative of a majority-owned construction company stated, "It could be a number of factors, but whether they have the manpower to do the job, whether they have... I would call it the values that we look for, a focus on quality, safety, customer relationship, worked well within the team, et cetera. It's just not an alignment around how we would look to service our clients. Some firms, it's safety record, sometimes it's focus on quality, it's demonstrated ability to not meet their commitments, it's a litigious nature in some cases. It could be any number of reasons. Certainly, there are preferred partners that we would go to. Sometimes that depends on the size of project, or complexity. There are some firms we would definitely want to use on large complex work. Those

probably aren't the same firms we would want to use on smaller work. But yeah, there's certainly preference that exists, based on past experience with certain partners."[#38]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Because what I've found, and this is probably the number one deterrent, I've seen those guys, I've unfortunately used a couple of them in the past, and a lot of contractors out there like to do the ballpark. They'll come give you a price and then it's like 'Oh man, I've run into this. This is going to be...'. When we go give a price, we survey the job and estimate it. And yes, sometimes things do happen and it costs you twice as much to do the job as you thought it would. But when we give our price we stick to our price. This is what it is. And a lot of contractors don't do it that way. It's like a bait and switch. They're dangling a carrot. They'll throw a cheap number out there, and this works all across the industry, all across the board for everybody, you have to watch it. Car dealerships are the worst about it. They'll dangle that carrot, 'Come get your car, \$99', and next thing you know that car done cost you three times of what you could have bought it for."[#44]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We always bid, but we quite often are using the right same people over and over again, because they're not only competitive, but they're quality people. There are a number of them that we hope are going to be the low bidders."[#48]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Two subcontractors mentioned the helpful role Virginia's programs play in finding work. [#2, #4] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "[Agencies] recommend us as a SWaM sub to a large company. And those companies, after we worked with them once, the majority of them have called us up to work with them on other projects. And so it's a very interesting situation where a public agency would know us well enough to say, 'Hey, why don't you think about putting them on your team?' And it's worked. It's a really great way to get business. In other ways, it just tends that maybe somebody on our staff knows somebody at the staff of another firm. As much as you try to make the world a fair place, sometimes it is about just these personal connections that people get along the way. So that's how it works."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I'm in a database that [primes] can go to and whatever they're looking for my company name will show up and they have all my information."[#4]

Nine subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry. [#3, #21, #27, #28, #30, #49, #51, #54, #58] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "They tend to call us. We don't have a marketing push, we've just been blessed with

good name, repeat clients, referrals and recommendations. So very rarely do we just start picking up the phone and calling people, nor do we have a strategy to reach out. I mean, we do watch for public solicitations as a part of our marketing program, so we can respond to those, but traditionally it's having those contracts in place. And then on the private sector, just having relationships with folks that refer us, or call us based on referrals." [#3]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Majority, particularly the major contractors or international national contractors, they have a database. And when they come into an area, they're looking at projects in this area, they can contact you and ask you if you're interested in working with them. And a lot of it, I mean, if they don't know us, we don't know them, they'll ask, you know, what does your company do? How long you've been in business? That type of thing. By and large, when we tell them that we've been here as long as we've been here, they just said, 'Well, that's good to know, and we'll send you the plans,' or whatever." [#21]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "A lot of the state jobs, when they got those bridges coming through and the prime contractors [will] send me an email because they need a bid in on it, because they have to have so many DBEs or minority bids or whatnot just to give them work for something. I put some in, and maybe one or two I might get, I see there's plenty of work out here. I have been searching, trying to get in with brokers and contractors, but everything [has] just seemed like it's at a freeze and everybody's just using their own trucks or their own everything to get jobs done now. There's not a lot of behind sub-contractors or nothing too much now. I'm riding down the highway and I happen to look over and see something going on that's in my field. I try to pull over and see if I can find who's the prime contractor or whatnot. Then I go and see if I could talk with some of them or something." [#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "We're pretty much the go to [flooring company] in this whole area of Virginia and with all the years of experience we've got and the clientele we have, and so I don't have to do a lot of advertising. A lot of it is repeat business, big factories that use us and general contractors when they're going to build a new building, the architects expect [specialized flooring]. The bid contractors know us, and so we'll get invites to bid, email invites to bid via email, and then we participate in what's called the Blue Book, which is a clearing house for all bids, whether they're public or private. If they're private out for bid versus just the office manager contacting a couple of [flooring] guys. And so the Blue Book then knows our territory is the State of Virginia and the southern part of West Virginia. So then, we'll get emails from the Blue Book with links to plans and specs for new bids." [#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Generally, because we're specialized, the prime will not be able to perform it. It looks for someone to perform those tasks. The same, we would pursue an electrical or mechanical contractor. There's not enough others. Generally, there's two of us or three of us. They look at prices from everybody because if they're the prime, they don't want their competitors getting a better price advantage over them because they're in the same position we are." [#30]
- The Black American male owner of an uncertified MBE construction company stated, "A lot of times I assume they ask questions around, they'll see my vans around town Richmond

area. A lot of times they'll call me and say, 'Hey buddy, you do communications?' 'Yeah.' 'I saw your van riding around Richmond quite often. I got a project I want you to take a look at for me.' 'Sure.' That's typically how it works I'm going to say 98% of the time. The other times are when someone will look online and say, hey I need a communication's contractor in the Richmond area. They'll go online and they'll find something, then they'll call me."[#49]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Most of their people that want me on their team were competitors to me with my old company, so they know my reputation, they know how many jobs we took from them. You know? And they know the clients like me. So they'll call me and say... And I end up being on teams that are against the company that they're proposing against, the company I used to work for because they say, 'Well, they like him. We'll put him on the team.' And I end up doing a lot of work. It's not like they're just putting me on there for my name. So that's how. Mostly it's by reputation and experience. Even though you're competing with companies like that, I always tried to have a rapport with them and not an antagonistic... Because you meet them at meetings, professional society meetings, and you meet them in the owners office because they may have another contract with them. And so I had a rapport with them."[#51]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Someone will call me. Or I'll receive an email. They call me out of the blue. I've had a couple of large project management companies call or email me, because they are trying to get a project through the state of Virginia, and they just contacted me to see if I would be interested in working with them. And I've sat in on the panel interviews, and met with them to see how we can work together. But nothing has panned out yet, because either they don't win the contract, or they just dropped out. I've only had a couple of people call in that case. I think it's because they either see me information on eVA, or with the city of Richmond's minority list."[#54]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So I got one contract last year through [a prime]. And they had contract with [a federal agency]. So we subcontracted with them. So they needed the skillset we have. And they have a lot of the big team of other resources, but not exactly what we have. Especially the areas in which I am working. So that's how we were able to do subcontracting with them. With the industry, they will just do the subcontracting where we can work, but then we can't get enough to hire more resources."[#58]

Eight interviewees said that they get much of their work through prior relationships with or past work performed for primes. [#3, #7, #30, #45, #47, #55, #59, #FG2] They emphasized the important role building positive professional relationships plays in securing work. For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "A lot of times it either comes through a recommendation from a client, 'Hey, these guys probably could help you out.' Or it's someone that we've worked with or known through the years. We don't get a ton of cold calls. We occasionally do, but very rarely do we get many cold calls."[#3]

- The non-Hispanic white female representative of a WBE-certified construction company stated, "Actually, because we're all over the Hampton Roads area, you will see there are mixture trucks. What we do to get noticed is like right now we have [a message] on our drum of one of our trucks. We do a lot of "thank you". We did last year, what was it, [a different message] on our drums. People notice that. We work [with a nonprofit] so we've just passed out water bottles [on site]. [We volunteer]; we do a lot of community things [...]. The owners' philosophy is [for the public] to see us as part of the community. They'll put out a book with upcoming contracts. Then we'll reach out to the... If we don't know you and you're a new contractor, we'll reach out to you and say, 'Hey, if you're bidding this, we'd like to give you a [...] price.' But a lot of our customers we've had for years."[#7]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It's just relationship, awareness. We've been around a long time. Like I said, there's not enough companies that do what we do, where they can just take my competitor's price and use it without checking."[#30]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "A lot of its word of mouth, just because people know me on the national level pretty well. People call me, like my buddy from Philadelphia called and said, 'I got a call from this guy in California. I told him you're the person he needs to talk to.'[#45]
- The Native American male owner of an uncertified MBE construction company stated, "So contractors contact me to, I get invitations to bid their work. It's literally all by if the contractor decides to send me an invitation or not. That's the only way I'm getting on there. If they bid a job, and that job is public, then that goes on the public website, and sometimes my name will carry with their name. So they will say, 'I wonder who that is.' They'll look me up, and then they will send stuff my way."[#47]
- The Black American male owner of an uncertified MBE professional services firm stated, "I started with my refocus. I started hitting more networking events. A lot of things are word of mouth that come to me from other guys that I work with. I've worked with two other contractors, one being a painter and one being a drywall contractor that are smaller firms that have picked up work. They tried me on a few jobs that they had going that they just couldn't man. So I was there to pull my smaller force in and get in there and do some things, but right now that's it."[#55]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "We had a client that we've worked for 29 years. We remodeled buildings all over the country. Had a very good relationship. It was almost like a friendship or family type relationship. It was just that type of relationship. But then they brought in a new CEO and he cleaned house. I didn't feel comfortable with the new operation. They just went. Instead of demanding quality, it was all about the bottom line."[#59]
- The female representative of a business development organization stated, "I have some members that sometimes struggle where if they're more of a subcontractor, when you're talking about construction issues, or anything like that where their success is almost with them getting with the right prime contractor. That goes to them being able to network and to be able to work in that kind of space."[#FG2]

Eight business owners reported that they actively research upcoming projects and market to prime contractors. [#4, #17, #19, #20, #24, #45, #49, #55] Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "Just being a prime, it would be, I would look for a contract, but then it would say that someone already had the contract, so they're looking to subcontract out the job."[#4]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "No, we do on the government sector. Like I said, they're very, very large million-dollar projects. The Navy in particular award the contract to a general contractor, and then it's up to the general contractor to select subs. So, they would select their drywall sub, their plumbing, their electrical, and then they have to select a furniture sub. So, we do market to general contractors for that purpose. Otherwise, like I said, our government contracts sort of speak for themselves and we're contacted by the government for projects and opportunities."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "When you're new in the business, you've got to have thick skin and you got to go out and market yourself. You've got to network. That's huge. You've got to find the right people in the big businesses that will bring you on as a sub. One person, we had two people when we started and we were able to get on with a major league company to do a three-person job. So we hired another person. Let me tell you about, our first big subcontractor job was three people. And we built from there and even that was huge. You've got to know the people that's going to get you on as a sub. The customer too, because you could go in and convince the prime contractor, 'You put me on the team, I know the customer, he likes my work. And he will really help you win the contract.' We do. We try to be that team, that's the biggest thing that we do, we try to market our efforts and show our past performance. Again, that we're past the point, and show them that, 'Hey, this contract's coming out. We know you're going to be in conflict. We know you're probably going to win it again. This is what we can offer your team in going forward and ensure that you win it again.' And the specific role that you can fulfill in the major league contract."[#20]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "What I usually try to do is, I try to partner with an agency that has contracts. I think anyone who's willing to pound the pavement is going to find work. And pounding the pavement can come in so many ways. You could just be out there networking, or you can go through the different cities, and register in their database, so that if work comes up, you can get called. But you have to be looking. I think, as an independent like myself, you really want to be able to connect with someone who already has a contract that you can do sub work for, and to be available to do the work."[#24]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I go to the preproposal meetings, or I get a list of who attended on the webinars, or because everything's electronic now. And then, I follow up with companies I want to team with. A lot of times in the beginning, they'll say, 'We know you, we love you, but we had this team together for a year. We knew this bid was coming out, so it was too

late.' Going to these events, I do think that's really helpful. But I'll be honest with you, taking away time from your work is expensive. And I can't pay to go to all these events. So anytime you can offer it at lesser cost is always helpful."[#45]

- The Black American male owner of an uncertified MBE construction company stated, "We have a corporate capability package that we send out to primes. As we see that they're asking for contractors. If we can't get a face to face we'll send out a corporate capability package basically telling them this is what we do. This is where we've worked. These are some of our clients and this is what we're capable of. A lot of times they'll look at it, I'm guessing, they'll look at it and they'll say, yeah, we like this company, we'll call them. Then other times, we don't hear from them. Don't know if it gets tossed in trash or anything can happen with it once it's out of our control."[#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "Specifically, I seek business through other subcontractors. I've used the Eagle website. Few people I know, just because I know through my work with my regular day job. I've been to a couple of networking events with SCORE. SCORE, I've been using that platform. And I'm also listed as a member on the Village Exchange now, so I receive bids from there. I'm able to look at the bid list to see what contractors out there are bidding on the jobs, and then I'll reach out to them and just kind of introduce myself and see if I can work out something."[#55]

5. Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly. [#3, #4, #5, #6, #8, #27, #28, #35, #47, #49, #51] Examples of their comments included:

- The Black American male owner of an MBE-certified professional services firm stated, "There [are] some [primes] that I don't want to work with. The way they care about business. I want to say their lack of professionalism. That's pretty much it for the most part."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think it's just [easier to work with] an entity that you know, and you know how they work. So it's a really time saving, cost effective measure when you understand a client that you're working with and have established a relationship with."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Usually we work for these companies and they kind of know us and so they just call and ask if we would like to work on this project or that project. There are some that... there are certain firms that we will not work with because, like I said earlier, they have their own archeologists and they just sort of... they never use us. They get the contract, and a lot of times they don't even tell us they've gotten the contract, but we find out that they got the contract, and then when I contact them about okay, what are we going to do in the archeology, they'll say things like, 'Oh well, we decided we could do that in house,' and stuff

like that. So you kind of get locked out. I kind of feel like they used our resumes to get the work and then they bring in their staff to do the actual work."[#8]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "They were nice about that they knew that I was in the field looking for work and stuff. So they try to always find different jobs that when the job's already in, they'll try to turn me onto another DBE or SWaM that has some more work going on that's closer to me, because they were in the middle of where they could go either way, and I'm in a rural area. So they'll try to help me by giving me work that they probably could have taken or whatever and try to give it to me to help me out, because I'm in a rural area. So I won't be so far to go out to try and work or something. It was some problem with the work and it was a problem with the pay because when you're DBE and SWaM, you know they can't... Some brokers, they try to get a percentage of what, that they make a certain amount off the job. They will try to pay you a lesser wage, which they aren't supposed to do that if you're a DBE or a minority or whatever. They'll try to cut the pay and I can't think of the contractor name that I was working with down in Portsmouth. They wanted to cut the pay rates and all that. They wanted to get a percentage off of your truck or whatnot. They had the same truck out there and they wanted to make money off of your truck also."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "They pay well, they pay on time, they're honorable. Yeah, and that word carries a lot of weight for me and so with one of these big general contractors out of New York City, the Project Manager or the Superintendent will just flat lie to you just to get you moving and I've got a blacklist here. I've got a list of some of the big GC's that I will not bid to, and I will not work for."[#28]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah, there are some big ones out there. The smaller ones, I do not do business with because they don't get paid on time. But with the larger companies out there, the well-known established ones, they're getting paid on time and it's very good work and there's more support there. But that's about it. It's spread to a base of the larger national companies."[#35]
- The Native American male owner of an uncertified MBE construction company stated, "They are just running all over top of me, taking advantage of me, not paying. They're just not being very good hosts, at all."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "As long as you are fair and you're paying as you said you should, I'll work with anyone."[#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I didn't think they were ethical."[#51]

F. Doing Business with State Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in Virginia;
2. Barriers and challenges to working with public agencies in Virginia; and
3. The Commonwealth's and HEIs' bidding and contracting processes.

1. General experiences working with public agencies in Virginia. Interviewees spoke about their experiences with public agencies in the Virginia area.

Fourteen business owners had experience working with or attempting to get work with public agencies in the Virginia area and in other places. [#5, #6, #25, #26, #27, #28, #30, #37, #45, #46, #47, #49, #59, #FG4]. Their comments included:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Gosh, I can't specifically remember all of them, but there's mostly cities larger projects. For instance, I know there was in the City of Norfolk a couple bids we had gone after and weren't success in obtaining those pertaining with the city's traffic and a couple opportunities that they'd put forth. And gain, it seemed to us that it was just because we just didn't have the experience. One of the big questions is often, what other public work have you done?"[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "In relationship because you have different players even down to the different individuals administering the project, so you could have two projects for the City of Virginia Beach and one go exceptionally well. One would be a total limit; a lot has to do with people."[#6]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "You know for the longest time we were trying to do work for the City of Virginia Beach, and we kept trying and we kept trying, and actually for the City of Norfolk too, and we kept trying and we kept trying and they kept saying, 'Please, please submit your qualifications. We do want to do more work with minority firms.' With Virginia Beach we never once got short listed. With Norfolk we've gotten short listed several times, but we've never gotten a contract from either city. Then when I look at the firms, and I actually confronted somebody at the City of Norfolk and I said okay, here is the deal, I'm not going to do this anymore because putting proposals together is very expensive and we kept getting short listed and then the last one we lost, we lost to an Anglo firm. I was like, 'Okay, so you keep saying that you want to do minorities, but you didn't give it to a minority.' I'm sure that I wasn't the only one who applied. There's not that many, there's actually I think maybe, I think I know of two other minority-owned firms in this area. At this point we've made a decision, so we no longer go after Municipal work. We don't go after City of Virginia Beach or Norfolk or Chesapeake. It's too expensive and it's not worth it."[#25]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Got a call from Poquoson for the van over this summer. And they were

doing some things for COVID as well. And I may be new here, but I've heard some of the stories. Poquoson has historically been known as a pretty racist township. City of Poquoson, they called me. And asked me to give them a bid to move furniture around for them as well in their schools. And it worked exactly how it was supposed to work. They did a great job. And as a matter of fact, they said that one reason why they picked me is because they wanted to have more inclusion. And they were trying to change their perception, and... They wanted to work with a minority."[#26]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "The school system, when they were still in the high school system in my areas, in Sussex County, I was trying to get the dirt work for that job. They turned it over to another company. A young guy named Dickson Construction out of Surrey County. I was seven miles from the job site. They went and got this guy; he was maybe 20 miles out of the way. I was right here, all my kids and everything attended the same school and everything. I was spending tax money with them, supporting the school system. But didn't get no support right back."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I've done a lot for local sheriffs' departments, the police departments, but I don't guess that's State, I guess that's more municipal oriented."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "The VDOT and the Port jobs, we're doing those as the prime. everybody's playing by the same rules, we'll figure out what we need to do. We've done some work for universities as a sub. It was generally pile driving underneath building foundations."[#30]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "The county Sheriff's department. I did look into some of the other things they needed, but I have been...I really didn't pursue work for the county or looking into the county. The county, they called me on some work they needed, and wanted to know if I wanted to bid...but I was pretty busy, I didn't need much more work then. Again, it comes down to how many people do I have and how much can I ramp up for the job. I bid as a prime. It was really simple; it was a podium for the Sheriff with a box with the logo for meetings. For different places in the county. Not a big deal."[#37]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "In 2019, we were fortunate enough to work with the Fairfax County. So, under [a large prime], we are a sub, a DBE sub to their contract."[#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "A couple of years ago, King William County sent us a letter because we were a registered shop, and shop in the area. They were taking bids to service all the vehicles in the County, like the ambulances, the firetrucks, the police cars and all this stuff. And we submitted a bid. And then we got a response back saying that King William County did not choose any particular location. It was just going as they need kind of stuff. They didn't just settle for one repair shop. it was a simple process. They sent us a letter saying, 'Hey, we have these cars. This is the work that we're looking to have done in the future. And this is the services that need in the future.' And it was like, 'Hey, tell me, out of those services, what you can do,

what you cannot do. How much you charge us per hour. What your availability would be and whatnot. And email us a description, whatever, and then send it back to us."[#46]

- The Native American male owner of an uncertified MBE construction company stated, "The City of Richmond, to navigate their systems and their programs is almost impossible. If you do not know somebody that knows somebody, if you're not connected with somebody that will take the time with you that actually is a city employee, then you're screwed. The biggest hurdle would be one, obtaining the work, prequalification, and then actually receiving the invitations to bid. The second part of that would be trying to, if the work is awarded to me, it might take me six months to get through their system, to get permits where I can inform the work, where a larger contractor can go right in there and pretty much walked out with a permit that day. I guess there's only one municipality that I've worked for directly, and that was King William County. I did some drainage work for them at a public ball field, and they were spectacular to work with. It was a smaller contract that didn't require any bonding, so I was able to, it allowed me to obtain that work. They were much easier to deal with. One, I think they have a smaller infrastructure, so they don't have that much to keep up with. Two, they were just, I guess their culture was geared much more towards small businesses. They had a pre-bid meeting for this particular project that I want, and there were some big contractors there. They seem to gravitate towards the smaller contractors. It was great. I went in, I did my work, I sent a bill on a Thursday and the following Wednesday I had a check paid in full."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "I would say the first one that comes to mind would be, Hanover County. They had a, as I said, a very similar contract out to what I do for the City of Richmond and as I said before and I continue to say, they write their RP's in such a way that it's really just for one or two contractors. At the end of the contract, we were all awarded, we did not win. I asked for the documents that showed who was the winner. I actually sent it to all of the bidders, and I was the number three best priced candidate. But they were only looking for two. Yeah, it's what it is. I think that's the most recent one that I've done. They were all pretty straightforward. Like I said, if you're doing good quality work, when you first get in and start working, they're going to have all eyes on you. After a while, they'll relax a little bit and it's like, okay this guy knows what he's doing. Hey, I need that over there done. Then they'll leave you alone. City of Richmond, provided them services. It's pretty easy going. The only time you really have any concerns or issues is when they have a changeover of their hierarchy as far as managers. If you get new managers in, they want to come in, they want to see what everybody's doing and do their I'm making everybody accountable for what they do type of thing. Then they get to know you, okay this company's good, you don't have to worry about him. As needed changes, projects. Anything in the communication's arena, I've done for the City of Richmond. We go in, we do individual drops. We'll go in, if any phones replaced, we'll replace it. They need something trouble shot, we'll go in and troubleshoot it. We do large projects. We do small project for them. We've done the whole gambit for the City of Richmond."[#49]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Small jobs. So that process of getting that work has been fairly... I guess they've been small quotes. You don't have to do the kind of larger RFP bidding. It's been very easy. Call me or email me.

I've been working for them for several years and they've had a couple of different managers and they passed my name on, so."[#59]

- The female owner of a WBE-certified goods and services firm stated, "I've gone to probably every one of the buyer's events, Virginia Beach does one every year where they bring everybody in. The cold, hard truth though is I don't know that a lot comes from that. You get their names, but there isn't anything specific. And then there's the, 'Well send us an email with your capability statement.' And I'm still struggling with getting connected with where the opportunities are."[#FG4]

Ten business owners described their experiences working with or attempting to get work with the Commonwealth specifically. [#1, #2, #8, #13, #25, #29, #32, #47, #48, #60] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I think so. I think if I could've talked to a person and interviewed, or... I think if they could've understood where I was coming from, then I think I could have either. May not have gotten that particular bid, but I may have been directed towards another bid. Because I know the state's always wants to save money on a contract. And you can save a lot more on a one man, or two, three-man firm than you could with a 100-man firm. That has a lot of overhead."[#1]
- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "We used to have, many, many, many years ago, we had I thought a very good relationship with Virginia State Parks. That's been a client that I have... Somehow, I got on their bad side, and I have got to figure out how to get back on their good side. I enjoyed the work for Virginia State Parks. We just haven't been able to get any recently. Well, a lot of times what each of these will do is for open end contracts, they'll have pre-qualifications, like, once a year and submit that. And then if they have a... a lot of times... I think there are two different ways the state does this. One way would be that once they get all these proposals for open end contracts, some state agencies will go through them and develop a list of, I don't know, half a dozen that they'll keep, and they just toss the rest. Other agencies have kept every one of them in the file, because you just never know when some private's going to come up with a specialty that that firm there has."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "No. We went in with an engineering firm, but they told the engineering firm to hire us. They suggested that we were a good member for their team. It's a little difficult to find some of the contracts, but some of them we just don't do the work for because like I said, it can cost \$25,000, \$30,000 to put together a proposal and it's just... the fees are just too high and then the opportunities, we know they're probably not going to select us because we're a small business, so we just don't... we know that we're not going to get the project, so we just don't do it."[#8]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "When RFP awards points for your experience, your pricing, your understanding of the requirements, what they'll do is set aside 20 or 25 points out of 100 for a SWaM business, and when you're us, when you're a SWaM woman-owned, but not small, you get

zero points. Or maybe one or two points for using a subcontractor printing company, or a subcontractor insurance company."[#13]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We've had a really hard time getting Commonwealth work."[#25]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "We've tried. I've tried to bid on jobs that are 10, 20,000 dollars. Even much smaller than that, even 500 dollars. I cannot get government contracts. I've got a big prison here close by and I cannot get them to buy from us. I can't get anyone in the government to buy from us. They always go to the state contract, which is the big boys."[#29]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We actually have only had one official bid with V.A. in Richmond, Virginia, and that was quite sizable. We built three vehicles for them. That was \$270,000. That's the only official contract. Now in the State of Virginia, we work very closely with the DARS, or Department of Rehabilitation and Aging. They do contracts for services as well as vehicle installation."[#32]
- The Native American male owner of an uncertified MBE construction company stated, "It's still pretty challenging, performing the work for VDOT. I think most people will tell you the same thing, when it comes to VDOT, it's gotten so much more about politics and bureaucracy than it is about performing the work itself."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "The payments are good. Typically, from the State of Virginia, they do well. We've got this job from the State of Virginia, Division of Blind and Visually Disabled. They were very typical. I mean, I can't think of any new obstructions or anything. We simply went through the boilerplate and levered our way through it and made the bid."[#48]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "VITA is the Virginia Information Technologies Agency. They were the one that was created by Sam Nixon about 12 years ago now. They not only are supposed to hold the contracts for the delivery of IT services in the Commonwealth, but they were the ones that were overseeing the Northrop Grumman contract, if you ever saw that blow up in the newspaper. They straddled that line. Part of it is they're trying to be regulators and then part of it is they're trying to be people that deliver service, and sometimes they do not do that in a way that's fair to businesses. The only problem that we've had has been on the Computer Aid contract. I told you there was two sides of it. Staff augmentation is great. People enter the contracts, the agencies are automatically billed, they automatically pay, not a problem. On the SAW side, it's all done by milestones. You will submit the milestone for payment, Computer Aid will generate the invoice and it goes over, and then Computer Aid doesn't follow up. So, it already takes... The agency is already granted those 30 days. For SAWs payments, Computer Aid adds another 15 days, so now you're at 45 days. So, unless you're already following up with the client and making sure that they got the invoice and are processing it, then 45 days will come and go, and you will not get a payment. And there's been times that the agency has paid Computer Aid, but we haven't seen it. That's rare. Most of the time is, nobody from Computer Aid followed up to make sure that they

were processing it. Okay, well why are we paying 8.68% between them and VITA if they're not going to follow up on the bill?"[#60]

Eleven business owners described their experiences working with or attempting to get work with one or more HEIs specifically. [#2, #3, #5, #25, #40, #55, #56, #57, #60, #FG1, #PT2] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, VDOT, of course, is a continual client, and we've worked with them. We've worked with, let's see, a lot of the larger colleges, Virginia Tech, UVA. We've worked as a sub for VCU and William & Mary. We've worked at VMI and Radford, a lot of Commonwealth universities. Most of the time with a university, we'll be a sub. But, with open end contracts, we've been prime. And sometimes on smaller projects we've been prime too. UVA has hired us as a prime a lot, which has been great. And we do a lot of work with Virginia Department of Historic Resources as a prime, and they our architectural history expertise. And the Virginia Community College System has been a great client over the years and hired us both as a prime and a sub."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "It's comparable. It's comparable. It's seems to be standard through the industry. Sometimes they do. I'm trying to think. I mean, some others that we worked for, Virginia Tech and UVA as well, we've done work there. It seems like UVA had some pre-qualifications one time, but for professional services sometimes, but on the term contracts, that's kind of your pre-qualification process. You submit calls, they keep you on file. If they have a project, they call you and have you look at it. So, I guess in essence, those are kind of the pre-qualification process."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Also, with the larger universities or the schools. Although we've done work with private schools in the past, being able to work with the public schools' systems has been problematic."[#5]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We are doing a project right now with Norfolk State that is a public university, so they are regulated under the Commonwealth. Honestly, they're very small projects. We just got them the early part of this year. That's the first time that we've actually successfully gotten this kind of work. We've had a really hard time getting Commonwealth work."[#25]
- The Black American male owner of an uncertified MBE professional services firm stated, "Richard Bland College. It was a small cottage house. It was a drywall job, just about 2,200 square foot, very small. At the time I was class-C, so I knew I had to bid it under 10. I bid it right at 998. The job was probably worth at least 12-to-13,000. But me not having a whole bunch of overhead and stuff like that, I knew I could win the bid with my crew and do excellent work and maybe propel myself forward in the college. However, I found out about the bid the day before it was due. I went out there that day. I saw it then and I put the bid in that afternoon. However, when the bids were published again, there was another company that had my exact number. And didn't think that was possible. I'm not saying it couldn't happen, I was just like, 'Okay, maybe somebody saw something else.' I think somebody said, 'Hey, this is the low bid, and we don't know this guy. But he's our low bid, and if you want

the job this is what you've got to come in at.' I say that because I bid a job once out at Fort Picket years ago. I was also the low number, but the job was 'out-of-budget', and there was a rebid done. And I know that one of the, I won't say advantages, but one of the equalizers to being a small, disadvantaged business is just really getting a fair shot at a bid. So, I know this train is really leaving the station this time. The engine got turned on, but the train is leaving the station. All I want is what any other minority firm has out there, and that's just a fair, open competition, and actually winning the job."[#55]

- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "We've probably done 40 or 50 jobs at JMU. They're fine to deal with. Levels of bureaucracy, just like it is with any other state agency, but for the most part the experiences have always been positive. Social services are probably easier than any. May have just been whoever the local people were that we worked with. may have just been the people we dealt with were more in depth of dealing with a construction project. Not everybody is set up to understand how a construction project, particularly when you go into their building and try to work alongside them, and you have states construction. It's one thing if you get to take over a building and no one's in it, but when you're trying to work side by side with someone it's a little different. So, you have to put it out for bid, that's a state requirement. I know some agencies, like James Madison, they have different levels that they have to put out for bids. Let's say, under \$50,000. They don't have to put it out for bid. One person can bid on it, and as long as the numbers meet what their engineers estimates were, then they'll go ward a job. You spend a lot of money and time bidding jobs that most times you have no chance of getting. that's why we've been selective on what we bid from the state."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "One of the things with the public agencies, is you put in a lot of labor to get to the short list. Labor that has no pay to it, most of the time. I've come in second a lot of the time. The University of Virginia. Same thing. I think that just to complete RFP's and go through the interviews is a lot of time up front and a lot of money if you have to produce 10 copies of your RFP or whatever. That's a lot... It's been interesting that UVA... They used to like to hire local and now they don't like to hire local particularly."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "So, they will go and bid these out, award them not only colleges and universities, but also any government or quasi government organization with the exception of executive branch agencies. Anything that's under the governor and secretaries, they are forced to use the Computer Aid Contract, but everybody else can use VASCUPP. Unfortunately, the Computer Aid Contract has an 8.68% contract fee, VASCUPP does not. Department of Health, Department of Social Services are extremely difficult to get into I don't know why. But I'll tell you that even when I talk to some other SWaMs, I think those two agencies are more apt to hire. But at the same time, they... I don't know. But those are usually the two toughest agencies to get into."[#60]
- The Asian American female representative of a business development organization stated, "It's very mysterious to me, that the university, so all the big university VASCUPP, it has its own purchasing network. And I just want to insert funding or supporting those who are underutilized. I'd like to open that up."[#FG1]

- The owner of a professional services company stated, "Some universities are more open to working with me, but with our company. But I think it's very... That the information was a little bit of place for all the schools, right? There's no central place for information. There's often duplicate contracts. Because what do you call it? Collaborative contracts out there. So, if you already have one, you have to do the whole process over again to work with a particular university, even though there are areas that might be covered by the contractor on. So that is the thing, small businesses do not have a lot of time to do a lot of these proposal writing, especially if you've already established, submitted the paperwork to demonstrate that you're capable and you have to do these 50 other times. It's not efficient." [#PT2]

2. Barriers and challenges to working with public agencies in Virginia. Interviewees spoke about the challenges they face when working with public agencies in the Virginia area.

Twenty business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms. [#7, #19, #23, #24, #29, #38, #41, #43, #48, #53, #54, #58, #60, #AV, #FG1, #FG2, #PT3, #WT4] For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "Just the restrictions they put on the drivers. It's the ports, of course the schools, all the government bases, and any of the annexes that are involved with them." [#7]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "And there's no... there's no prepayment. The government will give a deposit. The federal government will give a deposit, through our general contractors. The state will not, and that's detrimental to a small business. DPS, Department of General Services is probably the go-to that we've done maybe three or four with. I would say that we have been awarded less than 10% of what we've submitted to the Commonwealth. And it discourages us from doing business with Commonwealth, which is a shame. Again, I'll go back to saying, they want small women owned minority businesses, but they don't do anything to support us when they're going out of state awarding low bid contracts." [#19]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Well, I'll say we haven't looked at it a lot from the state contracting side. Looking from the federal government side, we have noticed that women-owned companies are not... The government has not been meeting its goal in providing women-owned company contracts and that the dollar amounts of a lot of those are below what we've been working in, so it would actually become a limiting factor." [#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I believe there's a lot more places that could have work for interpreters, such as public schools, but they don't contract. They don't hire. Apparently, they don't have a budget to contract, and I see a big need. I'll give you a perfect example. This afternoon, I am spending a couple of hours volunteering with the local middle school to go out to a community where there a lot of Hispanics living. It's a mobile home community. Trailer home community. Trailer park. So, they're going to set up shop to have the payments come to them. They're asking people to volunteer to be an interpreter. With something like this

that's delicate, we don't mind volunteering, but you want professionals to be hired to do the job. In our area, at least, I don't see an effort. One of the biggest school systems, Virginia Beach. I don't see where they're putting the effort to develop a contracting system to contract interpreters. The issue in general is that there is a particular that should be applied, that apparently is not applied. So anytime somebody could bring in somebody to volunteer, they'll take them. There's no requirement. I don't want to seem negative, but that's what you see a lot in these smaller communities. And although Virginia Beach, which is where I am, is not a smaller community, in many ways, the challenge that I have encountered here in the area is that, from some reason, folks don't really want to buy in to that our community, the Hispanic community, is large enough where there should be more services, and more attention paid to that community."[#24]

- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "I gave up about 10 years ago, trying to. I gave up about 10 years ago trying to talk to anybody in the public sector to get their business I just, I never get any response."[#29]
- The non-Hispanic white male representative of a majority-owned construction company stated, "For the Commonwealth of Virginia We've certainly looked at some opportunities and haven't... I would say over the last five years, haven't made the decision to continue pursuit, based on what we found. Some of that was the interstate state funded higher education opportunities or otherwise. What we found was a very large number of competitors and very little evaluation based on qualifications. Really just a low-price solicitation with 8 to 10 or more firms."[#38]
- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "Well, I don't think they are that eager to help minorities. I'll say that because I think if I sent them a picture... one of my advertising is a picture of me on the front. So I mean, looks like to me, at UVA and Martha Jefferson, they would have given me a... say, well, look, we go through this. I had to look up online what I needed to do extra to work with them. They didn't say, well, let's talk about it or anything. In fact, when I went to UVA because a friend of mine said they don't know any minority businesses. So, I sent my paperwork there. And nobody called me from that."[#41]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "If the buyer, and it doesn't matter what agency, is not going to give you the time of day, or you're not on an existing contract, that's the first thing. If you're not on an existing contract to sell your services, it's almost impossible for long segments of time to get on there because state government does not like this. It's cumbersome to issue RFPs for every... using technology as the example, every technology procurement. Now this state spends over a billion dollars a year in technology. So, it's not chump change. When you look at the amount of money we spend and then we come back and say, 'You have to be on a contract,' that eliminates a fledgling business of one or two years from getting it on a contract vehicle to sell. The agency wants the contract vehicle because a lot of these things aren't worth going out with RFPs, and RFPs in their own right are cumbersome in a body called state government that has money shrinking on how much and how many people can be employed. So, they've got to go through these existing contract vehicles. So, a new business can't get on the contract vehicle. The SWaM is not a license to sell. The SWaM

certificate is a certification that an agency can get credit for. This all comes back to our very first discussion where Virginia laws in transparency and Freedom of Information Act, and I'm not saying we should do away with those. I'm not saying we shouldn't be transparent, but the way the law is written and the way it's interpreted by the agencies, it has created a divide between the agencies, those responsible for administering government work and those that are trying to sell to government and get that work. And that barrier has got to be eliminated. I'm sure most of the small businesses that you have talked to will tell you, 'Get out of my way, let me do my job.' I don't think you'll hear any different here, but we've created through these quote unquote feel-good rules an environment where we've made it impossible for the state employee to be open and effective. They're risk averse. Looking in the private sector, we take risks every day. In the government sector, we run from risk every day."[#43]

- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Simply be the paperwork growing around each of our jobs has been multiplied many, many times. And it was to the extent that we now keep a man in the office who does nothing but deal with what we call boilerplate, which is all the darn requirements on each job that we have, and hoops we have to jump through, just to get to the point of putting something in place. It's difficult to describe quickly, but believe me, the magnitude has grown by probably a multiple of eight or 10 since I built that Hopewell High School."[#48]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's like when you do a project, say a public project, say a school addition or whatever, you're going to have to have a much more complicated contract. You're going to have to have additional insurance requirements, you're going to have to assure to the owner, whoever the agency is, or whatever that's running this, that the... The contractor will make requests for payment every month, and then you have to certify on a special form that, 'Yes, he is due this money, because he did do this work,' and so on. So, there's all kinds of things like that that you have to go through, that you would not necessarily go through on a private project. Unless it was getting to be a large project. When you get into the larger ones, yeah, you do a lot of those same things. But I don't really do those really large type projects, like a mall or an office building, 10 story office building or something like that. I don't do those. I don't know. Because I know why those things are there. Because a public agency needs to justify that their money is going where it's supposed to go in a timely way, and that the project's on track, and stuff like that. And it has to be all recorded, so somebody maybe can audit it later, or if there's some problem down the road there is a record of everything. So, I kind of think those things may be necessary for that kind of work. I'm not sure how to streamline that, or make that easier."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I haven't been diligent enough in searching on the state's website. I have some projects that just come by email. They'll come to me saying I might be a good fit for this. But I guess the paperwork for it all, and... It was a turnoff."[#54]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "The system itself is you go through this entire process of investing a lot of time into writing proposals. And I'm not really sure what is exactly the criteria is in the practice versus what is on documents. It looks they are different. Looks like. So, what is written is

different than how they regard it is different. And that's something... I mean, if we can go to talk to them, and even if they don't give us information, then it's more like... You're just competing with others and you're not getting any hand holding, any advantage of being a small business. So that's... And then maybe they'll prefer to work with a larger vendor for some reason. We don't know. Or even if not larger vendor, even if they want to work with specific vendor, there's maybe a preference why they would work with certain vendors. But my experience has been working with them is just almost like a dead end. You keep working, keep responding. And why are you not getting? So at least we should learn why we're not getting it. So where should we go? We go to them they will not explain lot more. They don't have time to explain how you can improve your RFP next time. There's no system like that. So, government doesn't seem to have a system where we can consult and say that 'Okay, this is our proposal, and what's wrong with it? Or why we are not getting it.' We haven't learned yet why we are not getting the government approvals or any funding yet."[#58]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It is extremely difficult to break into the Commonwealth market. The running joke in there is if you can do work in Virginia government, you could work anywhere because it's one of the toughest in the nation. VITA also tries to make a profit because when they were created, they were supposed to be self-sustaining. That means no general funds from the big budget that the General Assembly approves. They have to fund themselves to fees. What does that mean? So, all of a sudden in addition to creating the regulations, they're now selling services to put people in compliance. And then, they are selling services to audit whether or not the services that they sold are compliant. That's a conflict of interest. The Auditor of Public Accounts has notated it, the Inspector General has notated it and they seem to get away with it. Here's the thing. What they will do is, we'll go out there and try to sell services. If VITA is providing what they call their centralized services, so auditing and information security officer. I'm not talking about any of their IT infrastructure. That's a whole big other area that is mandated by the legislature. I'm just talking about their centralized information, security and auditing services. They will go to the state agency and say, 'Okay, you have to lock in with us for three years.' If VITA, which they do not perform and the agency wants to fire them, they have to get VITA approval to fire them. Where else in the world does the service provider who doesn't perform have to give you permission to fire them for not performing? And so, we've had to actually advocate. We've taken a number of those agencies after the three years have been up and transitioned to them, but now VITA is not making money in certain areas and now they're saying, 'Well, wait a minute. We really didn't mean it. We expect you to use these services in perpetuity.' Okay, well you're not delivering anything," so the agency is left sitting there holding the bag. Again, it's a very delicate walk because on the other hand, the same agency where this conflict of interest is for a business like mine then goes, 'You know what, we're now going to penalize you on the contract because over there, you're taking some of our clients.' I'm telling you, it's like the mafia for IT. That is VITA."[#60]
- A respondent from the availability survey stated, "The problem with government jobs is that they burden you with so much paperwork, and they take too long to pay for the job. Also, 99 percent of [government] work is unarmed; we do not work without being armed for our protection."[#AV]

- The Asian American female representative of a business development organization stated, "From dealing with purchasing officers, throughout training and being with professional association, it is all about pricing. Because that's what they do. They're there to make money for their offices. And so, the elements of something called the underutilization, that is a concept. To me, in my experience working with them. It's very common, it's something they don't even have any notion about. So, the concept of multiculturalism, Hispanic, Asian, African American, Indian, it's a very new concept to be, I'd say, 80% of the American population. Well, because of the American population is a very conservative and bland." [#FG1]
- The non-Hispanic white female representative of a business development organization stated, "My experience is that a lot of businesses really think that it's way too complicated. They see all of the paperwork that they have to upload, and they think, oh, I don't necessarily want to share all that information with this system here. I think there's some fear in sharing some of your business files with the government." [#FG2]
- The female representative of a business development organization stated, "I think just their capacity to continuously work towards access to state bids. If you are larger business, you could have a whole staff person, that's all they do. Whereas a small business, probably is adding it to someone's existing job, that's already a full-time job. I think, again, that creates a disparity, it creates an impact of the growth of that small business, because they just don't simply have that kind of time, even though we all know diversity is a good thing." [#FG2]
- A respondent from a public meeting stated, "The construction manager and risk program that the Commonwealth as thought it was started about seven, eight years ago, where they would move construction managers at risk and what the construction management risk is very subject about who they chose. You never built one highly unlikely chance that you will get one, you know such as, they have... A man still does it, but you got to give justification for why you do, why the end user decides to use that method. But in that it was designed initially to increase the level of a normal participation with the Commonwealth of it. But to me, that a reverse effect, because if you've never built one, I'll be able to get one. So, it was like a catch 22, you know, so you don't even bother this is for them because looking at this list is sensitive, and you don't compete. They don't turn over, you know, I see that as a potential area." [#PT3]
- The owner of a construction company stated, "Supporting both entrepreneurs who are at the kind of the beginning of their journey, and a clear barrier for them, particularly the ones participating in making rounds. Typically, the state is the network of people that they need to get it through that slab macro practice. I didn't want to, because I worked with a few of our higher education institutions. And for me to get a contract, I had to dismantle. So if I didn't get the phone number of a friend of a friend, but these are the process as well. I didn't happened to know the guy who actually works in the office and then we'll work through the process. And then I was also coached in to how to follow up. Like I had three people hold my hand, walk me through the process and then figure out the workarounds that I needed to get still. When I couldn't allow us waiting on the certification to come in. I just had all these unions help me. That's specific to my own personal network. If you don't have that, it's really easy to give up. And so, what could I have done over this year? It's supporting businesses has really highlighted the real difference between networks of people and the

kind of handholds you have to have to be successful. Knowing the practice, knowing policies and if that's not part of your network it's really easy. Or you operate your business at a deficiency. So, you don't have the right practices. You don't have the right tools in place. You're running the business, but then you got to apply for TPP. You don't have all the things in place. So, when highlighted just how the deficient you work you couldn't get the funding, you couldn't get help so your business goes away. So, we've seen that time and time again in particular for black businesses here in the city who are just not part of those networks and allow them to get that insight and resources that some of their colleagues." [#PT3]

- A respondent from a public meeting stated, "It does seem that the effort to include women and minorities is not genuine. Because if it were, you wouldn't have to have the network. If the system was set up so that every person had an opportunity to participate, it would see that if you reach out to someone and you're lacking in some way, that person can say to you, 'Hey, I received your capability statement or your email or whatever. And I meant to refer you to person X and that person who didn't let you know why you're not ready.' But that's not what happens. What happens is you see something; you see the person's name and sometimes they're just not even associated. They almost deliberately leave their names off just so you have with contacting them. But in the event the name is that you send email capabilities, same assets, like goes into this... and you don't hear anything. And so, it's not that people aren't trying. I don't think that based on the way this is set up, that there is a legitimate interest in including women and minorities, just because of the difficulty in participation." [#PT3]
- A comment from written testimony submitted to the study team, "The other thing that discourages small businesses is that we have to pay to do business with the state. Then the State has all kinds of rules and regulations on how you will pay your bills. Which means I have to use more of my time following up on all of this. By nature, a small business is just that a small business, it does not have a department to handle all of this paperwork or billing. Small businesses have very narrow profit margins and Virginia puts all kind of obstacles in place to prevent these businesses from wanting to even do business with it." [#WT4]

3. The Commonwealth's and HEI's bidding and contracting processes. Interviewees shared a number of comments about the Commonwealth's and HEI's contracting and bidding processes.

Seven business owners viewed the Commonwealth as more approachable and focused on small business development than other public agencies. [#3, #13, #21, #28, #45, #47, #FG4] Their comments included:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Let me think about that. I mean, again, you have to go on eVA and find it, or you get the eVA notices for that particular thing. I mean, once you know how to get them to notify you, it's fairly simple to look for the solicitations." [#3]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Sure. Contracting-wise, every city, state, and federal agency we've ever worked with has been... It's such a formal type of business that we find that they play by the rulebook,

they're straightforward, I can't think of a circumstance where one of them was less than professional. Historically the Commonwealth has been very efficient, and effective, and above board in what they do. They're occasionally hamstrung by things like the scoring that I described previously."[#13]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "No. I mean, most of the information that you... I'm not talking about VDOT now, I'm talking about the others, it's pretty much standard stuff. I mean, they don't go to the depth like VDOT does as far as the information they required. It's a more or less just a... They tell you how their system works from the standpoint of who you will answer to and who directs your work, and then, of course, the payment process and that type of things. I think the system works pretty well. We've worked on both campuses for years off and on, just on all kind of stuff. But it's, again, they're looking for people who are capable of doing what they want done, and they don't have to go out and take them by the hand and show them everything I got to do. So that's a big part of it. And with VDOT, like I said, they're local people. We've known them for years and they've known us. And like I said, it's one of those things where you feel comfortable working for them. They feel confident that you can do what you're supposed to do. When you work for people, as long as we have, and you get to know the locations, the campuses, and whatever, particularly that type of work, there's a lot of... We've either had experience in this location where the work is taking place, or we can offer them a better solution sometimes than what they're trying to achieve. And I think a lot of them appreciate that from the standpoint because, just like everything else, a lot of people that we used to work with are no longer there and you've got younger people in place now. And I think they appreciate somebody that knows the place."[#21]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I found it easier. I actually find it easier. You have to do it on their forms and what not, but they're generally geared to a recognized audience, versus the federal government that just overwhelms you with document after document, I call it the old 'all the cover your ass' documents. And 100 pages of specifications where maybe 10 pages are actual technical specifications and the other 90 are recitations of US code and ATM testing methods for the product you're going to use, and it just goes on and on and on."[#28]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "Going to these events, I do think that's really helpful. But I'll be honest with you, taking away time from your work is expensive. And I can't pay to go to all these events. So anytime you can offer it at lesser cost is always helpful. I think with Department of Rail and Public Transportation, we do have a contract with them. And even before the contract, I think that they are... I think they're good people, and they do a good job. Like, their procurement officer and the DBE, and they do have events. Like, they have the proposal meetings, and they do things by the book. And you know, they want the job done right. I would say in the middle, because I mean, they have federal clauses, and they have to do it a certain way. So, it's hard to not make it challenging, I guess, is the answer. So, let's say it's as easy as it can be. DRPT, that they already put it in the contract that you have to pay your vendor, your sub, if it's a DBE or SWAM within seven days of getting paid. Like, paid on faith, plus seven days. I have to say I like DGS. I think they're very fair, and they look at everything."[#45]

- The Native American male owner of an uncertified MBE construction company stated, "I would say I got overlooked in bidding the VDOT work, just because of the amount of paperwork it takes to get into that, and to give a proposal. There's really no issue with me performing the work. It's just harder for me to provide different submittals and different plans, and engineers that I don't have in-house. You know. It was a small, road rehab where they were winding and straightening a road. It was a small project; I think that it was less than half a million dollars. It had some paperwork, but mostly road construction. It was easier. VDOT is probably the best. Just because they're very good at making their projects public, but there again, if you don't know the process of getting to these websites, you just don't know. A lot of that became available to me during the process of getting my DBE, working with those folks over there, they made me aware of different things to help me get in to be aware of upcoming projects. I use a site called BidClerk, as well as you can sign onto the ebook page for VDOT. You can see the product for VDOT there. As far as different municipalities like the City of Richmond and stuff like that, I just don't know where to go for all that."[#47]
- The Black American female representative of a business development organization stated, "Very impressed with the overnight. It felt like accessibility to various agency. So, I didn't know if some new legislation, I didn't know what happened, but all of a sudden, everyone was... VCU hosted a SWaM, they've hosted a couple SWaM event for it. It's just for the vendors to come in, if you are SWaM certified, every department that they had was out and available, they all had their list of all the things that you could supply for them. They had their buyers on hand, so they had the entire Segal Centre or whatever it's called now, filled with their vendors. And I've seen several of these events happening or had been prior to COVID, where you could have a direct line to the buyer, which is something before you had to go into eVA, go look it up, see who the buyer is, schedule an appointment. And they were still available, but even like the SPSC, they did an event not too long ago with buyers from across the state spectrum as well."[#FG4]

One business owner discussed difficulties in learning about Commonwealth and HEI contract opportunities. [#36] For example:

- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "A little bit. I haven't had much real success. I'm talking solely about finding service contracts. We did an open house one time in Richmond and we did have some folks from the government show up, and we did a lot of demonstration stuff for the Virginia National Guard. So, it was very easy to get people to come out and see the demonstration, but they had not gotten to the point where they would do a solicit mission yet. They're interesting because they just haven't got there yet. I think knowing who the right people are that you need to get in front of, and it's way more difficult with COVID right? You try to get somebody in a meeting and you just can't do it. Everything's kind of put on hold until. I haven't done anything like go to the Virginia website and I try to do an unsolicited proposal or anything like that. That's always, I suppose an opportunity, but I just haven't looked into those kind of opportunities that just kind of going after an unsolicited proposal. We've pretty much tried to show the capability and then try to stir up interest that way."[#36]

Fourteen business owners shared recommendations as to how the Commonwealth, HEIs, or other public agencies could improve their contract notification or bid process. [#1, #2, #3, #19, #27, #38, #42, #47, #48, #54, #55, #56, #57, #60]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "Well, what I would do now is I'm actually tomorrow, I'm going to look up some of the networking opportunities and different workshops, and see what else is out there. Because just from when the lady called me two weeks ago, I started saying, 'You know what? I need to get back into it.' Just maybe there is some opportunities out there, and try to find somebody to give me a mentoring guide of how to actually maneuver through the process."[#1]
- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "So it's interesting, both ways... If people have asked me, I'd say, 'If I were you, I'd just keep everybody that submitted a letter in that file, because you never know when you're going to need some specialty that one of those firms that you tossed is going to have.' I don't know the rules and the laws on how they do that, but it seems to me there's no use in tossing them, because you may find just the right match along through the year."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "No. I mean, we've been doing it for 15 years and I don't think we've missed an RFP, but I mean, we have someone actively looking too. But I think on the state side, the eVA portal is a good tool to funnel all those through, and it's got automatic checks to get notifications on, so it seems to work for us. On the municipal and local government side, I mean, they probably could use some support on that. They don't always have effective ways to advertise, other than their websites, but I don't know that there's any notification process."[#3]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "I think that the state needs to support state owned small businesses and not go out of the state for large contracts. It turns us all off from responding."[#19]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's kind of hard to explain, because I know I went to one of the things that Miss Jessica Moore, I think her name was Jessica Moore, had in Norfolk one time on the tunnel thing they had was coming to Hampton Road. We went to one of the seminars for it. It was broken down how it was going to be paid and whatnot. So, I think if they would call me ahead of time and train me on how to go about to being on the jobs or something, it'd be more helpful also."[#27]
- The non-Hispanic white male representative of a majority-owned construction company stated, "Yes, I would say, from what we've seen, I would say go talk to their friends over in VDOT. We don't engage in a lot of horizontal or transportation type work Nancy, but, certainly VDOT has been very progressive in adapting design build, or other alternative delivery models, heavily based on qualifications that we would find much more attractive if those were also used on the vertical segment."[#38]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Better advertisement of the opportunities available, because you don't really hear about them until after."[#42]

- The Native American male owner of an uncertified MBE construction company stated, "I think there's a lot of things in place. So, the only thing they could do better would be maybe more effort making small businesses aware of what's out there. They have the tools out there to be utilized, they're just not well marketed, they're not advertised."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "No, no other than streamline it. Make it as simple as possible. Get rid of some of the more complicated boilerplate items that they require. I don't anticipate that is going to happen, but it would... If we go back to 1965, it would be much easier on all of us. But that's not going to happen. It's just, the business has evolved, and these are the things you have to do, and we do them."[#48]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I think they've actually created a pretty good system."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "I believe they already do certified payrolls and audit checks, but I don't know what the audit process is to actually go out and seeing if people are holding to the subcontracting plans, they're submitting. I know they submit small business subcontracting plans, but I've sat in meetings and heard people say before, 'Hey, we just have to show an effort to meet the utilization plan, but we still like this guy.' I think there needs to be some kind of real accountability on having people go out and checking and really doing an audit review and making sure that, 'Hey, this guy really couldn't meet the qualification,' versus, 'It was so close, but we went with the guy we like, and we always work with.'"[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "I think it would be helpful if the state had like an advisory committee, and maybe they do, of private general contractors that sit down with government agencies, the ones that decide the jobs and have more of a collaborative open floor mat to understand both sides. We have a mutual interest to make the Commonwealth the best we can. I think we could shed light on each sides issue and what they have to deal with and a better end product for the Commonwealth. Right, like VDOT at the end of a highway project. They'll pull the plans and review the job. What was good about it, what was bad about it, a post review would be good. Even having a, like I said, an advisory group, that could sit down and give insight as to how to make the process better than the Commonwealth."[#56]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think I don't know how they would improve it, but I think it becomes so cumbersome when every meeting is 10 to 12 people because they have to have everybody represented. The meetings tend to be longer and the meetings don't always hit upon what's really... I think it becomes cumbersome for everybody when they have their weekly meetings. I think it's necessary. I'm not quite how I would change it. I understand how all the different departments have to be represented."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It has been unfortunate because VITA has made it difficult like I mentioned, for smaller businesses over the past several years. For example, I can't necessarily go and directly market to agencies with an approved VASCUPP vehicle. They have to use Computer

Aid and there's a lot of restrictions around that. Well, that's fine if you're a large company. But if you are a smaller company trying to be competitive and trying to provide competitive pricing, almost 9% of that is a kickback to VITA for that contract vehicle. Part of it goes to Computer Aid, and part of it goes to VITA. Okay, well if you are competing with say Robert Half or you are competing with some of these other larger firms that are on that contract vehicle, well, then they can afford to take smaller margins for greater volume. So, one of the things that needs to really be evaluated is if the Commonwealth of Virginia is really committed to providing SWaM opportunities, then they need to stop making small businesses pay these contract vehicles for a mandatory use contract. Because here's the thing, and this is what I really want the agency to know. Computer Aid will sit there, and they'll turn out their reports to VITA and VITA will turn out their reports to your agency and it shows, 'Oh, look at all of these small businesses. We've got all of these small businesses that are subcontractors and look at all of this spend.' But it doesn't tell the real story. The data is giving a false sense that small, women and minority owned businesses are getting a fair shake. Because, you can be a, let's say a Dixon Hughes that's classified technically as a small business. They've got several hundred employees. They can go out there and they can take lower margins and absorb the pit for that contract vehicle, and Computer Aid will give them credit for being a small business. Well, that's not the same as somebody like Assura that's going out there with a much smaller group of folks that is seen they're trying to make the numbers work and they can't necessarily take that hit on the margin. Because guess what? These agencies are not going to pay that 8.68% themselves, they're going to expect you to take it out of profit. I think there is a false narrative, not intentional, but I think there is a false narrative that's being portrayed that, 'Hey, it's easy for these businesses to operate and provide IT services,' and that's not the case. There needs to be a total revamp of the contract vehicles that are available for SWaM businesses, and especially micro-businesses in order to provide the services, and VITA doesn't need a kick back. This Computer Aid vehicle, we do all of the work pretty much. We're going out there, we're doing the hunting. They're not providing the opportunities to us. We do the hunting, we do the selling, we then have to stay on top of Computer Aid to process their paperwork. Computer Aid is not following through on whether or not they pay their bills. So, what is the point of paying? And don't get me wrong, I love Computer Aid. I mean, they're nice people. But at the end of the day, what are they doing for us? I can sit there with these other agencies and local governments, save them money by using this VASCUPP vehicle, and they pay no fees, and it's a much better buying experience for the localities. And this could be a much better buying experience for the agencies. They're frustrated to. They don't like having to use this. It would be great if... I know that there are so many boards and commissions. I get that, so I'm not saying that. But it would really be great if Supplier Diversity had a handful of people in the trenches, businesses in the trenches that they could call on to call chicken on some of the ridiculousness in contracting. Because I know they're seeing the data that's coming out of these agencies saying, 'Yeah, everything is great.' If it wasn't for studies like yours, they probably wouldn't hear anything different. So, if they had a cadre of folks that they could call on and say, 'Okay listen, your business, or you couple of businesses do work in IT, right? How is that going? You know what? We're thinking about a working group, can we run some stuff by you?' Or 'Hey, you know what? You're providing tangible goods? How are things like that?' So it's not a once every four years study, that they have somebody that they can call on to say, 'Okay, how are the boots on the ground?' I think

sometimes when I see the appointments of these advisory committees, they're mostly political appointees that don't even have a business, or they have a business but it's a sole proprietorship and they're not having to jump through the hoops."[#60]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of Virginia's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Relief programs for businesses affected by COVID-19;
3. Past marketplace conditions; and
4. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

Sixteen interviewees described the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, cancelled contracts, difficulty obtaining supplies, and general anxiety about future ventures. [#7, #8, #18, #21, #25, #28, #44, #45, #47, #52, #53, #59, #FG1, #FG2, #FG4] For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "I think a lot of the major contractors, for example the movie theaters that were going up, they are no longer going up or they've stopped business. I know some of the Wawas have stopped building because they're not making the money. So, there's no need to put up a movie theater if no one can go to the movies. I think some of the contractors may be suffering right now."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "No. I think that... I really think that's why so many businesses were going under. I mean, I understand why the government... the PPP loan really would've been more beneficial, and probably would've kept businesses afloat, if they had not... I mean, our business was considered a non-essential business and so we were part of the shutdown. And if they had done the PPP loan so that the businesses could have spent it the way they wanted to, it probably would have kept more business afloat, because it's hard to come back after two, three-month shutdown because I furloughed them. I purposely furloughed them so that I could maintain their health benefits. If I have laid them off, then I would've had to cancel their health benefits and so you have health premiums and all this other kind of stuff and not a lot of money coming in."[#8]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "The coronavirus has been interesting because construction never stopped because people still need if their water stops or they have a flood. They still need construction, but to me, I saw a change in people who couldn't finish jobs so there was a lot of chaos in the government contracting world. I'll be honest with you. Government stuff, that slowed down, actual doing

work in the field. I did notice there were a lot of changes like bids that were posted were being cancelled. So, there was a lot of wasted time. You've got pre-bid meetings and stuff like that, so all these bids that are now cancelled because of COVID, that's a lot of wasted going into it."[#18]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We have been fortunate to have had some more ongoing work that we continued with and continue to work on, but there's a lot of work pending. The people and the owners who want the work done or I have the work to do, are just kind of on the fence. They don't know what's going to happen. The biggest impact we've seen on our business is the number of projects or work that are there for probating purposes has slowed down considerably. And so, like I said, that's the biggest impact we've seen."[#21]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "For us it was really interesting when the pandemic first started everybody who owed us money decided to hold their money. So, at the very beginning it was very scary because we had no money for payroll, we had no money for rent. I contacted my landlord and he's also a small owner, he doesn't own a lot of buildings. He was like, 'I can give you a break for two months, but that's all I can do. I can't help you more than that.' So, it got really scary."[#25]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "But I'll have to tell you that COVID really didn't slow us down. I had that big VA hospital job going and you would think they would've blocked all contractors like several of the medical care facilities did in this valley. I had several purchase orders withdrawn from Carilion, the big hospital here in Roanoke, because they weren't letting any contractors in. But it didn't really hinder us. Now the oddity is it's caught us now. Things have really slowed down over the past 30 days. Not only for us, but others. And I think a lot of that is here in the zenith of COVID was stuff that already financially anticipated with purchase orders and what not, and so those that didn't have to shut out contractors, we continued to roll. But right now, there's just not a whole lot out for bid and we're not getting many inquiries. So COVID's caught us on the back door."[#28]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We are struggling to get parts. We're basically having to beg for equipment. There's only certain allocations they send out. You only get so many pieces per week or per month. We're just now getting equipment that was ordered and expected for delivery as far back as June the 5th. We picked up two system Friday that we've been waiting on since June 5th. The manufacturers have sent us notices that... What they're seeing, because naturally they shut down their factories down too, they had run a stockpile between January and, let's say, the end of February, first week of March. Everybody started shutting down in March for this COVID stuff. So, the first couple weeks of warm weather back in May, between May and June, the stockpile was gone, and factories were still closed. They have fired back up, I don't know what percentage they're running at, but they told us that they're projecting, they're not promising, they're projecting the supply chain should go back to some normalcy by September 15th. So basically, as far as the heating and air industry, and I'm sure it's everybody else too. I know it is because we have a property in Maine that we own and the lumber there is hard to get. Everybody is just wiped out. Everything is wiped out. Prices

have jumped, things are more expensive now due to supply and demand. This COVID, it's affected everybody in every walk of life from what we're seeing. It's made things 10 times harder than it normally would be. It's hard anyways, because this trade is tough. The HVAC trade is tough. If it was easy everybody would be doing it."[#44]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "Since COVID-19 started, our one recent contract that we have, we've had to go into maintenance mode. So, we have very limited hours. I've asked my coordinator to kind of take a hiatus until things turn around. the Center for Urban and Transportation Research for the University of South Florida, I said, 'I will do the training for you,' which they hired us to do it in person, which is my preference. But then, when COVID-19 started, they're like, 'Could you do it virtually?'"[#45]
- The Native American male owner of an uncertified MBE construction company stated, "I was on this \$3 million contract, and that contract got pulled due to coronavirus on the government being shut down to where they weren't able to get the job permitted. The time that it took to get it permitted, the owners decided to pull out of the job."[#47]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "When COVID-19 hit, the phones stopped ringing, and that was expected. One of the things, like I said, we were working on trying to determine what else can we do to bring in income besides just selling cars. So, getting that rent to own program established right at that time, actually all that paperwork and everything was complete when COVID-19 hit. And we moved forward, we put out there, hey, we do rent to own, and people started calling, saying how does it work, they like it, they like that even though their credit is challenged, the rent to own program gives them options. So actually, when COVID-19 hit, that program actually helped us a lot. But again, there was like one replacing the other, because the sales stopped, but then because we did have the rent to own, it's kind of replaced it. But at the same time, that rent to own helped us because the sales stopped. So, it's still kind of like at that plateau, because now the sales have stopped, the rent to own program kind of replaced that, the goal was to get something in addition to the sales. So, the sales have definitely slowed down. But again, we are thankful that we did have that in the works, because if we didn't have that, we probably would have really gone down. So, we're kind of like at a plateau, and still working to get over that hump. inventory prices when COVID-19 hit. All of a sudden now, a vehicle that wholesale value is 2000, we go to the auction, it's selling for 4000, so it's impacted that way. Another thing is, with COVID-19, with that rent to own, we wanted to try to maybe get into renting vehicles, and there is a type of financing that you can get, but we went to the company that does that type of financing, because of COVID-19 they're saying right now we're not taking any new applications. That's another impact."[#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I lost some projects because of the pandemic probably four or five projects, small to midsize, all residential, have gone on hold. I don't know if they'll ever come back or not. You know, the people may come back to me once this is over and want to resume, I don't know. So, they sort of stopped. But surprisingly, I've gotten some calls from people wanting to start projects. They are all residential. I think people are stuck inside, and they're board.

Some people have money available. Those people are figuring, 'Well, I might as well do this thing I've been thinking of doing now, because I got nothing else to do.'"[#53]

- The non-Hispanic white male owner of an SBE-certified construction firm stated, "I'm not really wanting to put all the blame on COVID, but I guess it's just... I don't know. There's so much that's really affected us. It's just affected the whole marketplace. You just don't feel comfortable getting out amongst strangers. Right now, because of COVID-19, there's a tremendous shortage, and sometimes, especially HVHC equipment is. I guess all the factories are shut down. A lot of the factories were shut down, so there's very big shortage."[#59]
- A respondent from a focus group for SWaM advocacy groups stated, "Our Northern Virginia, which is 60% of our membership, suffer greatly from you know, that the government is not functioning too well." [#FG1b]
- The Asian American female representative of a business development organization stated, "Federal Government wise, lack of resources shut down State governments local, slower local government, even in Northern Virginia don't buy a whole lot."[#FG1c]
- The non-Hispanic white female representative of a business development organization stated, "We're seeing that second round, post-PPP, idle, spin down that they are starting to suffer from a lack of cash flow again."[#FG2c]
- The female owner of a WBE-certified professional services firm stated, "I've noticed in the federal sector, just more so the funding issues. So, since the funding has been reallocated towards combating to COVID or the pandemic, it's taken away from the services supplies, some of the requirements that we would normally see specifically in a shipping repair and maintenance community. A lot of the availabilities are being pushed to the right, not coming in on time. Also, kind of creating, more so, a tense environment when it comes to the funding, having to fight overspending the funding for the COVID relief pandemic efforts, or having to spend in front of contractors for PPE or to be able to pay them to do the work that was initially anticipated. So, there has been a lot of ongoing pulling and tugging in that environment. For my business specifically, I think it's more so how to reinvent yourself in more of a virtual environment. Also, with the networking, that has been limited. So, I guess just trying to figure out how you can get your clients and your business out there in the forefront, especially within the federal, state, local markets as well. It's resources, funding that's available. I know with the PPP, loans, that's an adjustment that a lot of businesses have to get used to. A lot of the unknowns and regulations are up in the air right now. They're going to have to pay them back, if they're going to be forgiven. So, I think it's a lot that's going to be into whether or not these businesses are able to stabilize or if they will have to, like you said, pivot or whether or not they're just going to have to go out of business. Possibly for the short term or the long term." [#FG4b]

Nine interviewees noted that COVID-19 has had little to no effect on their business. [#6, #11, #12, #20, #22, #30, #35, #36, #FG1] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Very minorly. Yes, almost insignificantly."[#6]

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "We have a warehouse, and we have most of our jobs and stuff taking place in there. But we have a 5,000 square foot facility, so it's not hard to keep everybody kind of farther apart and stuff."[#11]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The COVID hasn't affected us very much, but it's affecting the marketplace, which is affecting everybody."[#12]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Initially thought it was going to be pretty badly affected going into... back in March when it first started. I was really kind of panicking, but it turns out that we were in a better position than 99% of the companies, I think. I thought the company was going to cut back on our people or they were going to lay them off because of the shutdown of the bases and everything. Our contracts basically stated we can't work on base. I mean, we have to work on base and when they shut the base down, I thought all those people were going to be laid off that are working on base. That was kind of really sad in a lot of ways, but the government decided that they can let those people work from home. They changed their contracts; our people can work from home."[#20]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Really the only effect it had on us was obviously we invested in some safe techniques as far as masks and hand sanitizers and cleaning the trucks every day, which is something we didn't normally do. Put some rules on our guys. I started taking their temperature every day before they go to work. Just really being on them about... During the peak of it, during March and April and May, we did request out of them that than coming to work, they stay home, because we wanted to be accountable for who we were sending in people's homes. Then we just requested of the customers that they keep, older people, little children, not in the same room with us and whatnot, just so we didn't have to worry. But so far, knock on wood, we've done very well. No one's gotten sick. None of my guys have gotten sick. We do the best we can to control the environment as we can."[#22]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Fortunately, work levels have not been impacted by the pandemic. What we do, we're outside doing a lot of infrastructure-related work, so we're not shut down, we're not impacted. A couple of projects were delayed. But there was a lot of uncertainty in March and April."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah. One of the measures that we did is, increase our marketing and just pretty much were focusing more on the construction phase of the... I mean, the construction part of the business, and that's what we did. We noticed that construction wasn't really affected by COVID-19. People were still building stuff. With retail, one day doors open, the next day doors close. And then you got to chase after the customer for payment, which they may or may not exist at that point because they're officially closed. So, it's kind of a risky environment now that we kind of do where you're dealing with a retail store that is on the verge of closing because it's been closed for such a long time, and the customer or whoever has not picked up. That's in regard to the retail stores, but the construction site is always there."[#35]

- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Other than supply chain, we haven't been affected to date, much at all. Not economically. We were considered a critical business, so we were not forced to shut down. I have not had, but one COVID-19 employee. With everybody doing home improvements, a lot of building materials are getting the short supply right now." [#56]
- The Black American male representative of a business development organization stated, "The private sector's almost in the same condition. It's a little more vulnerable in the private sector, but not as much as it used to be." [#FG1b]

Two interviewees shared that COVID-19 has been beneficial for their business, noting increased sales, higher revenues, and more business opportunities as a result of the pandemic. [#13, #24] For example:

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We had dips in the type of work we do for municipalities, such as libraries and community centers, things of that sort, gathering places for people. Those locations all closed down, but there was more than enough need with either current clients or new clients for temperature scanning, that pivoted and added temperature scanning services. So, at this point we've done 75,000-plus completed hours of temperature scanning since the 14th of march." [#13]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I think, because of the pandemic, there's more flexibility and more things that are becoming available online." [#24]

Eight interviewees noted that COVID-19 changed the source, scope, or structure of their business. [#15, #16, #19, #51, #54, #57, #58, #60] For example:

- The Asian American male owner of an uncertified MBE professional services firm stated, "I think it definitely has affected us in some way. One thing is we all work remotely now, so most of our client meetings are live, so this is a big shift for our daily practice." [#15]
- The Black American male owner of an MBE-certified construction company stated, "The only way we've been keeping afloat now is our referral. That's what's been keeping us afloat now." [#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Because of COVID, I'd say we're very high in the 80 to 90% government. And we've had to sort of pivot, like every small business has, and grab every contract we can. But like I said, COVID has completely shut the commercial world down. And we are very heavily government right now and getting through COVID." [#19]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Everything is on Zoom or similar, or Meeting, virtual meetings, whatever it's called. A couple Google ones didn't work as well, but yeah. Everything is more remote, so I haven't been able to go and sit down and go over projects with clients. I haven't done it at all since, I guess, March or whenever that was. But it hasn't slowed down the work, because most of

the work was already in the mill. It slowed down some of the things on the clients' end, because different clients have had some people that were sick and missed work. And fortunately, nobody has died, that I'm working with or anything, but it's slowed down. If something's designed that has to go to construction, it's going to slow that down. It's going slow that. And that hasn't happened yet, but that could happen really shortly. So that'll be a part of the work that I'm involved with, where all of a sudden, we're grinding to probably a crawl. The private sector is hurting more. Yeah. The public sector... Now, I don't know, as money goes to COVID relief and that type of thing, what's going to happen, but right now the public sector, they're basically replacing, improving, maintaining infrastructure. It's stuff that has to be done. Like, if you have an old pipeline that's leaking. Or your franchise with the state says you have to serve your territory, and when they can't serve people within that territory then they sort of have to... And they can put this in their rates, and that's what saves them."[#51]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It has slowed up some. In some areas it has slowed up, and in others it seems like it has picked up, because I found that I've had more clients come to me that either they're bringing their elderly parents into their home, and they need accessibility to the home. Wide rooms, hallways, doorways, adding rooms on for the elderly with bathrooms that are accessible. In that instance, it has grown."[#54]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "My business has been affected by the pandemic. However, I've kind of been fortunate to have slow and steady business throughout. I've been able to do pretty much all of my work from my home base and deal with everything over the computer and telephone. It's very strange. My lifestyle is really strange to me, but in essence, things have been fine."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "It has affected so that we had those two resources who were used to come and work with me. So now that situation... Working remotely is not that great of an idea, because it's a lot of communication, and it's not like just you can make a Zoom session to, or some way with this communication in work. It doesn't work that way. We do rent an office, and we need to also make sure that we need to keep that. So that means there are resources which have been invested. So, we have decided to just cut down those resources and work remotely. That's one."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Since COVID hit, we all work from home. It's interesting, we changed our marketing because again, a lot of our sales and marketing was one-one and one-on-one meetings. We had to significantly change our investment. There was some capital injected into our online marketing and our online presence in order to continue to make these services, or to make the localities and the state agencies aware of our services."[#60]

2. Relief programs for businesses affected by COVID-19. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Most firms noted that they received some form of financial support through federal or state programs. Other firms described the type of support that would be most beneficial to their type of business during this time.

Forty-two interviewees described their experiences applying for and obtaining COVID relief programs. [#3, #5, #7, #8, #9, #10, #11, 13, #14, #15, #17, #18, #19, #20, #21, #22, #25, #26, #28, #29, #30, #33, #34, #35, #36, #39, #40, #42, #44, #46, #47, #48, #49, #50, #52, #53, #54, #56, #60, #AV, #FG2] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "We were, and in fact, we actually got one of the loans. Because, yeah, especially the PPP. It sounds like equipment, but it was not. It was a federal SBA loan that turns into a grant for about two and a half month's payrolls. And that was remarkably helpful, so we were able to take that and use it on payroll and spend the entire thing. Even because we've been able to keep workflow right, we have noticed a tremendous... Well, our accounts receivable has grown tremendously. So, Uncle Sam's check really came in handy during that period."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "We worked with the Small Business Administration on the PPP loan and have that in place as well. So, we haven't worked through the close out of that loan yet, but we do have that available."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yes, we did. We did. We received a PDP loan early on. And about 50% of my employees have small school age children including myself. So obviously, some of us had to drop back on our hours and provide childcare and schooling for our kids. And we've tried our best to accommodate employees that had to drop from 40 hours to 30 hours or half time. Generally, mostly everybody's back to 100%. Now that may change again in September when we have to do virtual learning again. We were very fortunate to have an association with a local bank that was on top of loans. And they helped us hand in hand quite frankly to apply and be successful in receiving the loan."[#5]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "I honestly want to say we did apply... I want to make sure I got it right. We did apply. We got the money, but then we realized that we were doing... We haven't suffered so we gave the money back."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yeah, but... yeah, we got the PPP loan, and we got the... which really doesn't help pay your salary, like the owner's salary kind of thing. But there wasn't a lot to help the individual owners out with the government programs that are out there. We did one of the BA small business loans and that's helped."[#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I think a lot of people needed some of those programs. Obviously, I said we are growing but we don't have a lot of employees, and so there's a situation there where that's a game changer for a lot of these companies that have a lot of employees that they feel obligated to and want to keep busy. But also, I think, probably, I don't know, I think it's going to negatively affect some. I think some of the more rational thinkers that did utilize those programs are going to use that for more of sustainment, and I think there's some that are making errors in terms of trying to make unwise growth move. I'll just leave it at that. I think they're going to abuse it and put themselves in trouble. Who knows? I could be wrong. Wouldn't be the first time."[#9]

- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "So I actually went and filed for the PPP loan since I had one employee and I received that through my bank. And now I'm trying to file the forgiveness application. But my particular bank is saying that they're trying to get a website spun up to make it nice or easy for you to file the application. But I did my research even before I signed to get the loan, making sure I could do the application and qualify for the forgiveness, because I'm not going to take on a loan if, you know?"[#10]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "I would say that the PPP money did help out a lot though,"[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "It just so happens that our firm is right in the middle [of applying]."[#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Luckily for me it was two-fold, one I was already in the downsizing due to other circumstances, but we were able to reach out and get a PPP loan. It helped because we had several projects that we were on that got postponed because they were commercial projects. They were in commercial buildings, but they were government projects and because of government workers the whole job got shut down. Yeah, we couldn't go into the buildings and so everything came to a dead stop. Luckily, we did get the loan."[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I've seen with the way the stimulus package and just the way Trump, the president, really invested in these smaller businesses and took care of them first, I think that's what saved us, and I think that's why I haven't had such an impact because I did go through the 2009 recession and my company made it and we were brand new."[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Then when I saw that this wasn't going to be effective, I turned it down at the last minute and actually I got the money and I sent it back when first started in those first weeks. So, we did get assistance. We were going to get assistance no matter what, and that was going to help me out. But then again, I saw we didn't need it, so I turned it down."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, we participated in the PPP program, the paycheck program. And so, like I said, we just fit in that. We've actually used all the money that was available to us. And so, like I said, that's the only thing I guess that we've done. Our bank kind of walked us through it and gave us a list of the information that we needed and worked with us and were very accommodating to take care of things and get everything documented and get the program moving. And like I said, that's what we did."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "But I did educate myself on them to see what was there in case we did, but we just did not need to do that. I just didn't want to. I don't know. I just didn't have a good deal on my gut about any of it."[#22]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "As soon as I heard about the PPP and the EIDL, I immediately applied. We got

the advance for the EIDL, which is the emergency loan from the SBA, we got that really quickly. I think because we applied so quickly. What that did was that I was able to pay my rent, and then I was able to meet payroll for the first month, month and a half, then after that we got the PPP and then I was able to continue. After that it seems like as other companies were also getting their loans and assistance, all of a sudden everybody started paying so we were able to get in a really good place. I actually got the SBA EIDL loan. I haven't used it, but I am paying off on the interest and I have saved it. Again, because I want to wait until the end of the year. If I don't need it by the end of the year, I'll probably be returning it, because there's limits as to what you can use it for."[#25]

- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Yeah I applied. I did get \$10,000 from payroll protection but that was only a drop in the bucket. That wasn't anything."[#26]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "We did get one of those PPP loans, which was kind of a formula. You didn't... if you're familiar with that, you didn't say, 'Hey, I would like \$80,000.' You just send them what your regular payroll was and so forth, so we did get a, I think about a \$46,000 PPP loan, which is still on our books, because COVID's continued. They keep delaying the payback or the forgiveness, so we're just waiting for the green light from the SBA and our bank to fill out the forms for loan forgiveness and I'm going to make that attempt."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "We got the PPP loan. And we got a couple of grants we had applied for, a couple of small grants and that's it. That's the only help we've gotten."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "We did pursue the PPP loans that were offered as the first stimulus package."[#30]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Because of the illness, I had to lay off all the people I have to work with and had to let them go. I had to let them go. Because the employees are already gone, then I'm working with my brother, sister and son doing small jobs. So, when you apply for the PPP, also they tell you, we will not give it to you. So, I haven't gotten anything, nothing from the government, nothing from the state."[#33]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "The biggest thing that I noticed was that a lot of what's offered weren't loans for small businesses that would have a form of repayment. We are not at any type of position to take out a loan that would require a hundred percent repayment, that's why I only applied to the PPP and that's why I like it so much. If we met all of the standards, our repayment is eliminated, we don't have to pay it back if we meet all their qualifications, which we do and we have. We're in no position to pay back money unfortunately, we're just not in the business that generates a large amount of revenue a year."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "We applied for a PPP loan program, the paycheck protection, but that's all I can think of. It helped out a little because most of our, I guess, customers that are on the retail side, they closed their doors for a while, so that stopped all the checks or invoices coming in. So,

that came at good time, I guess. That helped us float, in regard to those. So, that helped pay the employees and all that stuff."[#35]

- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "I did three times and didn't get any from the three times, and I don't really know why because that's another thing. Nobody ever comes back and tells you why or what. You just don't ever hear from them, and that's very disappointing. That process it's got a lot of accolades, but there's a lot of small businesses that just weren't able to partake in that, and who knows. It is getting better though, and I think that soon we're going to start seeing people... even though they're working from home, I think they're going to start getting better at being able to put solicitations out on the street then we'll be able to monitor those electronically and still propose. But at least then we can propose and maybe they can get some awards, because they anticipate that from the time, they do an award to the time of the start of work is a couple of months. They'll anticipate that things will be better by then."[#36]
- The Black American male owner of an uncertified MBE professional services firm stated, "I'm aware of programs at the federal level, the PPP Program and those items that were part of the CARES Act and the relief program. We've taken advantage of a couple of those, but I haven't done anything at the state or local level."[#39]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "And we were able to get that, yes. Well, we originally applied for the EIDL that SPA had, but we actually didn't pursue that one because we were able to receive the PPP. Because there was some question about how much are you going to get, what are the circumstances. So, we really pursued that one."[#40]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "We filed with the government assistance. PPP, I don't think we filed for the payroll, because we had the one employee and with the timeline of hiring versus when it started, I don't know if they actually would have qualified it for the payroll protection. It's the government give your stimulus directly to the business to help out, how to give every homeowner or everybody that filed taxes got a stimulus check. They did the same for small business. Well, you had to apply for it, and we found out a little late, and it's still processing there. Never get no answer off of it. it's still been pending approval for almost two months. For me, my experience was bad, because I ain't got no relief or help yet, but yet, there's businesses around here that's got a \$100,000 in their bank account that's been had it, and I think that's a problem. I think it should have actually gone to the small business owners first, before pocketing to the big business that could potentially sell a tractor trailer for \$60,000 and pay their invoice for two months. As opposed to me, I don't get it. I could possibly don't get no work. Then my employees don't eat. I don't eat. My kids don't eat, and it's that simple, no bills get paid."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We did qualify for the PPP loan. In fact, I've got to do my forgiveness. The bank's already contacted me about sending it because they extended the deadlines and all that stuff, so I've got to sit down with the banker and actually write my loan. We did qualify and we're granted o PPA loan. Because I tell you, March and April, it was tough."[#44]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "So we applied the first time around and they ran out of money. And then the second time around basically never got to it. But we did get a small business loan. This one we do have to pay back, but it was a nice just for boost of confidence to know that it's there if we need it. I even reached out to the small business administration. They said that the applications are done in the order in which they're received. And that they're backed up and stuff. But it eventually came through."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "I was able to get the paycheck protection program. That experience was pretty painless obviously I think that the PPP program was certainly beneficial, and I think that actually kept me in business, honestly. I'm not going to lie to you. If we can't give it 100% credit, we definitely can give it, that was a key factor to keeping us going."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We did, and we would have let, had to lay off some folks, but we did get the business assistance. So, we've got that through, I guess it's really through this week. Where we go from there, I don't know, because we couldn't get by with fewer people that we have now. Yeah, PPP. I think that that was completely mismanaging. They gave a lot of big businesses millions of dollars that weren't justified, but you know, I don't know. The thing has been handled so poorly, top to bottom, that I'm not so sure I want to see them do it again. Just turn us loose, and let us battle our way out in the marketplace. And that's coming from somebody that's probably going to suffer more than anybody else, because the construction business is the hardest hit in these things."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "We did get a grant. I think it was \$4,000 and that was all that we've actually gotten. I want to say that might've been the one that they sent over. I think a lot of businesses automatically got \$1,000. The EIDL."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "We got the PPP money initially because we knew we were going to be impacted and weren't going to be able to open It was helpful. And we only asked the one person because there was only one employee at that point. We were not open. She was just working; she does all the books and also, she grows all the plants and stuff in the greenhouse. So, it was pretty good. we qualified for a small business loan during the COVID. It was a 30-year loan for 14,000 and it was \$70 a month and it was ridiculous, the interest."[#50]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "We did apply for the PPP. We did not get a whole lot of funding, we only got \$1800. We've been surviving, so I don't know if they looked at our tax returns and said hey, they weren't making a lot of profit before, because we dump a lot of personal money into the business. We feel like at some point we're going to find that model that takes us over, and that's why we keep trying to do that and establish time in business, because we know at some point we're going to get there. So, we believe in that, and that's why we keep doing it. But I don't know if they looked at it and said hey, they didn't profit that much in their tax return, so why do they need money during COVID-19? Which I don't really agree with, because like I said we were already putting personal money in it to help the business, now when COVID-19 hit, that just made it even worse. So, we still need money

too, that just means that more of our personal money has to go towards helping with the impact of COVID-19. We did apply also for the EIDL. I'm not really sure what happened with that, because we were on it day one, and we applied as soon as it opened up, the first day it opened up. We knew it would be a little bit of time before we heard anything because everybody was applying. When we finally heard something, things had evolved since COVID-19, so they changed the application, they changed the portal, and so when someone finally reached out to say 'Hey, we got your application, what we need you to do now is reapply through the new portal that we have.' So, we did go through the new portal, I put in our information again, and they gave us a \$1000 advance right away. Then after that, we thought okay, here we go again, we're back in another list of people. So, we waited another probably two months, only again to be told 'Hey, the applications have evolved, we need you to apply again.' With that they put us back in the bottom of the bucket. And we waited another couple of months, and they responded, and they said 'Hey, you've got three applications out here, we're canceling these two numbers, and we'll do this one.' And we waited another couple of months, probably about a month and half, two months, to be told that we were denied because we didn't have our tax return. But what was interesting was they told us that we had not filed 2019. So, they said 'Hey, if you want to be reconsidered, send us a request,' and so I did, and by that time I had filed my 2019, so I sent in the taxes. I think we got thrown back into the bucket again. So, another one and a half, two months later, they said we're denied. We didn't get your taxes. So, then we got thrown into the bucket again. She said they sent something saying you can be reconsidered, we sent it in, I said okay, I do want to be reconsidered. A month later they said I need to fill out 45016 for individual and the business, and we filled out the request. We just received another notification about 30 days later, just last week actually, saying we filled out the wrong version. I said okay. So, they sent me another form, I filled it out, and so now I am waiting... that was last week, so I'm still waiting."[#52]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I did apply for the PPP loans, and I did get one at the very end of June. So, I'm getting some money from that. That is helping fill in the gap from those projects that did stop, so that's good. Well, it took quite a while to get it, but eventually it did come through. It's pretty simple with my type of business. I just sort of write myself a check every two weeks, of 1/24th of the money, and that's just sort of a supplement. Then I use that to pay for things that I need to."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I've applied for small business help. I can't remember the exact name of it. It was pretty good. I mean, I hadn't filed my taxes for 2019 and 2018... And once I filed my taxes, then the application that I put in was accepted. But it was pretty easy for me to do the application."[#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Yes, PPP. It was fine. It was very well done, as far as I was concerned. it was a very easy procedure. I thought it was well put together and it wasn't a complicated process."[#56]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We did get a PPP loan just as a safety net because at the time, this was the first

round. We didn't know what was going to happen. We didn't know if the bottom was going to fall out. We've utilized it appropriately, but we've consistently held steady. We are extremely thankful for the SBA, and even through the agency that your contract is with is just giving small businesses a heads up about those things coming down. That was really impactful. We actually had a very good experience because we have traditionally used community banks. We feel like that is honoring small businesses, because we're a small business, right? And thank God we did, because community banks got it done when the larger banks couldn't. We worked with Village Bank and they were on top of it. They were able to help us get us processed and to get those funds. But I'll tell you, a lot of the other small businesses that I've talked with that dealt, especially with Wells Fargo, they're still waiting around, or they didn't get anything. I feel so bad because people didn't know. You would think traditionally with these larger financial organizations that they would be more attuned to doing this, but they really dropped the ball on small businesses." [#60]

- A respondent from the availability survey stated, "I am also a lawyer, and I noticed during COVID that people need help with basic legal questions to help steer people through for the kind of legal problems people have right now due to COVID." [#AV]
- The female representative of a business development organization stated, "Our businesses were waiting for CARES funding, right? There was this, okay, we've got six weeks, eight weeks, three months' worth of capital, we've got to get something, we've got to get something. I think we were the fourth or fifth community that took a really good portion of CARES money that came to the locality, \$5 million in Chesterfield, that we allocate it back out to businesses in grant form, and here's what we found. After the waiting and waiting for either idle money or PPP funding, because part of the restrictions we did in our first round is, if you received funding in either of those two areas, you didn't qualify for the local Back in Business Grant that we offered. Our businesses were just waiting. While when we released the grant, our businesses had... I would tell you, everybody in Chesterfield got PPP or idle funding. We ended up doing around two, but we're going to do a round three, because out of two rounds, we've given out just under \$2 million of a \$5 million allocated funding in the community." [#FG2]
- The female representative of a business development organization stated, "We actually just came out with a survey this past week, most of our members, a vast majority of our members did get PPP or idle loans. Almost 90% of them have spent that money. That's all been done and gone, and in fact, more than half of them, about 60% of them are already ready to start doing the paperwork for the forgiveness piece. But we did have, one in five of our members say that they will likely be doing layoffs in the next coming months. About 44% of them said they would want to apply for a second PPP loan, if that becomes available." [#FG2]

Sixteen interviewees did not apply for or were not aware of COVID relief programs. [#3, #7, #9, #16, #18, #22, #24, #27, #31, #37, #45, #55, #58, #58, #59, #FG2] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "And we've seen some of the other things that they have, we haven't done those yet." [#3]

- The non-Hispanic white female representative of a WBE-certified construction company stated, "We did not apply for that business loan."[#7]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "No, I just felt like... I'm sure there's others that maybe need it more than I do."[#9]
- The Black American male owner of an MBE-certified construction company stated, "No, I didn't want to. My accountant told me not to. She asked me if I wanted to lay in the bed with the government and I said no I don't want to lay in the bed with the government. She said well leave the money alone then."[#16]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Okay with the PPE, I did look into it and I did look at the EIDL and the reason why I didn't do either one was because I was concerned with the SBA and the banks. There were only five requirements and there was nothing... I'm like, 'There has to be more detail. This is so vague. I'm scared of getting this money and then all these restrictions being put in place and I can't meet those commitments.' Especially banks being the middle person, and when I build construction, I don't want to mess with them."[#18]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "I said no because I don't believe there's anything such as free money and, God love our government, but I knew they'd come looking for it eventually. My thought process was, 'If we don't eat it, let's leave it there for someone who really does,' because I also knew it wasn't a bottomless pit. He has actually a couple of siblings who are business owners and they were all over it. I said, 'No, because they are going to come looking for it again. Maybe not this year, maybe not next year, maybe the year after. They're going to come looking for that money payback one way or the other. You're also taking from a pot that's not bottomless, and we could be taking from someone who really, really needs it.' Since we decided as long as we don't need it, we are not going to partake."[#22]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I was told by the person who did my taxes that my business was just too small. I don't have employees. I don't have any of that. So, I didn't, and I didn't apply for unemployment either."[#24]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I haven't applied because I didn't know that they had any until I went to renew my SWaM and I think the gentleman by the name of Kevin, he was telling me that I'm eligible to get a grant to help me out with this and everything. I'm in the process of applying now. I had to get all of my tax papers and everything updated in the system because some of my certification was already there, but it needed to be updated and everything. So, I had to get everything updated. So, he's supposedly giving me, telling me to this lady I think her name Miss Curleen White or something."[#27]
- The Hispanic-American male owner of an uncertified MBE construction company stated, "Yeah, I did not do it because, really it was about a 10 hour process. I decided not to go into it, because it wasn't that big of a deal to me. We were able to keep growing with what we got right now."[#31]

- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "What comes to mind initially is the one that the President put out for small business loans. And then there are a lot of people, or I shouldn't say people, but a lot of companies who call me all the time to try and give me a loan. I think based on that, but I haven't taken a loan."[#37]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "No. I don't want to ask for help if I don't need it. That's one reason I didn't do the PPE, because the way that my employees are seasonal to begin with. And I've got enough paperwork floating around this country, between small business supplier diversity and the Texas SWAM, and the Texas DBE people and the federal taxes. You name it, and I thought I just don't want to go that route. Because to be honest, it would increase my rates for my insurance, my business insurance, too. And so bottom line is, I'm not happy with that."[#45]
- The Black American male owner of an uncertified MBE professional services firm stated, "No, I didn't."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "No."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "We have not received assistance. As a matter of fact, we did not apply for the assistance. We did not know whether or not a small business like us would... Since we have a contract right now on hand, so it shows that we have something. But it's just not something that's going to secure our future. So, it was kind of a catch in between that we have enough to show that we have these earnings. It's not like we lost a job, or anybody lost a job."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "I have not. I don't feel I'm the one to warranty those."[#59]
- The non-Hispanic white female representative of a business development organization stated, "The fact that most of our businesses are early startup, a lot of them were not qualified for the PPP. So, there they are. It's been interesting to see how some have shifted their focus and shifted their services so that they could continue during the pandemic."[#FG2]

Eleven interviewees shared suggestions on the most beneficial types of assistance their firms could receive to reduce the effect of COVID-19. [#7, #8, #32, #34, #35, #37, #39, #42, #47, #49, #FG2] For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "We were taking advantage of the quarterly. There's some kind of quarterly credit you get if you have to pay an employee for being out for quarantine, or due to not having a babysitter because the kids are out of school. So, they have up to 12 weeks you have to pay them. We are turning that in to get I guess a tax credit. I'm not the accountant, but I do know that there's a credit out there that we're taking advantage of."[#7]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The monies are set aside to pay the team members and then you can use a little bit for utilities and stuff like that and that was helpful" [#8]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I really am hoping that this President... Well, certainly, not the President right now. I can't believe him, exactly. It's the Congress, and what comes next, and the Cares Act. We definitely could use support, in terms of another PPP. That's what I pray for. If we have the opportunity to get another paycheck protection, then we would be able, definitely, survive the next six months to a year, pending the climate. That's what we need most. Thank goodness for the unemployment. The extra federal benefit for our employees. That was fantastic. That was a big thing for us." [#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "If we break even each year, honestly that's our goal, with payroll and our labor costs, that's where we stand. I would have liked to be more grants available for small businesses and I don't mean what was a big house that qualified for the PPP and was able to get PPP funds. I'm talking about poor people like us that really will not survive, we may not have any additional locations. We are independently owned, and we would not have survived if we did not get the PPP funds." [#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I guess another round of the PPP because it's been a while since the last one. So, I think another one would be good. That would definitely help get back to normalcy. Because what's going on is, these businesses that were closed, half of them are reopening. So, that's a good sign there, and I guess, slowly as they're getting back their business, they're going start requesting service for us again. So, I guess, we're almost there as recovering... as far as like recovery, as far as businesses are concerned. I know that grocery stores are not or anything like that. So, pretty much another PPP would definitely help in covering that few months period until everybody's back and running again." [#35]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I think the guaranteed loans from the government are a huge help. Especially if you're between a rock and a hard place and you just need that next job to get over the hump but don't have the money to buy the materials to get it going. Or to pay your personnel to get to the point where you can deliver. Most places, whether it's COVID-19 or feast or famine, which is basically what it is all the time anyway, it's getting through that low spot. Having a plan to get through your low spots." [#37]
- The Black American male owner of an uncertified MBE professional services firm stated, "What type of assistance? Well, I guess if there is a way for us to tap into those types of opportunities, consulting opportunities that are available and that haven't been affected by the pandemic or have come about as a result of a pandemic, that would be beneficial. I haven't spent a lot of time pursuing any Commonwealth work, so I don't even know where I would go to see where those opportunities are and we're not on, I don't think, the distribution." [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "They need to ease up on the creditors, because they're holding people back from working. They

scare people not going to work. I mean, people can't pay bills, and you get creditors calling people, expecting them to pay bills when government's saying, 'Hey, stay home.' You know what I mean?"[#42]

- The Native American male owner of an uncertified MBE construction company stated, "I guess in addition to all that, I think we're still not out of the woods, and I'd like to see a second round of that come through, because we're still facing the same issues as we were back in March. I know some people may think that business has gone back to normal, but it's still pretty far away from being back to normal."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "More monetary for payroll, things of that nature. Keeping the business afloat. We were able to do it, but a government grant out there or any kind of grant out there that would've been beneficial as well."[#49]
- The female representative of a business development organization stated, "Because that's the thing is, these loans have been great, and certainly our members have benefited from them, and they hope there's another round. But that's the thing that hasn't really been addressed is the lost revenue piece. We anticipate that, it'll still be a little bit of a long hoe for folks over the next year."[#FG2]

3. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the state of Virginia's marketplace that they have observed over time.

Four interviewees described the pre-pandemic marketplace as increasingly competitive. [#55, #57, #60, #AV] For example:

- The Black American male owner of an uncertified MBE professional services firm stated, "For me I'd say the market's been good. I don't want to say it's been bad. Again, for me, I think in the Richmond market especially, some of the work that I go after is mainly walls, drywall, painting, plumbing because I had certain contractors to do that work. However, there are big, big players in this. It seems like there are a lot of contractors who do that work, so it becomes a little difficult at times to get work in that fashion."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think, Charlottesville has an abundance of architects. It also has an abundance of people who have enough money to do architecture. It would never survive in many places. I think Charlottesville is its own little circle. I think the biggest change, and this has happened, I'd say over the last 20 years, is that people don't want the full services of architects. I think that's taken the biggest hit on our business."[#57]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It has been unfortunate because VITA has made it difficult like I mentioned, for smaller businesses over the past several years. For example, I can't necessarily go and directly market to agencies with an approved VASCUPP vehicle. They have to use Computer Aid and there's a lot of restrictions around that. Well, that's fine if you're a large company. But if you are a smaller company trying to be competitive and trying to provide competitive

pricing, almost 9% of that is a kickback to VITA for that contract vehicle. Part of it goes to Computer Aid, and part of it goes to VITA. Okay, well if you are competing with say Robert Half or you are competing with some of these other larger firms that are on that contract vehicle, well, then they can afford to take smaller margins for greater volume."[#60]

- A respondent from the availability survey stated, "[Virginia is] a good place to work. There is a lot of competition in my line of business and since most of the businesses are home based businesses, every street has a tax preparer. It's competitive. Generally, I would say it's a fairly competitive market. With all of the construction going on downtown in the hospitals and others, there is a lot of room for growth. It wouldn't be feasible to start in my line of business, there are already too many painters in my area. About 15 or twenty people have tried to start and have failed. About 65% of the painters in my area are not licensed."[#AV]

Twenty-two interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses. [#2, #3, #5, #6, 10, #11, #14, #20, #22, #27, #29, #34, #35, #44, #46, #48, #53, #56, #58, #AV, #FG2] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "And we actually had seen our domestic markets had actually gotten a little stronger every year, probably for like... Ever since 2008, just a little stronger every year until this year when they started to kind of level off a little bit."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I mean, over the years of working for the state, it's always a matter of their budgets and their funding. And so, we've been through the cycles of when they didn't have money and when they did. Not a huge impact, because we have some diversity in our portfolio and who we work for, so our industrial clients sometimes carry us through. You know how it is, I mean, economic downturns hit in cycles. We all stopped spending money, the state's still got money, and then they don't have money. So, we've been able to ride those at the size we are and only had a couple of concerns when we were light on work. I mean, our business model is built around doing quality work and doing repeat work for the same clients as much as we can. Because we do a good job, so if you do a good job, people want to work with you again, over and over."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think because of our location in Hampton Roads even in the decline I know we were effected but probably not as hard as some other areas because of the military presence. And quite frankly, as we've grown from 2011 to the present it's just been a constant steady growth."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I think just overall confidence in investments into development and infrastructure construction. Overall, I think it's been kind of balanced. There's been a strong residential, strong commercial and strong infrastructure in the past few years. Yeah, I say in the past three years, it's really stepping up and that's where our growth has come from. I'll say, I think there's a lot to do with politics. I think it's just the confidence, consumer spending, investment. There was a lot of pent-up demand that got released into private sector in the past three years. It's a lot to do with the confidence of investors. I believe in site

development. I think generally speaking, everyone now is a rising tide is lifting everyone that is, I've seen a number of family-owned businesses that have no legacy to hand the business down to, they're going by the wayside, but the upstarts and the more progressive companies are taking off."[#6]

- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "And it was so easy to pick up more work and everyone was so flexible. I mean, it was great. I could choose my hours. I could choose my clients. I could choose my work. And I was actually only on filling about 50% of my time just because I brought in enough revenue to keep me happy and it was low stress. And so yeah, it was pretty nice and easy. And obviously then things changed."[#10]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Well, the vehicle wrapping is becoming a lot more understood to a lot of people. So, the industry's growing very rapidly. And I think we're a \$12 billion a year industry right now. And I think three years ago, it was probably only a \$5 billion industry. So, we've almost doubled in size as an industry in the last few years, which has definitely increased our business and made it to where people were more understanding because you got a lot more people seeing raps and understanding how they work and what it is, things like that. So, I think that's had a positive impact. We typically grow by 20 to 30% every year for the last 14 years. So, this will be the first year that we've kind of taken a downturn and not hit the growth and actually probably slid a little bit on our total revenue for the year."[#11]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "We were trending up. And so, we've steadily grown Currently right now in 2020, we have exceeded our revenue from 2019 in July. By the end of July."[#14]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "No major changes, really. Everything has been basically business as usual. I can't think of anything that was out of the ordinary. We're just stepping up our marketing efforts on the commercial side, but that's about all. We did develop a software that is sellable out there in the commercial world, on maintenance engineering."[#20]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "From our standpoint, our business has slowly but surely continued to increase. I've not really seen a big shift, one way or the other, with people. When people started getting their relief checks and whatnot, we did see a little bit of a pop in business, people getting things that maybe they couldn't have afforded before, just decided it was extra money, they were going to do it. We did see a little bit of pop in business during that timeframe, but overall, I feel bad for the places, the restaurants and so forth that are struggling. We do actually still try to support, especially our small businesses in our area and whatnot. But yeah. But other than that, I really haven't noticed, for us, a huge sway one way or the other."[#22]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Before the pandemic hit in March, I had got set up where I was ready to get some work and to go to different brokers and was in the process of getting work It was great. Because actually I was doing, I don't know where you're from or whatever, but I was doing a job down in Portsmouth. We did four or five years ago, we did the MLK job in Portsmouth.

Then we moved from there. I went to Cortland and we did that long round about. That intersection they have on 58, the roundabout. I was doing that through a broker. I was doing great. This was doing pretty good, and it just took a turn, and when it took that turn, it started to go decline after that."[#27]

- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "We were doing pretty good. We were going up. We were increasing our business by 10% sometimes more than 10% every year prior to the pandemic."[#29]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "We've talked to some of the other local shops that are here with us. There's four or five of us that all do about same thing with service repair shops, and we all have the same thing now of now we're so busy we don't have enough people to work."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Factors, conditions, and... Yeah. Pretty much we're seeing a lot, especially in the northern Virginia area, a lot of construction and a lot of money put forward to construction, and that's one of the changes that we've seen over the past few years. It's actually a big boost. It actually helped out a lot, because if you think about it, a construction project utilizes pretty much everybody, from plumbers, electricians, to security companies and security systems, and so on and so forth. So, the more construction projects there are, the more companies are growing and are competitive."[#35]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We were wide open. Everything was wide open. The building industry, everything was wide open. And when this COVID stuff it's destroyed everything. I still see a lot of building going on, but everything is operating, what I'm seeing, is operating everybody 30%. Everybody would be back at 100% if the supply chain was open."[#44]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Well, for the past couple years, it has been pretty consistent as far as the sales and stuff."[#46]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Well, there's been, it's been very steady. We've been, as I say, we've had steady flow of work. People were optimistic. And of course, with all the deregulation that Trump did, and all the other programs he put into effect, lowering of taxes, we were sitting in a catbird seat in the construction market. People were pulling jobs off the shelves they had been saving, and things were booming. Let's just put it that way. But it was like walking off a cliff when all this hit."[#48]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, if I could extend it back to about 2015, that's when things began to improve after the great recession. It was just going along until then. Then I think people decided they weren't too scared to do projects anymore, so I began to get more calls, I began to get more business, and it just gradually increased. Until the pandemic, and then that just sort of made things a little more uncertain, but not as bad as it may be could have been."[#53]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "For us, probably the last four years have been probably the

four best years since I've been in business. Good, strong, economy in the Commonwealth Virginia."[#56]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So in last two to three years there has been kind of exponential growth outside in this area where we are, in the technology area, in the data science area. However, we didn't see ourselves growing with the market. So, the market is growing, skills we have are needed, but we're not getting there. So, we have a lot of potential to share, to solve problems, but we're not getting that break. Not even from industry, not even from government."[#58]
- A respondent from the availability survey stated, "Virginia is a place where startup companies have potential to grow and to be able to have a substantial amount of success. Specifically, within the security and technology field. Virginia is a good place to work for engineering; both civil and mechanical. There are the shipyards, pipelines, and the switch from coal-fired plants. With some qualification, some education, and a good track record, one can easily find work."[#AV]
- The non-Hispanic white female representative of a business development organization stated, "Prior to the pandemic, we had a fairly robust economy in the Lynchburg region. We were seeing... We have some higher ed and two really large engineering firms that really bolster our economy in the region. Those tend to be fairly even industries. Things were okay prior to COVID. Lynchburg is an exceptional community in that it hasn't really suffered a lot of boom-and-bust cycle. It's been a fairly steady economy. For the businesses that we have here, it was pretty steady growth prior to COVID." [#FG2]
- The female representative of a business development organization stated, "For about 40 some years now, we've done a monthly optimism survey of our membership, and we were record highs. The highest numbers that we've had in its history. A lot of that came from the federal tax reform, because a lot of small business owners, as you know, do their taxes at the individual rate, and there were a lot of benefits with that, and then with the state conforming to that. We think those were big triggers for our members, they were able to reinvest in their business, make hiring, that kind of thing."[#FG2]

Eight interviewees observed that marketplace conditions were in decline. [#2, #8, #12, #13, #17, #37, #49, #AV] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "The American Institute of Architects said that the first half of this year, their pacing and their predictions has been the worst since they started keeping record. And I kind of panicked when I saw that. But knock-on wood, that has not been the case for our little firm. We don't do the normal kind of design work. We do a whole lot of consulting for little towns and things like that. And I guess what I'm a little concerned about is the next three or four years, because little towns especially, and even bigger towns like Roanoke, have a lot of income that comes in from the meals tax and lodging tax. And it seemed like such a great idea when all these communities were putting that in. But look at Virginia Beach. Oh, my goodness, you're going to have a terrible time, because the municipalities sort of figured they could... It's great money because it's tax money that the people are spending that aren't necessarily even your citizens. It's visitors. But that's going to really dive, and so a lot

of the projects that we see funded by these things may start to dry up. So even though we've been kind of coasting for the last six months on old budgets, two or three years from now, it may be a little bit more bumpy."[#2]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The recession I think that the government kind of learned a little bit by the recession. I mean, when the recession hit, the federal stimulus for unemployment people was only \$25 a week, and this time they made it \$600. They actually probably made it too attractive because there's a lot of people who just decided to stay on unemployment and not go back to work. So that means for my four people, I paid their health insurance the whole entire time for three months of health insurance premiums and then they didn't come back to work, so that's kind of a big hit."[#8]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "But the biggest thing that changed for us is that we stopped being competitive in the public library market. Other firms came in and learned what we knew."[#12]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "So what happened is, you just had entire swaths... There were several, I think they said 1,500 to 1,750 businesses, that have been purchased in our industry, of various sizes, over the past 10 to 12 years. So, there's very little, the entire playing field has changed, so that's why I say there's approximately 35 firms like us."[#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Unfortunately for me I was on the downside. That was because I had run into an issue on a job that had created a situation where I had to put forth my effort for my company into finding out what really happened to me and to my company and what I had been signed up for on that. During that time, my company went down 90%."[#17]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "We were getting business hand over fist. Things were great. Then 2011, the market just took a nosedive. There was a lot of military contracts that weren't going in. It was during the Obama administration where he was focusing more on other things. The military was kind of taking a hit, and consequently my work took a hit. So, at that point, I ended up...I had a friend who said 'You guys do really good work, really good welding, the community around here needs welding. So why don't you...' He said, 'I could hang your sign from my windows at the local service station.' It was getting pretty sad at that point, and that was within nine months of a \$4,000,000 bid. And then nine months later I'm back here subcontracting myself as an engineer. And he said, 'why don't you do some welding for us?' Before I know it, I'm getting welding jobs and the shop, BLT Engineering, just shriveled up and waited for something else to come up. So, we started doing all kinds of welding, machining for commercial venues. Landscaping companies, that kind of thing. You do what you got to do. Last year, the work that I was doing for Homeland Fabricators was getting really scarce. Why, I don't know. It just seemed very scarce. Then towards the end of the year there was just nothing, no telephone calls. Getting nothing. So, I really couldn't tell you why that was happening. But it's happening to a lot of businesses larger than mine."[#37]
- The Black American male owner of an uncertified MBE construction company stated, "I would say more than anything, technology. The way that technology is changing the way

communication is being done or has been done in the past. Speaking probably, if you're working at a government entity, you probably understand what I'm saying. Your phone system, years past we truly had what's called a true phone system. We had technicians that have to go out and install the system, program the system and maintain the system. Whereas now, most of your government entities have gone over to Voice over IP phones. What that does for us in the industry is where we would normally go out and install a voice line and a data line, it only requires one line now. So that has cut our industry in half as far as the amount of work that's now requested."[#49]

- A respondent from the availability survey stated, "Business has not been good over the last 4 or 5 years, and with COVID, it's been very hard to get ahold of people who need work done. Honestly, at the moment, marketplace conditions are pretty hard given the climate. On our end we are just concerned about maintaining our business. If we had some growth that would be good. We're just trying to keep up with the concerns of our employees."[#AV]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Virginia marketplace, in their respective industries, and in general. [#5, #6, #7, #8, #9, #10, #14, #16, #17, #18, #20, #21, #22, #26, #28, #30, #32, #34, #36, #37, #38, #40, #46, #47, #48, #49, #50, #51, #53, #55, #59, #60]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Now, we did a very good job and very quick. I should say very quickly. We... Anybody that wanted to work from home, we set them up at home and we still have several employees that are working from home. Our offices are set up so that each person has their own space that's very well distanced. The housing industry was defined as being essential. And like I said, our clients assumed that we were essential. So, about half the employees continue to work from their offices, but again with social distance. We wear masks. We've taken measures we need to. We've had no issues. And those that felt more comfortable working from home we set them up and they worked from home. There is a drive that I think as a female and a woman in business I constantly, and this is from the moment I graduated college, there's a constant need to prove yourself to be better than the other firms or the other folks that are around you because you feel like you need to prove yourself."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Boy. I'm a firm believer that in America, if one wants to be successful and one's willing to work hard, there's nothing stopping them from achieving that success. And I think there's opportunities out there that if you see something, you go grab it, you take it on and you work hard and you're honest. And you come away with your profits you want, and you hire people, and their families benefit from that. It's just, the good old American way. I think there's plenty of opportunity for anyone who's willing to take risks and work hard."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "Actually, I'll be honest, we are more expensive than our competitors, but we base our... Our market is customer service, and all our customers have my phone number than can call 24 hours a day, seven days a week. They can reach the owner of the company. We have an open-door policy, so that's what makes us different than the competitors. You just don't call here, push a button and get a sales department. No, you pick up your cellphone and you call in the middle of the night to tell me you got a problem."[#7]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "You really have to know your market. I think we have... I look at our job sectors as a pie and kind of have them split up. We do one-quarter of the pie is for energy projects. We do a lot of solar farm work. One-quarter of the pie is federal government, one-quarter is private, and one-quarter is localities, utilities, gas companies, that kind of stuff."[#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I don't know that most people value the network as much as they should. Not just from a, 'Hey we provide a service for X, Y, Z company and they provide us a service.' Not that type of network. More of a relationship with, working relationship, with people in the industry and relationships with competitors, relationships with the general contractors that we do work for. And I think we're a little different in that sense. We value that a little bit more. It's not so much about the bottom dollar, it's more about the relationships. So, I think that's showing through. Your reputation as a... Not just your quality of work, which is huge obviously, but also your integrity and things like that I think once people see what level those things are at, I think it goes a long way. I'm unrealistically competitive, naturally, so that's part of it. Just pretty strong drive to make it. Make it. Make it happen that kind of thing, but I also think it was challenging, right. It was lean initially and a lot of work was required that didn't necessarily pay. Developing, getting out there, getting your name out there, things like that, didn't pay initially but obviously it pays in the long run. And then I think you got to be honest with people, that's huge, and I think you have to be able to look at things from their perspective. I think if you can put yourself on both sides of the equation more often than not, you're going to earn people's trust and their business."[#9]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "A lot of experience. Yeah. I mean, you have to have a certain amount of education and that education has to include learning how to learn. Because in the technology field, you can't... The stuff I learned 20 some years ago in college, it was mostly theory. But what I learned in college was how to learn, how to pick up a new topic on my own. That is a critical skill, that I'll be completely blunt, our school systems are completely failing at that. There are so many good intentions going awry, like the No Child Left Behind, and here in Virginia, the Standards of Learning Test. Those are all great ideas that sound good on paper. But the end result is that the system teaches you to pass the test. So, they get their score. Nowhere in there are the children being taught how to learn."[#10]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "And that's a separate business that will own the real estate and I brought in a couple of partners for that that have a lot more money than I do. Because in order to be successful, those types of stuff you need access to resources they've invested money, but it's going to create probably another 100 jobs in the next two years which is against... Strategically you asked me what I do most days is implement the strategy that we had in place and this was part of the deals we wanted to do as far as strategies are concerned. It is all about relationships. And you got to understand that it doesn't matter what market you're in, it's a small market. And everybody's going to know everyone else. So not that you can please everyone, but once you jump into a situation with a customer or a partner, you got to be the best that you can be as far as a partner or customer because word will get around and the moment that your reputation is tainted, it's harder to fix it unfortunately."[#14]

- The Black American male owner of an MBE-certified construction company stated, "Yeah, we're trying to figure that out now. We're doing something different now to try to bring in more revenue. So far, it's working pretty good, I just don't know how much of it we're going to get because I've noticed I'm not the only one diversifying. There's a lot of people diversifying over in some of the same stuff I'm doing, so now there's a lot of competition to, which I'm finding out, but I just have to start sharpening the pencils and try to beat the competition out."[#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It's interesting that you ask that because now it's changed so much. It is and it's interesting. I've been watching that so much but prior to was the employee benefits and technology. Especially in construction it's technology. What we find is, and what I found, part of it was that we have some old school people and I totally understand it but it's so hard to get old school people to change if they've been with you for a while. I had been in the 8(a) program and the 8(a) program is a federal program and it's very heavy, heavy, heavy, heavy paperwork. When I say paperwork... and it used to be literally paper, paper, paper. It was yeah are you going to turn in your QC plan, seven of those and they were three-inch binders, seven. It's we want seven of those, the same three-inch binders but now we scan those in and send them to them. When you have old school people who want to stick to old school ways, then you have a hard time getting that. I was in a very interesting place. Then what happens is you're transitioning and you're transitioning with people who go, I'll just go get a job someplace else because I don't want to do this." They'll go to another 8(a) because they know when they go to another 8(a) it's going to be just the same thing. It's going to be the same amount of paperwork; and government is just a lot of paperwork. It's just a lot of forms to fill out a lot of this, a lot of that. The technology though, oh my gosh I love it. I've been able to change because I'm the one that's paying for all the paper or all the binders and yeah. I love a computer."[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "One thing that being brought up in, just being raised in a family business owned, you don't put all your eggs in one basket because normally where one is low, the other one picks up for it."[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "The people. The people that we have are... we treat our people better than just about any contractor of our type, I think, in the country. I've learned my lesson in the 15 years I spent as a government contractor and I said I wasn't going to treat my employees like I was treated. So, we have some great benefits. We have some great people and you've got to give people the rein, you got to let them run the show to give them pride in what they do and how they do it. I guess that's the main impact of the success of our company. Well, on the public side or the government side, you've got to be low cost. That's the ticket. We don't make much money down on the government side at all. Our bottom line is probably 4% to 5%, if we're lucky as far as net goes. Where in a commercial sector, you can get anywhere from 10 to 20. But again, you've got to not only be low cost, but you've got to be very good at what you do. You got to be satisfied with what you get, but you got to treat the customer with kid gloves. It's very, very important that you provide a really good product going forward and hopefully you'll get enough revenue to where you can sustain yourself for 20, 30 years."[#20]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The biggest factor, I think is you having employees that you can depend on, that that are diligent, that are proud of their work and they want to do it right. And it's, as they say, if you don't have time to do it right, later you'll have time to do it over. And that's the biggest... And your reputation. I mean, believe me, the efficiency in this business is awful. It's like, all I can say is that's the best I can say, because there are so many factors that come into play, whether it's the weather or anything, that impacts what you do. And like I said, if you perform and do the work correctly and show people, the industry, that you can operate and operate efficiently and do the work and be profitable at the same time, that's the secret."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Honestly, the biggest thing is having the experience, being able to give the experience at a reasonable cost, because the costs are... they are very comparable with all licensed electricians. Maybe once or twice a year, I'll call around other electricians and just ask 'Hey, what are you charging for a panel and this and that,' just to make sure we're in line. That is the biggest challenge is that trying to get people to realize that yes, it's expensive, but we firmly stand behind the fact that the experience and the knowledge of our mechanics is worth what we're charging. Some people understand that a little bit more than others. I've been told by contractors before that were with us for years that we're not the cheapest, but we're the best quality. We always try to feel people out. We've learned over the years; it seems like people with the most money are the least willing to spend it. They are usually the cheapest people. We do. We get people that try to tell us what they will and won't pay for or whatever, but I've learned, and I learned this when I was a real estate agent for my broker, that if your pipeline is full, then you can afford to not have that customer. That customer that doesn't see your value or doesn't appreciate your worth or whatever, as long as you're not starving for business, you don't have to take that customer or that client. As much as we hate to not take a certain customer or client, sometimes, very rarely, you come across someone who does not place value in the knowledge of blue-collar workers, plumbers, electricians, secretaries. Most people, even people who can't afford a whole lot of it... we always work with people who are in emergency situation. If they can't afford it, we work out payment plans, we work out discounts and whatnot, but as long as we keep our pipeline full of loyal customers, because we treat them well, they treat us well, then those few and far between people, we're happy to let them go somewhere else."[#22]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "It takes marketing. It takes organization and it takes a lot of capital."[#26]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "It's in pricing. Now I've got a lot of clients and they aren't automatically going to the lowest bidder, because they've learned their lesson in that regard. I would like to say number one is quality of work, but I think still number one is pricing. Number two is quality of work and epoxy flooring, and I'm not going to babble on but it's my life and it's what I've been doing for so long, is a really difficult business."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "You need work to do. You need equipment that can do the work. And you need qualified people to be able to actually run the equipment and do the work."[#30]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Customer service, marketing and quality. Access to capital and making sure that you are projecting the future, in terms of what business is coming in and making sure that you're going to have the capital. Honestly, that's just the biggest factor, the biggest influencer, in terms of securing business. The other part, honestly, working as a private pay is much easier, because that's cash in. They come in. They pay for services, goods, whatever."[#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "You have to offer services that are going to benefit you tomorrow. You have to cater to your customer a lot. The median age is 60 or so years old in our area. Like I said, retiree central. So, you have to cater something to your customer base. I think that the key factor to succeeding here for us is being flexible, being a trustworthy option. And that's what we pride ourselves on. I think the greatest advertising that can ever happen is word-of-mouth and the only way that people are going to continue to tell other people that we're here and what we do is by us continuing to provide the best service that we can, which being a trustworthy, notable place, where we're not just going to do what you asked us to do, we're also going to tell you what probably needs to be done. We're going to do what's best for you, we're not going to do what's best for us."[#34]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "You have to have a little reputation in the business first off, because they're going to look and see, can you really do it? With a small business you don't always have the pass, the permits that you need. So, you partner. I think small business needs to partner with a business that has some past performance. I told you that I was with another company, right? Which I did. I've partnered with pretty significant companies So you use partners like that to help attract and ensure that your company can actually do the work that you're telling them you can do."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "To be competitive in this line of business is to have integrity, say what you mean and mean what you say, don't beat around the bush. Tell people, even if it hurts, what you can't do. Or what is going to cost them money up front. Because they're going to hear about it in the end. Whether it's the government, when you're talking to them man-to-man, woman-to-woman. Or you're talking to an individual who owns another company who needs your help. The best thing I've learned is to be as honest as possible, even when it doesn't sound pretty, saying 'This is what it's going to be like. I want to warn you that these are the kinds of things you're going to incur with this, and this is how much it's going to cost.'"[#37]
- The non-Hispanic white male representative of a majority-owned construction company stated, "That's a good question and I would say it depends on the type of work that they're pursuing, but certainly qualifications, past performance on projects, as well as qualified personnel. And with that, I would say, we try to stay more on the best value or qualification space to opportunities as opposed to just... What do you call it? LPPA if you're familiar with that or just kind of low-price scenario."[#38]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "Yeah, I'll tell you. Especially AV, AV is a very strange business. I laugh because there is a such thing as. You go to buy and they're like, how many HDMI cables do I need,

and I always say, probably in the entire state of Virginia at least two each. Because we seem to have these everywhere all the time. But it's pretty simple technology. On the other hand, it's really, you have to have skilled folk. They have to be certified in certain manufacturers. And so, a lot of the AV companies have really struggled. We've seen some layoffs, we've seen some companies go under, even before the crisis. So, I think the AV part of our business, even though it's played a large part it's difficult to get your handle on, and it really, like some of the components can get very pricey, and very expensive. Our engineers really spend a lot of time. A lot goes into preparing a bill of materials, and looking at the sites, and what people want to be able to do with the equipment. So, it is very hard. Because some people come in and just give a low-ball price that is realistic and hope for change orders. We try to not do that. We try to price it fairly to begin with, and not go after a lot of change orders."[#40]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Being honest. Honesty is a big thing. That's taken us a long way. I suppose dedication and motivation to make it successful, not just come in and work your eight to five and go home. I mean we pulled 14, 15-hour days, six to seven days a week in the past to get it going. Now that it's already on its' feet and rolling on its own it's easier to maintain. But to get the ball rolling, it definitely took a lot of effort and energy and motivation."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "We gained a good reputation in doing good work, and people like for us to work with them."[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "It's got to be very well managed. You've got to be lean and mean and tough. Because, as I say, we're not given all these jobs. At least half of them, we've got to be competitive with and bid on a price basis, and therefore we have to manage very carefully to make a profit. There's not, profit margins are not nearly as large as people think about the construction business Just hands-on management. I'm in here, I'm 92 years old, and I'm still in here every morning at 7:00 talking to the superintendents. They meet here every day. And we find out what their needs are, so we can back them up. We distribute the labor, if there's a movement from one job to the other, where one requirement is tapering off, and the other is building up. All that goes on every morning. And it's very active. And that is a part of our competitiveness, because a lot of people just, a lot of construction out there is just, let their people go onto the jobs without that hands-on supervision every day."[#48]
- The Black American male owner of an uncertified MBE construction company stated, "I would say, first of all the quality of work and the hourly rate for the work is going to keep a company competitive."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "the success of our is that we are customer oriented and we are personable."[#50]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "You have to have the technical ability. You have to have that. And you have to have the reputation. It's hard to get out of college and start something like this and then go in with guys that are managing, have been in this business forever, and then tell them you

know it all. Okay? You have to be a little humble and you have to admit that you don't know it all. And it's about building relationships."[#51]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think what I would say is one is the, when a client comes to me, they get me. I do the work for the most part. Although like I said, I've had some contract people helping me at times. But mostly they work directly with me. And usually now, I've been here long enough, that's why they're hiring me, because they either know me already, or they have heard of my work, or seen my work, and that's what they want. I think I can sometimes jump on things faster than a large firm can, and I have a lot of experience. Also, I can handle unusual stuff. That larger firm in town here, I know them, and they occasionally get a project that doesn't really fit their profile, because it's kind of an oddball project. Sometimes they call me and they say, 'Are you interested in doing this?' Usually, I take it on. Because I'm very good at solving problems and dealing with unusual situations. Whereas if you had an employee who didn't have the experience I have, they would find it difficult to handle that, because it's not the usual same thing that they're used to seeing. It's unique. And it helps me also if there is something like the recession, I can survive it because I'm very small. If I have one decent project, I can hang on pretty easily. I can live off the land a little bit, I guess you'd say."[#53]
- The Black American male owner of an uncertified MBE professional services firm stated, "I think you have to have a good project team. I think you have to have someone out there in front really selling your product, selling your company, going all out on that end, getting your name out there. And then I think once you get the work, you have to really perform well. For me, the way I'm set up, I'm more dependent on other subcontractors versus actual workers because I don't carry employees. So, if those guys don't perform well, then that looks bad on me, and then people move on to the next, so a good relationship with a good contractor. And then the last thing I'll say about that is having the cash on-hand to be able to last longer than 30 days on a pay cycle, at least up to 60 days so that you can pay your subcontractor and continue moving forward, and then having your GC pay you."[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Doing what you say you're going to do and retaining good employees. Having stable work force. If you put a proposal together, and what you put in writing you officially do on the job site, and not try to change order people, or say that wasn't included."[#56]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "We have little overhead. We strive to do things expeditiously and I think we could compete with anybody that's in our line of work."[#59]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We obviously focus on the quality work, but we also spend a lot of time in understanding Virginia government and that landscape, which gets to the market for our services."[#60]

H. Potential Barriers to Business Success

Business owners and managers discussed a variety of barriers to business development. Interviewees also shared suggestions to ameliorate the effects of these barriers. Section H presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or manipulation;
15. Treatment by prime contractors or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;
18. Size of contracts;
19. Bookkeeping, estimating, and other technical skills; and
20. Other comments about marketplace barriers and discrimination;

1. Obtaining financing. Forty-six interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses. Examples of their comments are included below. [#2, #6, #9, #11, #13, #14, #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, #29, #30, #32, #33, #37, #39, #40, #41, #42, #44, #45, #46, #47, #49, #50, #52, #54, #55, #56, #58, #60, #AV, #FG1, #FG2, #FG4, #PT1, #WT1, #WT23] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, traditionally, it's been a struggle to get financing. So the good news is, it's actually a good story, which is the last two or three years, it seems to me that we've gotten out of that

last recession enough to kind of get healthy enough that we were finally able to get financing again, which was very helpful for us."[#2]

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Being able to financially qualified to bid larger work. That would probably be, the biggest barrier is finances and having those resources available."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "And then financing, I have very little finance. I never wanted to be leveraged by that, so just kept dropping pennies in the piggy bank and made purchases. I've utilized rental a lot, as well along the way, because number one there's a tax benefit there, it's 100% write off. And maintenance, it cuts your maintenance costs down and things like that. So I've purchased equipment but I've purchased it either cash or very, very... Finance for the business' sake, financed a little bit."[#9]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "The biggest thing I think is building a good relationship with your banker and having a good understanding of your financials and her having, or them having a good understanding of your financials. That's gone a long way for me. And then also part of financing is showing the income. And I used to be very aggressive about looking for tax, write offs and trying to pay as little in taxes as I can. And it comes down to it, that's all income that's looked at is what can get you more capital to grow. And so, I started paying a little bit more in taxes and not worrying as much about the write offs and things like that. And it turns out to be a lot easier to get financing because you're showing a strong income."[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We had a bank that we worked with, but it was always an anemic level of financing. It was always, kept your nose above water. Because ours was a very simple, you bill, you pay, you see what's left over, then you bill, then you pay, you see what's left over. Fairly simple business model from a financial standpoint. it never occurred to us that our bank would actually be scared of our success. That the entire premise that they would be bothered by that and concerned about it was just anathema to us. We just couldn't imagine it. Eventually we went and had a meeting with them, and they said 'We're scared of your guys. You're too big a part of our book of business.' We ended up going into something called factoring, right before the pandemic, and the only reason that we... If we'd have had to go through the pandemic with our prior relationship with our bank, we probably would've been out of business, and we just wouldn't have been able to keep everything flowing"[#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "Well when I first started out, I couldn't get financing at all and I moved from bank to bank. And then finally BB&T was willing to take a chance on us, but I mean the four and a half years, five years of business nobody would touch us. Well everybody talks about having a business plan. A business plan needs to be fluid. It needs to be able to move even though our goals are certain things, we need to adjust based on the environment. Especially if you're involved in technology. Technology now changes every six months, not... Before it used to be 18 months, now it's six months and sometimes even quicker, yeah."[#14]

- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Okay, for me, for my gutter company, I'm maxed. If I grow my gutter company any more than what it is, then now I'm doing roofing, siding, now people that give me work are now my competitors at that point. You don't bite the hand that feeds you. So how do I take that and go and say, 'Hey, bank, here's what I have. My company's paid for. I've paid it all off. I've got all this equity in my house. I want a business loan.' It's few and far between. There's basically no lending... It took me a really long time to get my business, and what I actually had to do to get credit under my business as an LLC was, I had to cosign for myself to get my business starting to get credit. Yeah, it's difficult and they don't care. It's interesting. The other thing is, is there's some lending for the SBA, but again, talking to one person and having that direct contact to mentor, they don't offer that. It's like none of the government offices work together. They're a whole disconnect. You talk to this person, they say, 'Oh, you got to call this over here,' and then, 'Who do I talk to?' 'Well, they don't have a rep.' I'm like, 'Wow, aren't we all supposed to be working together?'"[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Fortunately, we're stable and we don't require a lot of financing right now. In the past, it's been private investors. But if we go... And I could've financed that project, but the margins and the profit center on these projects, in order to win anything with the state, you have to be skin and bones with very little margin on it. So, you're already not making what you do federally or commercially working for the state, but now you have to go and finance it. And that dips into your bottom line. That the state provide deposits to manufacturers for product. They can't expect a small woman owned business to finance a \$600,000 project and make any money."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "There's no doubt about that. The only reason I was successful in starting it and had the finances to do it because my house was paid for and I was able to leverage my mortgage to get funds to start a business and pay our people. I took a big risk. I started a company with a line of credit for like \$250,000, which was significant at the time and I'm really happy I did it. If I got less, yeah, I probably could have done it, but it would have been more difficult. But the most important thing is financing in starting the business. You don't want to be panicked and you don't want to cut corners in getting things done the right way. Yeah, just don't start a business until you've got the collateral access to the money that will help you. Either a financial investor or somebody that will help you out with funds and believes in the business. But the most important thing really in starting a business is finance. Then you can help with low-cost interest loans, but again, it's really tough. Let's say if you're a 30-year-old or a 25, 30 year old kid trying to start a business, wait until you get enough funds available or access to those funds before you really dive into it so you have a cushion. That's, I guess, the best advice I can give anybody starting their own business. There's a lot that the state of Virginia does, and the federal government does that really helps small businesses out. There's a lot of programs out there, [a local] program to loans basically from the government to help those people out. But then again, you can't overextend yourself. I can't emphasize that enough. You've got to be able to handle the finances of a company before you go into it."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, I think there's programs in place, there's Small Business Administration and such

that... I know there's money available, but one of the things I've been told, and I guess it's typical, if you want to call it, is the bureaucracy that... In other words, the amount that it takes for you to file an application or whatever, it just becomes so cumbersome that a lot of people just give up. And the banks, they're willing to loan money there's no question about that. That's their business but they're cautious as far as who they loan. They want the people to have some type of history or something that shows them that these people can do the work and afford. It's not easy, I'll be first to say it. And it's getting started or if you're small businesses and you don't have a lot of history behind you, it can be pretty tough."[#21]

- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Yeah. I will say that I have learned that if you own a business that is not, in the eyes of a financial institution or a bank, worth a whole lot of money, it is very hard to secure financing because we're not getting a paycheck because we're not getting a paycheck. As owners, we're not getting a paycheck, we're not getting a W2. We're not getting this proof, I guess, of income, other than maybe our bank statements, and I will say, it is very difficult to get financing because we don't have that. Unless I have \$50,000 worth of vehicles or something like that that I can offer up, they're really... Again, I know the small business association is there for places like us, but your standard financial institutions and whatnot are usually very leery of any kind of financing. think either a government relationship with maybe a branch or two a bank or financial... something that's goes in line with a small business association that says, 'Hey, we specialize in helping small businesses or financing small businesses,' that kind of thin. Maybe like you get the federally backed mortgages. Something along that same idea where you have a little bit of government assurance to the bank that these loans will get paid. That kind of thing. I definitely think some sort of partnership like that would be helpful."[#22]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I'll give an example of another business that I've been communicating with. They're in Norfolk, and they're a childcare provider. It took them forever to get started. They're Hispanic owned. Took them a long time to get set up and get started. It's an excellent business. They have everything they need. They put so much money into it. At the very end, because they had to wait so long to open, because there were so many, I don't know, bridges to cross and so obstacles to overcome, that, by the time they got ready to get started, they didn't have any more money. So now, they were getting in a little bit of trouble, because they were desperately trying to find folks to bring their kids, because they people registered, because they needed to generate income to continue to pay the rent that have been paying all along, even though they couldn't function, because they weren't approved of all the permits. Somebody like that, they could not find anybody to loan them money. So yes, if I'm speaking on what I have seen from others that are in need. Many business, unfortunately, have had to close because they couldn't quality for funding to continue operating."[#24]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "Now to be very honest, before the pandemic we had about a year and a half, two years, we had a really difficult time. I tried to get additional funding from my bank and they turned me down. I had to max out my line of credit and they wouldn't extend my line of credit, they wouldn't give us personal money, so I basically, we ended up maxing out our

credit cards to make payroll. It was crazy. We've been in business, as of this year 27 years, and the bank would not increase our line of credit."[#25]

- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Yes ma'am. Well, resources always will help any situation. The more resources you have, the better you are equipped to take on challenges and difficult times. Where the money is lower interest rates. Maybe more access to grant money if there is any. And so we could build up our business quicker and be able to hire up and pay people. A lot of our problems is we can't pay people. We just don't have it."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yes, ma'am. When I apply for loans or something, a lot of them turn me down because I'm not... I don't have enough income or whatever to show that's what I'm going to be, how I'm going to pay them back or whatnot."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Right off the top of my head, I don't know about other firms. I've had to get some financing in place to overcome that 2018 debacle. I did get financing but my bank wouldn't touch me. And so I ended up going into one of these, I'm embarrassed to say, Snap Advances. A merchant advance. So a high interest rate and a daily debit from our checking account. Not weekly, not monthly but daily debits. And I'm still paying that off. They take \$174 every business banking day out of our checking account. And I got that thing trimmed down to about \$30,000. Well, also that's going to be [another] 10 months, because \$174 a day plus their interest rate, and I have thought about going back to my bank now that my numbers are so much better and maybe getting a loan to pay off Snap Advances, so I've got a much lower interest rate on that 30 some thousand-dollar balance, but I haven't moved on that yet, but I've been considering it. So in a sense, yes, I did have trouble getting financing from the [traditional] type lenders in 2019, but I did get financing from one of these abuse the hell of you type lenders. So, that is where I'm at and I'm not even sure if I went to the bank now, even though our balance sheet, profit and loss sheets for 2020, show a remarkable turnaround, but that's kind of where I'm at."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Obtaining financing has been difficult. Difficult. The banks are not loaning. Even before the pandemic, the banks were not loaning to small businesses. Now it's even worse. As a small business I always have issues with financing and trying to obtain equipment that I need because you can only get certain loans and my situation is a little different. We were involved in a flood over 20 years ago and six feet of water inside our business here in our little town. The entire downtown area flooded. All businesses were destroyed. And for 20 years we've been trying to build back from that but we had to get an SBA loan and for 20 years they're first on all of our mortgages so you can't get additional loans because they won't release it. Maybe if they gave some sort of incentive to the banks around here to allow small businesses to purchase, get loans to purchase equipment that might help because they currently... And I mean small businesses, not 500 employee businesses."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "At times, yes. More because of the fact that if you need money, it's hard to get. But if you have money, it's not hard to obtain financing. So the people that can get

financing usually don't need to it. It's a catch-22. Probably payment terms [could help solve the problem]. Speeding up the turnaround of if you've got a payroll, if you're a heavy, labor-intensive contractor, speeding up in terms of paying a contractor every two weeks instead of 30 days, things like that. It eliminates some of the need for financing."[#30]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I think banking is the big elephant in the room. Being a small business, even with the designations that... Before I got in the business, they said, 'Oh, you'll get help. You'll get help. You're a veteran. You're service-disabled. You're a woman.' None of those designations have ever actually gotten me any business. None of them. And financially, it's no different I don't think with any businesses. It's very difficult to get lines of credit and such. There's a lot of lending predators, and there's also a lot of contracts support predators, that really do prey on the small business. Firms that are marketing to companies to help them get government contracts, or to get State contracts. I call them the Pay Day Loan for companies. It's a lot of stuff to sort through, and it's hard to determine who's helping and who's not, which isn't really so much anymore. They're all predators. Oh, my goodness. So they take a lot of your time. They're the capital lending companies, or factoring companies. We get a fair amount of calls. I would say at least two a week. Calls, emails, text messages about lending to the company. It really it is a predatory type of... Their storefront seems like maybe they're from a government source, that they're truly helpful. But they're really just bombarding... And mail, too. They just bombard you with doing business with them. Thankfully, my business partner is a finance guy, otherwise I could see how very easily it would be to fall into those traps of funding. Their terms are sometimes 50%. They're a lot of like the Pay Day Loan companies, or title loan companies for business. We actually have struggled with that from the very beginning. We did have an angel investor, thankfully, or we wouldn't be in business. We've had very small lines of credit through the bank, which was BB&T. It's not an individual branch or bank issue. It's a banking issue. So it doesn't matter if you go to BB&T, or Navy Federal or any bank. Their access to capital and financing, or at least this line of business, is impossible. It's not possible."[#32]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I have no money. I'm a minority company. Now we win this contract and we need funding. We need \$5,000. We also need the ability to find a way to get the money. I do not have the financials to hire anybody. I have identified more than 10 individuals that will work and do very well in the company and I have the ability to win contracts. But I need to be able to get equipment. I need to be able to pay salary, pay rent, pay equipment and do other things, including paying for repairs of the hole in my office where it is flooding water."[#33]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "The thing with getting business capital as a loan, is you have to show...and this could be a barrier, especially for a startup, you have to show that you're making so much money. That you're grossing so much a month. From that, they will finance your company. Or you have to show them a contract you've got that says you're going to make so much money before they'll give you a loan. So if you're starting out, you really don't have anything but you need to have people on board to get those contracts. Then you don't have a record, you don't have anything to show or cash flow. So that could be a huge block to keep somebody from getting their business going. Back in the old days, you could go down to the

bank, and they knew you. Not that I'm saying anything that helps you out. But nowadays, you used to go down and you get a loan because they knew your reputation. Nowadays your reputation is a couple of numbers that comes from three different credit agencies So with that being said, I would say that it would be...for whoever is getting into business, it would be good if there were lenders who really knew business and the companies, and knew the reputation of those people in order to make...I know that's getting really down and personal, but loaning for business is a risk thing for people who are making loans."[#37]

- The Black American male owner of an uncertified MBE professional services firm stated, "Again, I've been on the other side of the table and have been mentoring small businesses and minority businesses and they constantly talk about the lack of financing and they talk about the scrutiny that they are put under that some of their peers may or may not experience when they're seeking financing. I think it's pretty common knowledge that it's not a level playing field when it comes to those types of things. If it were, you wouldn't need a lot of these programs that are put in place."[#39]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "We sort of, we really try to make more relationships with our banking. But the thing is, is that things that would be through say SBA, I would say our biggest problem is we're not really a large business and we're not a small business. So I think businesses like us who are in that middle, there's really nothing for us. So maybe some kind of, we're not large enough to get the attention, and we're not small enough to get attention, so that mid-sized business there seems to be some difficulty."[#40]
- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "So I think I know everything that I need to do. I need to realize how to get the money to do. You asked me about if I was helping someone, I would tell them, you need to know what your startup costs for the supplies that you need. And see, I didn't need that many supplies because my greeting cards are made of fabric and I got a whole lot of fabric left. People gave me. And I know how to use it and make it work for me. It's the pillow that I need to buy. That hard stuff that you put on. And I got a printer."[#41]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Oh yeah, everything I got is privately funded. The same thing happens with everybody else. You don't make enough money to get what you need to get started."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "But I had already been in the trade, so I was already well known when I started the business, which my past experiences, and the positions I held helped me at that point. Had nobody known me and I just wanted to start a business it would have been almost impossible. Because when we first started the business, for the first 10 years the bank would even talk to you. Until you've been in business for 10 years it's impossible to borrow money. It's impossible. After you hit the 10-year mark it's, 'All right, these guys are going to be around.' Then all the sudden everybody wants to give you money then. Provide startup loans where you can sit down and talk to real life people and start some kind of financial support to help start a small business. Because I got to be honest with you, when you first start a business, if you started from scratch, from ground up, it's almost impossible to obtain financing to do it. The only way I was able to do it, I cashed my 401K and rolled the dice. I put everything I had on the line."[#44]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "one of my pet peeves is that VDOT has a federal grant. It's to support the Dowd Center, D-O-W-D. And I love [a contact] there, because we go way, way back since our kids were little. And we worked at VDOT together. But I'm upset because they said we're only going to fund DBE companies that are highway related companies. You know, asphalt, aggregate, striping, signage, blah, blah, blah, guardrails. Well, I don't do that and I don't want to do that. I'm not comfortable doing that. But what I do is, the work that I do supports the infrastructure once it's there. I've borrowed money from my sister to start when I had my first payroll check, because it was going to take 60 days to get reimbursed for that. And at one point, a friend of mine here in Richmond lent me some money. And I paid them both back within 60 days. asked for a credit card from my bank, because that's what my bookkeeper told me to have a separate credit card. And they wouldn't give it to me because I hadn't been in business long enough. So I said screw the banks, you know what I mean? They can't even give me a credit card? Give me a break. So, I just have my debit card from my company, and that's it. And I haven't applied for a loan, but I did apply for a credit card and was denied."[#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Now there are resources that we did not take advantage of, because we didn't want to go into credit. So there's floor planning and credit and stuff like that, for when you're starting out. That allows basically the bank gives you money to a dealer so that you can go and buy cars at auction, wholesales and stuff. And I never used it. We never took advantage of it. But a little bit of information that we got, [is that] for the first 30 days that you bought a car you don't have to make a payment. After 45 days, then you have to make a payment, but then you start... It starts growing interest. But, and it's a short-term thing. So I think you have up to six months to pay it back, with interest obviously. But for the first 30 days, if you work to pay it off, you wouldn't pay any interest on it. In 45, you will pay you an additional X amount. And then the few days you would pay more. So a lot of dealers I know take advantage of that. Dealers that have been in the business a long time, you're using someone else's money. I know you're going to be able to sell it within 30 days. We were just scared of debt. We didn't want to dig ourselves into a hole that we couldn't get out of. We didn't want to just get carried away with financing. We're trying to do everything. It just maybe it took us a little bit longer, but we were on the safe side."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "Number one is cash flow. Cash flow is the largest obstacle that I face on a daily basis. As far as a young company, still, four years in, I'm considered a young company, and not as established as companies that have been around for 20+ years. They have lines of credit through banks, of course, but lines of credit through other distributors. Equipment companies and stuff like that, where they are getting the stuff from. They'll float them. They'll let them get by with taking \$100,000 worth of equipment out, and taking 90 days to make a payment on it. With me, the relationship isn't established yet, and I am establishing relationships every day, but it all comes back to, cash is king, and if you don't have the cash, you're out. I bank through Wells Fargo, and I've tried to obtain lines of credit through them. Because of the age of my business, they were not able to provide any financing. I did take a loan out with a less conventional source. I guess you would almost call it a payday loan, and of course I got burned on that. Super high interest, and the money cost me more than it was

worth, so that was a bad decision. Fortunately enough I made it through it, but that was a terrible decision, and I'll never go back that way again. So, I've looked into different things with the SBA and stuff like that, and nobody has ever been able to help me with obtaining any more financing."[#47]

- The Black American male owner of an uncertified MBE construction company stated, "In the past we did a larger project, of course financing is a huge obstacle. It dictates a lot of times whether we can even get the job or not, whereas we know we would be competitive and we could probably win the contract with our rates and our practices. But I know a lot of companies don't want to pay you for 90 days and that's a deal breaker. That's a deal breaker. It's kind of hard for a small company to float 90 days' worth of work and not get paid for it until 90 days. when we first started out, money's were kind of tight. You bank with industry, let me see if I can say it properly because it's not coming out right. You have a bank that you deal with, your financing and things of that nature. You have this project come up and you go to the bank and say, 'Hey, I have a \$80,000 job that I just signed and I'd like to borrow 25 to 30 to get me through the first 30 days.' Then of course, they go through their little financial whatever they use to approve you. But a lot of times they'll come back, 'Well we can't loan you the money.' 'But wait a minute, I have \$10,000 in the bank right now, in your bank and I'm telling you I just won this job. So what's the problem here? As I get money, I put it in your bank.' A lot of times they'll say credit. I think once they told me I did not have enough collateral for the project for them to authorize the money for the project. Just coming into business, I always thought that the collateral was the actual project. Here's a contract signed. It's a \$80,000 job, I only want to borrow 20 or 25. If they loan it to you, the interest rate is so high and you look at it, I'm giving you all my profit. What happened to the rate between five and say 10%? Even 10% is kind of high. They'll say, 'Well for us to loan you the money, we'll loan it to you, but we'll loan it to you at 20 to 25%.' In that case, I might as well use my credit card. It would be more of the entity saying, hey, this company has been banking with us for five years and their credit, we don't see them bouncing checks. We don't see any negative issues, so let's give them the money to grow their business. They always give this song and dance of we're here to help you grow your business, so just ask us for a loan. They send the information out regularly. But as soon as you apply for it, they always find a reason not to give the money to you. Like I said, it's not even the requirements. Technically we meet all the requirements. It's just they come back and say, well we can loan you the money but we want a much higher interest rate. I don't know maybe it's because we're a risk or something in their mind. I would say if they could lower the interest rate or have special rates for small businesses and like you said, maybe a little more leniency on the requirements of what they're asking for. The part that's not helpful is the financial industry. They make it tough to, I don't know if it's just because it's minority, but they make it tough to assist financially with minority owned companies. If there was a financial institution that would loan money to minorities and that's if there is, to be honest. I would go back to the City of Richmond; I know they do have a program that will loan money to minority owned companies. That's the minority development. They're setting a program in place now that they will loan money to contractors, minority contractors. Bigger projects included."[#49]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "And we have another farm market here that just built a \$2 million building. And I

know they've been on the Dole, getting all kinds of grants and stuff for a long time. And we just now are qualifying for grants because you have to be in business three years to get them. So believe me, if I have to pay somebody to write my grants, and I'm a grant writer... But if we have to pay money to get grants, we will. Because, I mean, it's just super hard to make it. If I didn't have cash to put into this business, we wouldn't have made it the first year, because we have been running at a 35 to \$40,000 deficit per year. So I have been supporting this business personally, which is great because I mean, it gives me a tax break because of my income. This is not my sole source of income by any means or I would be broke, but it's my daughter's sole source of income. We didn't really want to be beholden and be paying interest on loans. I mean, we qualified for a small business loan during the COVID. It was a 30-year loan for 14,000 and it was \$70 a month and it was ridiculous, the interest. I have had to put very little money into the business this year. In fact, we said, we're going to do this on a shoestring because of COVID. And we've done pretty well and our sales have just really tripled. The hardest thing is to identify grants. Like I said, I've been a grant writer for 20 years for historic things, because I formed a nonprofit here and everything. It's how to simplify the grant identification process. Because there's all these nonprofit grants, there's all these grants for localities, for government entities, but it's hard to weed out. Okay, I'm a little private business here, and I'm woman-owned and we are nothing but all about community and people love us. And I don't know how to get help. So it's not easy to identify for a small business grant because you got all the big wigs and the big nonprofits and the big localities being able to get millions and millions and millions. And then you got the little people like us struggling to make it, and yet we're solvent." [#50]

- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "We have not had any funding, or even financing that will give us the opportunity to grow. So until we get to that point, we're not going to accumulate a bunch of debt, we pay our bills, we're not getting a whole lot of financing so we use personal money to fund the business. I think starting a business, the number one thing that you need is funding. So some of the barriers there, you're starting new, you're starting a business, which was a dealership, I didn't think it would be that much of a challenge because it's not like I was starting a startup, something that had never been done before. I mean there are car dealerships everywhere, you already know what the market is like, the banks know, so why not. It's more like... some of them, they have their notions about car dealerships, but at the same time, there should have been something available. And of course, going to the banks and stuff, it was like no. they have requirements. They say hey, you have to be in business two or three years. I guess which is understandable, but at the same time it's a car dealership, you already know what the business is like. So helping someone get started with it I didn't think would be that hard, because it wasn't like we were trying to develop a business that had never been done before. But a lot of them had their rules where you have to be in business for so long, and you have to show profit over this year, that year. So they had a lot of requirements. That was the first challenge. After running into that challenge it was, okay, I guess we just have to use our personal funding to do that. So, like I said, we had a bit of a savings, but of course as we got into it there were other things that we needed to get the business started, so we had to do a personal loan. I'm kind of on the fence about that because, like I said, I can understand funding for a new business. I guess, because you don't want to dump money into something that someone's not... it's a new business, whether it's

an established business or not, like we talked about, it's not like we're inventing something new. But at the same time, I think that if you have someone that's getting the proper... it's a car dealership, it's not new. If you have someone starting... if they're getting the training and the mentoring of how to be successful, I think yeah, they should provide some funding for a new business. But at the same time, make sure that they are getting the proper training and mentorship to where they're going to be successful. Like if somebody goes and starts a dealership, I just want to start a dealership, I took the two-day class, I got my certification, well here I am trying to do it. I don't know what I'm doing, I don't know how to do it, I just said I want to do it and I'm here. But one of the things that we did is we had a mentor. We had a guy that had been in business for 20 years, and so he as going to the auctions with us, showing us what to avoid, what to look for. We were getting the proper training and mentorship along the way, and I think that's how we are still here today, still doing what we're doing, because we did have that mentorship, that training."[#52]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I haven't needed financing personally, but I have gone to my bank that I've been with for over 30 years, and asked if they had a program where when I get projects for my customers, did they have a program where I could recommend that my customers go directly to that bank, which is Wells Fargo. So, directly to them and the bank would... I guess through my relationship with the bank, if they would help them with financing for the construction part of that project. And that never went anywhere."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "Number one for me is startup cash, it's money. I don't have a family inheritance. I work very hard for my salary. It remains at a certain point, and I have other responsibilities to take care of. So, being able to get some kind of startup funding, whether it's a loan that's not high interest or a line of credit to pay my subcontractors because that is my lifeblood. That's always where anything starts and ends with me when I look at a job, will I be able to obtain funding to actually take the work, have contractors take me seriously and move forward? I actually used all the savings I had my first time out, and it didn't work out well for me. So, now I am looking at the other option of trying to secure some type of financing, even if it's \$100,000."[#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Starting would be capital, coming up with enough capital as you grow from year to year trying to expand. When you first start out, nobody will loan you money for two years so you're pretty much on your own. And I understand that because there's a large percent of failure in the first five years of a business. I think the average is 95% fail or something like that."[#56]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So I applied to a lot of grants for, federal grants, or proposal writing too for, mostly for NIH, National Institute of Health, because I have a lot of experience OAD medical areas, healthcare areas, as well as data sciences, artificial intelligence. And I wasn't able to get anything from those proposals. What I would recommend is for Virginia to start a program where... Give looking at companies like us who have a lot of potential, technical potential, and we want to develop tools, maybe opensource tools or maybe propriety tools, whatever tools. To give funding so that we can hire people and do the research and develop

tools and then roll it over. So once you have a break, once we get a product out, that will put us into a certain position into the market. For a woman owned minority businesses, if they avoid funding for product development or business developing, whatever kind of ways to uplift the businesses. In our case it's the product development that works. For other businesses it may be more into the starting fund, startup fund or something like that that will help them to establish a business. So those kind of things will help. So we come from many other challenges. Not only just being minority, and also not very highly sound financial background. We don't have that sound financial background from anybody to say, to pull from the relatives. 100,000. We don't have that. So the only thing I would say is the government should have certain programs for seed funding, which will help us to sustain maybe a year or two, two years program. And it's not like we're just taking \$200,000 and just waste it, but it is obvious there is a way to check and balance and see the progress. And a rather strict criteria about what products, what services you're going to provide, and what's the need of it. So that means you segregate other competitors, big players, out of this conversation. And within just the minority group you can evaluate and give them the funding. That will help a lot to startup a business and to get into a place where we want to be. The other option is going for some sort of investors. And in the case of investors, there are issues where the investor says they want to run the business the way they would like to. And in that case, you pretty much lose control. And our idea is you work hard to build yourself. So at the end you're kind of dependent on them, and they run the entire show. So it's not even... Really you are building a business for somebody else."[#58]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Financing, absolutely. We have been lucky that we have a pretty strong balance sheet. However, four years ago, we did a strategic change in our services. We went from doing primarily advisory project-based services, to managed services. Well at the time, we financed this through debt. We knew it, we talked with our bank and they knew it. They were the ones that loaned us the money. One thing that we were looking at was refinancing for more favorable terms because the interest rates went down. And they're like, "You're a credit risk.' 'How in the world can we be a credit risk? We've never missed a payment in 13 years. We have always paid our bills.' 'Oh, well wait a minute. You had a loss of 300,000.' 'Yeah, you saw our business plan.' I think the point is, and the reason I'm bringing this up because the bank actually said this stuff, 'Well you know, if you were a larger firm, this wouldn't be a bigger deal.' So it's okay if you're a larger firm to have a larger loss to give them the warm and fuzzies, but if you are a smaller firm in Virginia and that happens, and I imagine it happens in other states too. I don't think Virginia is unique in that, that you're heavily scrutinized. with financing it's interesting because you'll have the Virginia Finance Authority and different boards and different organizations. I'm not exactly sure how to suggest anything to fix on the financing side because I'm not a banker to run it up the flagpole to say, 'Yeah, there is this discrimination going on in small businesses, and especially women and minority owned businesses.' It's not that long ago that I still had people asking me, 'Well, where's my husband?' Or there's people that are like, 'Well, it doesn't matter.' We've been in business for this long and I still have to personally guarantee everything. My peers and other IT businesses are generally white males, they don't have to personally guarantee anything after five years. And I sit there and I scratch my head like, 'What is going on that this is still an issue in 2020, that I have to put up my house or I have

to personally guarantee everything, or if 13 years of great credit is erased because of one planned year of significant losses?"[#60]

- A respondent from the availability survey stated, "I think capital should be more readily available to those business owners who need it. I did not qualify and do not for a lot of available capital. As a minority, we do not meet the qualifications that are imposed. The coronavirus presents a challenge to find employees and banks aren't financing like they used to, so I am using my own money out of pocket to pay for my business needs."[#AV]
- The male representative of a business development organization stated, "And for so long, we've always said that small businesses need access to capital. And I can't reinforce that enough that even now, it's so much more than capital, it is money just to be able to keep their doors open, right, just to be able to weather this storm."[#FG1]
- The non-Hispanic white female representative of a business development organization stated, "Collateral to get a loan for small... Banks are very hesitant to loan money to minorities, and they're very hesitant to loan money to new businesses that are not necessarily have a long track record. Like I said, we have some loan monies that we can provide, but what's the collateral? They can't offer their product as collateral because we don't need a roomful of things that nobody wants to buy kind of thing. I'm finding that collateral for new businesses is a hardship and a barrier when it comes to getting loans in particular. Then the fact that they haven't been in business long enough to qualify for the PPP, they have to rely on local nonprofits or their local county, city, town governments... [I] think part of it is just historically, and maybe more of the minorities that are starting the businesses are not proven yet, as far as a success record. Three to five years of continued growth in income. Because we have a lot of minorities are... We include those folks that are just in a low-income bracket. If they don't have the income to have a collateral or they're just not proven. Our folks have those barriers that they're just getting started and they're going to quit their job at Walmart and start this lawn care business, but they haven't proven themselves to be able to do it yet. Those kinds of things."[#FG2]
- The non-Hispanic white female representative of a business development organization stated, "We see a lot of issues with a lack of collateral, particularly for women and minorities. When we are talking about minorities in Lynchburg, we are almost exclusively talking about our African American community...We have several historically redlined neighborhoods, and those neighborhoods tend to still have very low home values."[#FG2]
- The female representative of a business development organization stated, "[I] think the other part of barriers is simply having a relationship for access to funding with lenders, right? Minority businesses tend to have a deposit account that does not tend to be that they have a relationship on the lending side. You want to go into business, you've saved up, you've got some line of credit that you can get on your house, you're taking these personal savings. They might not have started at the front end with like an SBDC and said, 'Wait, maybe don't use all of your personal savings, use that for collateral and capital.' By the time they come for help, they're on their last X amount of capital because they spent it all and suck it all into the business. Again, that's access to information. If you catch them early enough before they get in that hole. I had businesses that I knew, and was reaching out to them to put the grant application in. I know you qualify, put it in. Well, it took them two days to get their tax returns, because they had to email it to someone else, and then get the

request and then get them sent to them. It's just two years' worth of taxes. I think that access, and then, much like [she] said, small business owners are knowledgeable and busy running their businesses, and that's cooked a bottle washer. They don't necessarily have the bandwidth to do much more outside of that, that might be outside of direct income producing work. I think that's the big challenge is having small businesses who work the business, they're not managing the business.⁶ I have restaurants and retail and manufacturers to body shop, mechanics, to doctors and lawyers, it's a pretty broad base. But I think sometimes state and local policies that pick very specific niche industries to help with tax credits, and things like that. This is not to disparage any cyber security company that's out there, but that's the new hot button, sexy business for everybody to be talking about. You see things like tax credits, or tax write offs for data centers, and things like that. I'm not saying those things are necessarily bad, but when you have been a whole section of the business of the economy that isn't in these niche industries, what are they getting? Why aren't we looking at broader tax policies or issues that benefit all businesses of all industries, and frankly, all sizes, as opposed to all... If you're smart enough to get into cybersecurity, or put up solar panels, then you're going to get all this government assistance. I think that is discouraging, I know, for a lot of my members who then are in those industries, they're like, 'Where's my help?' Sometimes those very specific industries, they get catered to a lot to all this information about other loans and things that are out there. I think sometimes that is just... Sometimes it's just the luck of the draw, but I do think that that's bit of it is, if you're not... It's just that access again, because you're not necessarily in something that everybody thinks is the new, hottest type of business out there." [FG2]

- The non-Hispanic white female representative of a business development organization stated, "One of the issues that happens to me at the Small Business Development Center is we frequently are asked about grants to start businesses. For the vast majority of types of businesses, grants do not exist. They only exist in the research space. It is at least once or twice a week that I get a phone call or an email from a startup, somebody who wants to start a business on our main street. The ones that really get me are people who want to start early childcare facilities. We desperately need them in our community, we need grants to get those kinds of businesses started. They say, 'Aren't there grants for me? Don't you have grants?' I have to say, 'Nope, I don't have any grants for you. I wish I did.'" [FG2]
- The Black American female representative of a business development organization stated, "I think a lot of entrepreneurs, especially for smaller businesses, don't have the proper amount of resource. They don't have the proper A team. So they don't have the banker. Especially like when I look at African-American women who are the largest group of individuals who have businesses, or women in general. We often don't have the banker who's our next-door neighbor who happens to be the golfing buddy, who's on our team. Having the accountant that we can call up and ask a quick question, the lawyer who we keep on retainer. So it's the standard team that the average entrepreneur just doesn't have... The thing I find the most interesting is that the largest population of entrepreneurs that's growing is African-American women. And so, I mean, they are the largest growing group of entrepreneurs, which I think is amazing. And it's sad too, because the reason for that is because they're not finding that they are being promoted the way they should be in standard private sector. So it's sad, but it's true. But one of the things that's also so amazing is considering that women entrepreneurs are the largest employers period nationwide, but

get the least out of capital. That is it's stark raving mad. And so for me, one of the biggest things that needs to happen is, is that we need to have more advocates from a federal, a state level who are actively seeking to educate, to provide capital and financing for women. And it's not going, unfortunately, it's not going to happen by the banks alone. It's not, we've already seen that. It's not going to happen by these entities operating on their own. It's going to have to be a mandate. It's going to have to be a requirement, otherwise we're going to keep repeating this unless we find a few more of these private groups that are coming together to fund outside of that, that is the number one issue. It's the number one reason people go out of business. And it's a very large problem for women entrepreneurs across the board.”[FG4]

- The female owner of a WBE-certified goods and services firm stated, “I don't think I realized how bad it was on until now, where I'm sitting now, I look back, but I was probably three years in business. We did \$2 million and I couldn't get a bank to give me a line of credit. I had gone there and I had put together the packet. Now, we're kind of going back to the... I only have so many hours and I put together a couple of these and, ‘Well, call us back in six months. We'd like to talk to you.’ Now, I look back and I go, we did \$2 million that year. How is it that no one could give me \$50000 in a line of credit? I had more than that sitting in the inventory. If they really thought I wasn't going to pay them back it, and I do think that there was an unintentional bias there, or I don't know. I don't know what to attribute that to, but it took me a long while to get anybody to give me a line of credit.”[#FG4]
- A respondent from a public meeting stated, "Access to capital is a big issue as well. Will the state has some type of loan guarantee program?"[#PT1]
- The owner of a goods and services company stated, "First and foremost, one cannot compete without the capital or line or credit to do business. Recently, I wanted to retool and pivot my micro business from in home computer related sales and services to becoming a vendor to do business with the state's eVA and the eMarketplace Procurement System. I have been speaking with Joni F. Marshall, the Regional Lending Manager with Virginia Department of Small Business and Supplier Diversity /Virginia Small Business Financing Authority since April 24th, 2020 and she has enlightened me with a wealth of information about the different financing programs that are available to me and my micro business. The first step was to contact my bank for a line of credit and to inform them that the Virginia Small Business Financing Authority would be willing to consider a credit enhancement program to back the loan. I have tried numerous times to reach my bank and for a call back or to send me an application via email so that I could start the process. To this day, I have not received a call back from a loan officer. My first contact was with the bank was during the height of COVID-19 and was told that the person that I needed to speak with was on vacation. After a week, I was able to speak with the loan officer about a line of credit and she said that she did not handle lines of credit and that she would forward my request for information to another loan officer. I also gave her Ms. Marshall's contact information so that she could explain the credit enhancement program. Ms. Marshall informed me that she had not received a call from my bank (Atlantic Union Bank). I have been struggling to save my business and it's kind of sad after 13 years of banking with AUB and having a good solid credit score, I cannot get a call back for a line of credit even with a credit enhancement program backed by the state." [#WT1]

- A comment from written testimony submitted to the study team stated, "Despite these important contributions to our economy, these small business owners encounter obstacles unique to their experiences that white business owners do not, particularly ongoing discrimination in accessing capital, procurement and contracting. According to the Federal Reserve Bank's 2016 report on minority firms, only 40% of firms owned by people of color received the full amount of capital they sought, compared to 68% of non-minority owned firms.³ Similarly, U.S. Small Business Administration (SBA) loans to women-owned business accounted for only 18% of the total number of SBA 7(a) and 504 loans approved, even though they represent 40% of all small companies. Ongoing discrimination and sexism in accessing capital undermines the success and trajectory of women- and minority-owned small businesses."[#WT23]

2. Bonding. Public agencies in Virginia typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses and twelve interviewees discussed their perspectives on bonding. [#6, #13, #18, #21, #27, #30, #47, #49, #55, #56, #FG1, #FG2] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Being able to bond that work. Yeah. Commonwealth requires me as a non-small business to provide opportunities for the SWaM, DBE, MBE all those sort of classifications. And one of those opportunities that I can, or phase that I can address is bonding for those companies, providing that financial backstop, if you will. We are required. Part of every contract is to provide certain opportunities to the small minority-owned businesses. The opportunities are there. I just don't see a lot of small minority women owned businesses, really taking advantage of these opportunities. Yes. If they're starting new, we can bond the smaller company. That's how a lot of them get started is the prime contractor provides the bond for the subcontractor. And over a period of time, they start developing a reputation experience, some financial resources to where they can break away from the bonding from the general contractor. And I've seen that on a number of companies that are now very successful in providing their own financial back up."[#6]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Was a bit of a nuisance, because one bond tied up another for another contract we were bidding on, but it didn't end up being pertinent. Because DMV came out at the same time, and they both seemed to really, really love the idea of the bonds, and so you're only allowed to have so much bonding at one time. That was problematic."[#13]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Yeah, that's been really difficult. Luckily, I found a way because I've done some big deals so I've got some cash money people so they were able to front me to get my first bond, but I'll tell you my biggest problem. I go to, on a local level, NHRA, I go there to do a bid and its federal funds, because the federal government gave Norfolk Redevelopment Housing \$30 million dollars and I knew that because I've been watching it on media. They got funded so I knew they were lower end housing and they're going to invest. Well, I know that federal money is federally regulated by the rules, so I knew that my women-owned could take part in this. Well, here's the deal. If I go lower on my profit to get my bonded limit, now I've priced myself out of the job. So, I went and I had some people that have fast cash money, so what I

could do was get \$200,000, put it in my account, let it sit there and then I can get bonded because I have the cash there and then they'd just get their money back. That's what was happening in February and March. Now I know because I had to have that equity, I had to have that cash money. So now that I've got that in mind, we had coronavirus and then all the other jobs I was going to bid on to get bonded, they were canceled. But yeah, I will tell you coming into it was very difficult and they say, 'Go through the SBA. Go through the SBA.' That's all crap. I did it. I think they need to have somebody specifically. How they're doing it where there's different departments on different levels, I don't think that's how it should be. I think they should have almost one mentor who handles every person, and that mentor is the one that's the interlink between all the agencies. Got me? Because that person needs to vouch... Like me, when I go in there and I show somebody something, that person should vouch for me so the next person they send me to, they already have that relationship and they know I'm not crap. They know invest your time in this, I'm a grand slam. You invest in me, I'm going to win. That's it. I'm going to make you look good and make your job easy, move on to the next."[#18]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Not currently, but we've had some rough times in the past. But that's one thing that the bonding companies, they keep a close watch on your financial position. And like I say, if you go through a period of time that you lose money or you're not making the amount of money that they feel like you should be making, they'll limit you as far as how far they're going to go as far as bonds. I say, we haven't run into that lately but it's something that... They keep a close eye on your financial position. I think they call it under the VDOT requirement. I think it's anything under \$250,000 the bond's not required. I would think if you extended that throughout state contracts or even local contracts, I know there's people out here that would, I think, have an opportunity to do more work and would get more work and have a chance to prove themselves. Actually, if you could say, 'Well, okay, if it's under \$250,000, we're not going to require a bond.' And it's, like I said, VDOT, I think that's their standard now. But I think if you want to hit and use that same program on all the state and local contracts, I think it would give more smaller people, contractors an opportunity."[#21]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yes, ma'am. Yes. If I have anybody that could do the bond, the money up like that and help me out with it and stuff, it would be great. But I just never had the experience to have anybody to step forward or anything or never knew anybody that could fill out an application to apply for any assistance or anything."[#27]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It was a barrier to us because of some... I'd say the projects that we had that caused our bonding relationship with the underwriter that we had to go away until we got basically back on our feet, so that has been a barrier for us. Not at the current time. From the Commonwealth's perspective, there's probably more creative ways if they could interact to alleviate bonding requirements or allay a bonding company's concerns so they can partner with a contractor to keep a contractor from getting in trouble and the bond company having to step in. Things like doing joint check arrangements with suppliers to the contractor or the vendor."[#30]

- The Native American male owner of an uncertified MBE construction company stated, "I feel like I run into a problem with bonding all the time, and I can't really tell you exactly where my problem is. One, the age of my business, and two, the amount of case that I have on hand, it's just hard to get bonded. To play the devil's advocate, I do understand the whole deal about bonded and everything, but if we are never given a chance to get to that point, we will never be able to be bonded I think that would lay in the Commonwealth's hands, by maybe loosening requirements for the bonding. They could do that, if they load. The bond is to guarantee the work of the contact, but if they held retainage on the contractor's work, then the retainage would act as a bond. I think that they could loosen the requirements for bonding" [#47]
- The Black American male owner of an uncertified MBE construction company stated, "Some I'll get, some I don't get. We won't receive the project, just because of the bonding. We don't meet the qualifications." [#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "I don't have bid-bond capital, so I have to continue to work up to that and stack things to bid bigger projects." [#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "When you bond a job, you have to have personal capital outside. That's what a bond represents. You have to have assets to bond. It limits a construction company-" [#56]
- The Black American male representative of a business development organization stated, "The thing I see is access to capital, but also in the construction industry, bonding, it ties right into capital. And that's just the insurance industry, where it's almost impossible in it in a pandemic, where everybody's gotten hitting so hard financially. And body comes up tightening up restrictions on bonding." [#FG1]
- The female representative of a business development organization stated, "[If] you're talking about any kind of construction, state construction stuff, you have a lot of liability, and you have to get bonding insurance is typically required. It makes sense, obviously, the state or the locality want to make sure that you're going to be able to do the work, and you're not going to run out in the middle of the construction project, go belly up, so to speak. But to that point, for small businesses, typically, the amount of volume of work that they do might be much smaller than a larger contractor. So, they don't qualify for the bonding or that can they... Or they haven't done enough projects, or that kind of thing. I know that there was some legislation I know, a couple of years ago that I guess, was going to allow localities to have the flexibility to lower their bonding requirements. I think that we tried to make some strides in that. But I do know that any of that is as an issue of sometimes for small business owners, is that typically, they're not dealing in the same amount of volume, whether it's sales, or now projects and things like that, that they do that makes it more difficult for them to be seen as someone that's just as qualified to do that type of work." [#FG2]

3. Insurance requirements and obtaining insurance. Twenty-one business owners and managers discussed their perspectives on insurance. [#2, #6, #9, #11, #14, #17, #18, #20, #21, #22, #23, #26, #27, #29, #31, #32, #43, #46, #51, #55, #58] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Now, health insurance for our employees, I would say that the cost of health insurance is really a barrier, and does that count as one of these? Insurance, like professional liability insurance or something like that, is not a problem, but... And it seems to be reasonable. But what I've noticed is that we used to be able to pay all of our employees 100% of their health insurance. And over the last decade, the price has skyrocketed, and so now, we can only pay about half of... Well, we pay half. We'll kick in half, they'll kick in the other half. Which is, that's a barrier. And I find that a lot of my employees... And this may be the kind of stuff you're looking for, because what'll happen is, if have employees who have the least bit of a health problem, say you have somebody with diabetes or something like that, they can't afford to work here because their insurance, their half is so expensive. So what that means is that they'll go to larger companies, like AECOM or somebody that has an enormous staff and can get power buying on insurance.... And actually, I think Congress and the presidents have tried to fix this before, which was to put in some type of system that kind of... How do you do this, prevents hospitals and things like that from having a lot of frivolous lawsuits, because that's one of the reasons that healthcare prices are crazy. So I think if that can be handled at the state or federal level to try to figure out how to control those kind of expenses, that would help to get the insurance money down. I actually thought, who was it, President Obama, who almost made it with that kind of national healthcare thing, I mean, I think it was on the right track. But it was kind of sad that it kind of got it started and that so many people found so many problems with it that they kind of ran the other way when it... It's like, well, Social Security started like that the same way, and there were hundreds of problems. But they just started working through and fixing all the problems. So at a national level, it seems to me... And I guess other states have done this too. Was it Massachusetts I think that got a really solid state program together? So I think at the... Yeah, and since Commonwealth has hired you and you're asking all these questions, to me, that would be a really good work item if you really get the Commonwealth of Virginia to take on trying to get a cooperative insurance piece together. One thing that is starting to become a barrier, and this is in municipal contracts, it's not in the Commonwealth contracts, is that more and more, municipalities have started to want a very high limit on professional liability insurance. And just as an example, the town of Blacksburg, and now Montgomery County where they're located, they'd say, 'Well, we'd like you to do a little master plan for us, but you need to have a \$5 million minimum professional liability policy.' That is a barrier. Commonwealth of Virginia, you can work on any size giant library or anything that has a \$1 million limit of professional liability. That's reasonable. And so every firm I know can afford the \$1 million limit. And I have actually asked my insurance agency, 'Why have these municipalities starting to put this enormous limit on it?' It was somebody giving a lecture up in Northern Virginia recently and they recommend that for Fairfax, and all of them wrote it down. and I'll say, 'There are only two or three firms in this entire region that have that kind of limit on their insurance, and it's because they're bridge engineers. Nobody else would carry this. Only if a terrible catastrophe of a bridge fell, that would be millions of dollars' worth of problems. But none of the rest of us have that, and you need to get it out of there.' And I've actually had one town, since we're naming names, the town of Christiansburg looked at it and said, 'Well, yeah, I think you're right. We need to look at that again.' But I've had a lot of trouble with other towns and counties paying attention to that. And that will be a huge barrier to small business, because no small business can really

afford that kind of insurance. And in fact, most insurance carriers will not even consider a small firm for that kind of extra high ceiling. So that's going to be a barrier, I believe."[#2]

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Yeah, I don't know of any restrictions once again, if someone can pay the premiums for the insurance and one can show that they have experience in doing that work. I don't see any prohibition or obstacle there. A lot of it is I guess, comes back down to, will the insurance company provide coverage on someone that doesn't have experience in that type of work. That's a big risk to the insurance company."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Learning, what a learning experience insurance was. A lot of people that have influence with me always said, 'Gosh, insurance costs, insurance costs.' You can't quite wrap your head around it until you start getting into it, or I couldn't. I shouldn't say... I listened but I really didn't hear them that well, and learned along the way, you started out with a basic package I feel like. I had some commercial insurance for vehicles, and then general liability insurance for the company. And then had to learn what... There's standard amounts of coverage that keep it very affordable, but aren't very useful in terms of working with other contractors and stuff. So learning those adjustments and making those adjustments, and then in Virginia the worker's comp, when you have two or less employees, you're not required to carry worker's comp. However, it is in your best interest, in my opinion, it's in my best interest to carry it regardless of how many employees I have. Obviously, it's a good safeguard but as well even though I'm not required to carry it, another contractor that I may sub work out to, or I may be the sub for, they have to carry Virginia worker's comp for themselves on the project, and if I don't have it then they would have to add me under their certificate. And it's kind of a big rigamarole, and they don't really like doing that because that costs them more money. And I understand that. And in the long run, what ends up happening is they say, 'Well, can you come down so much on this job', and in the end it's cheaper for me, or more cost effective for me to just carry a policy, and just have it in effect. So that way there's never any... I just send a certificate over, and again they appreciate that. It's less work for them, it's really, truly less work for me, it's more effective that way. Yeah. I guess my message to them would be, y'all are going to do what I did, you're going to listen and you're going to hear people use these terms and tell you what you need to do, and try and help you avoid the pitfalls that they've either discovered, or whatever. But really truly listen. Yes, there's a cost there. As I advise my son, he's talking about going into business for himself and I was like, 'Okay, well here's the number one thing.' Establishing an LLC or a corporation, or however you want to do it, getting your articles done and all that stuff, getting your business license, things like those. Those things are relatively, they're important, they have to be done, but they're very, very simple, and they're not very costly either. The insurance stuff, that's what you, that's what I tell him the best. He said, 'How do you prepare?' I said, 'Save money for insurance and pay it annually because it's cheaper in the long run. And trust me, you're going to hate paying it but it's absolutely necessary.' So it is what it is."[#9]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Yeah, insurance isn't terrible. Workman's comp for us can be a little bit pricey, but that's probably one of the biggest things. And then the building we have, as far as some of the contracts that we handle, a lot of those people want to get added to the insurance and they

want you to have a certain amount of coverage. And we have a specialized million-dollar garage keeper policy, which means that if one of these big trash trucks that cost \$600,000 comes in the shop and the whole shop catches on fire and burns down, then that trash truck is actually covered. So there's a lot of companies that require that and they require certain limits and things like that. And they want to be notated on the insurance as a payee and all that stuff."[#11]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "Yeah, obviously at first it was difficult, no one wanted to insure us, but once we started getting contracts, it was much easier. But in order to bid on a certain contract, you got to have a certain amount of liability and insurance and again, once we got our first contract that was easy, but that was it."[#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It's an interesting thing, I have this project that unfortunately the way the owner situated the contract, and it's a state contract, that the way they set it up is because they knew there was asbestos on the building prior to and then they put themselves as an additional insured onto my insurance, by the contract, but they failed to tell us that... the contract says there was no asbestos in the building ahead of time but come to find out there was. That's what we're fighting about but they notified my... they put my insurance company on notice because they literally think that my insurance is their insurance. They put my insurance company on notice. Once you put a pollution company on notice it stays on your policy forever."[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "But yeah, insurances, no problem. That's all easy for me. I have had no problem with that. Same thing with my contractors. Again, I require my contractors to be licensed and insured so if they can't, what I will do is call my insurance and they will get a policy with my insurance company. Well, I require it and if they don't have it, I'm sorry, so they can either not do my work or if they have issues... And then of course, my insurance company, they love the clientele and they know if they're doing my work they're going to get paid. You see what I mean? Keep it in the family. So, they don't have problems but it's because I have taken them under my wing. Not every commercial builder does that. I see value in that."[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "[It] did. Yes. There's some unscrupulous characters out there that want to kind of take you for a ride. You've got to really do your research on the best people out there to do that. I know that the first insurance agent I had charged me 10 times the amount that was normally available until I found an insurance agent that broke that news to me. And so instead of paying \$20,000 a year to start it off, I started paying \$2,000 a year to start off. That's a lot. That's a big difference. And the best way to go is to get an education for those small business owners, a PTAC someone, an ODU, that's a pretty good system they have going there. They have big business come in and brief smaller businesses that are just starting up, which is very important. A lot of these enterprises haven't got a clue what they're going to need in the first year or two of starting this business. And we'll get somebody that's been in business for 10, 15 years to show them ropes and learn from all their pitfalls, it would really be advantageous to that small businessman that's starting out. Again, some kind of educational program for those small businesses."[#20]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The only thing that I can think of, and I don't know how this works but I mean, I've just been told about it. That they set up, I guess you call it a pool, where I guess you spread the liability out over a number of businesses and operations and try to get the premiums down to where people can afford to carry the insurance. And because in anything we go on business wise, I mean, the first thing they asked for was an insurance tick, it's standard procedure. So like I said, if you don't have it, it's no question, it's a liability. And like I said, I'm not exactly sure what would be the best fix for something like that but it definitely handicaps smaller businesses, I think."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Now, I will say in the beginning, it was tough to pay for it. There were times where it dropped and I had to redo it and whatever, and that was really just because we didn't have the money. We were very small and we didn't have the money, but overall, actually obtaining it is not difficult as long as you can afford it. I would say, again, an inexpensive maybe government-run program that encompasses both business liability and workman's comp for a small fee, obviously as long as the people are licensed and whatnot, because you have a lot of people... these, handymen or whatever that really go through doing a lot of work. They're not licensed or they're not bothered, they're not insured. For a little stuff and whatnot, that's fine, but it does undercut the industries of HVAC and plumbing and electrical when you have guys out there that are not licensed and insured. Yeah, they can do the work for \$25 hour because they don't have that overhead, whereas the rest of us are doing it. Maybe if it was a little bit more affordable for beginning businesses or one-man businesses or whatnot, they might be more prone to jumping on board."[#22]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "One of them is just really to be able to work on US government bases, the defense base insurance, DBA. And then certainly some special insurances for people traveling out of the continental US areas, including sometimes combat zones. It's not really bonding, but it's the kind of protection for our people."[#23]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Insurance is very expensive. I'd say on average I probably pay about \$25,000 a year in insurance and that's low. I mean, if I were to scale up where I was going to have say 10 trucks. I'd be paying probably about \$80,000 a year. I think Virginia should have its own marketplace as far as business insurance. Just like a lot of states have their own marketplace for worker's comp."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I usually [get] the proper insurance that I need, it's just a problem of getting the financing, getting what they need to be on the jobs and stuff."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "They need to have a separate set of rules with less requirements for someone with 10 or 20 employees as opposed to someone with 500 employees. They lump us all in together and that's not exactly fair. It just doesn't fit. We don't have the capital to purchase certain types of insurances and so forth that the company with 500 employees does. It all goes hand in hand. So you can't do for me what you do for 500 employee businesses. We're just not the same. There's two of us. It's just not comparable. So in my

opinion the commonwealth needs to focus on the smaller companies, limit the requirements for insurance. Employee compensation, workman's comp, and all that stuff needs to be reworked to consider the smaller company."[#29]

- The Hispanic-American male owner of an uncertified MBE construction company stated, "This is the third year. They know we're the same company. I've been doing business for the last three years. So they stayed with the same price. I didn't see no discount."[#31]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have one company that will provide insurance in this industry. So the barrier would be there's not a lot of choice. There's zero choice."[#32]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We have to shop health insurance, health benefits every single year. Those are the things that get in our way of doing business, is the compliance issues that should never impact a small business. I have to provide health insurance."[#43]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Then the insurance. Right up front you got to pay three grand just to be able to be insured so that you can have a dealer. Also, you need to have a certain location that meets their requirements. Which that also counts as overhead. I think that our insurance is around \$3,500, and that financing was, he had to put, I want to say, close to a 1,000 or \$1,200 down. And then you would have to make monthly payments. And obviously that was the option that we went with at that time. But coming up with that \$1,500 that could have been put towards inventory to make the business grow a bit quicker. But I know that you need insurance. I'm not saying to get rid of insurance. Maybe if there could be like an insurance assistance or some sort of other coverage for startup companies. Something that... Because insurance is a [burden], especially when you're starting out. Now we kind of got used to it. And it's kind of we got the expenses taken care of. We know that it's coming, we budget for it."[#46]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Liability insurance. So right up front, with what I do, my clients require several million dollars, depending on the client, several million dollars in professional liability insurance, \$1 million, and then blanket's at \$5 million. So right up [front] you're paying \$3,000 to \$4,000 for liability insurance, just to work, just to get where... Because, when you go for a client, they want to see that attached. So you're paying that right out of the gate, pretty much."[#51]
- The Black American male owner of an uncertified MBE professional services firm stated, "If I had more employees and stuff, I'd have to working out workman's comp and anything like that. Again, I would just worry about being able to finance it, the up-front part for it because with workman's comp, you have to pay up front. And depending on what I'm doing, that could be a \$1,200 bill to a \$5,000 bill."[#55]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "[I] didn't get much off the guidance in terms of how to do the bookkeeping, the requirements for businesses, insurances. Simple thing as you need to have worker's compensation, all of this. You learn all of this by okay, you don't have this, you don't have that. Okay, I didn't realize I should have that. So this is a harder way of learning."[#58]

4. Factors public agencies consider to award contracts. Twenty-four business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms. [#2, #4, #8, #14, #17, #20, #21, #23, #24, #25, #29, #35, #38, #44, #45, #57, #58, #AV, #FG4, #PT1, #WT7, #WT13] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "I looked at the system in Louisiana, I looked at the system in Massachusetts and in other places and thought and found at the time, this is 1988, that the Virginia procurement system was one of the best I could find anywhere. And I still believe that it's the case. We were a tiny little firm getting started, and it seemed to me 30 years ago, and it hasn't really changed that much, is that the Virginia system of procurement, a couple of things that worked great about it. The Commonwealth requires that you don't discuss fees as part of procurement, professional fees. And that is very rare, but what it means is that everybody gets an equal chance. It has nothing to do with money. And sometimes, procurement agencies will say, 'Well, look, here's the budget for this project. Don't apply if you can't do it for that,' right? So, to me, getting fees out of the equation gets a true sort of apples-to-apples comparison for the best firm or the most interested firm. A lot of times what ends up happening is the firm that has a little time on their hands, they could do a fantastic proposal and they win it fair and square. So I actually am a big believer in our Virginia procurement system, the way professional services are procured" [#2]
- The Black American male owner of an MBE-certified professional services firm stated, "By networking, I think, because I've talked to a few other... I guess, as far as I know that start your own business, they said the way they get their contract is through someone that's maybe doing something and they directly reach out to them versus them go looking." [#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yes, I think they have... well VDOT and some of the other ones that we work for, they definitely have told us that we're too small. They feel like we are not big enough. We don't have the depth of what another big company has, and part of it is a big company probably doesn't have as much staff permanent as we do. I think if they could waive, for the small businesses, the audited rates. I think they do have that. If you are... if your project is under \$100,000, they can waive that rate, but a lot of people don't want to do that. They want everything to be audited because a lot of times you're in with a larger company, you're like a sub, and I think that should be more... it should be made clear that you don't necessarily have to have an audited rate." [#8]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "I think those [requirements for SWaM vendor inclusion] are needed. Those need to be mandated especially, to bring small businesses in. Like you had asked me before, having the pre-qualifications to bid, if and I'll use an example because General Dynamics hired me, hired my company once I left and they did it because they had a 23% requirement for small business. And because they knew who I was, they started giving me... And this was a company where I way low bid just to get my pedigree and my history and my work history set up. And so, but they had that requirement. I still think that needs to happen. Veteran owned businesses need to be a high priority or especially the state of Virginia. I think one out of every five new businesses started in Virginia are veteran owned businesses. That

requirement needs to be there because I mean we provided our service to the government on the military side, we should get some sort of... And I'm not saying special treatment, but some sort of star or something for providing that service to them, to the government."[#14]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "Well, what I find very interesting about that is that it will say there's a... for the localities, it will say we're doing this in order to help meet the states or because of the state requirements and things like this. I've worked with one locality that it says we have a policy but then they don't have a policy. Yeah, that's my favorite. When we ask why don't you have a policy and they say it's easier to defend not having a policy than it is to pay to have a policy and train everybody. We got to figure out a way that we hold big business accountable. We have these really great programs and I think the state itself has the right programs and it has some good diversity but we can go out there and we can say we're going to do this and all of that but are we really? Are the big businesses really doing what they're supposed to be doing? Are you really treating the small business the way they're supposed to be treated?"[#17]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "There's always barriers there. You always look at the guy evaluating your proposal. He's got prejudices obviously, right? And he's going to select somebody that he's more, or she's more attuned to. Don't get me wrong there are a lot of good contract officers out there and a lot of good technical representatives out there, but there's still that element of favoritism one way or the other somewhere there. I don't know what you can do to break that barrier. It's a personal thing. Every individual is different. There was a lot of barriers and a lot of good things that are happening in the state of Virginia for instance, and in the federal government and how big small businesses go. And you and I both know that small businesses are the backbone of this country And if we can keep them growing strong then our country will continue to succeed and move forward. I think, any help that the state can give to small business they really need to do it, more so than anything."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I guess the question I would ask is, like I said, in this area, how they come up with the percentages sometimes. How can they justify that, knowing that there's very few minority contractors in this area. But like I said, I'm sure they've got their reasons. I think one of the things that might help improve or not, is a requirement on these set asides that you have to self-perform so much of the work. I think that would help. I think it would create a better situation than just going out here and I'm going to take a job and subcontracting the whole thing to somebody else. I think if you're going to set aside for this business, I think that business ought to be capable of performing a percentage of the work themselves. Like I said, it's just, you have to give people an opportunity to prove themselves and however you do that, I mean, program-wise, I'm not sure the best way. But I just know there's a lot of people, small businesses that are capable of doing work that sometimes don't get a fair shot at. This is across the board, all of this stuff we talked about, there's multiple things that can limit that or hinder that, and that type of thing. It's not just usually one thing. It's just a number of things."[#21]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "I think one of the areas that has certainly frustrated is that we have seen that a

lot of the work that we have tried to bid on is classified as LPTA, lowest price technically acceptable. We always look at that as a race for the bottom, and it ends up hurting the workforce because you're trying to do everything as cheap as you can. And so, we found that we no longer even submit for contracts that our bid is LPTA and instead look for those that are best value, where we can hire a workforce at a reasonable salary, give them decent benefits, rather than trying to cut corners just to get the bottom dollar."[#23]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I understand that there's folks that are experts at getting these contracts. And they're well-known. Because of the company name and their knowledge that there is about them, and the work that they do, they continue to get this work. They have long history, and that's why they get the contracts. But I think it's more difficult for the newcomers to get the contracts, because they're not known. And that's just anybody. It's not just the Hispanics."[#24]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "As much as I wish there was no need for the minority programs, we live in a world where it's who you know, not the quality of your work, necessarily. Now the repeat work comes because of the quality of your work. That's what I keep telling people, just give us a chance to get our foot in the door, I'm sure that we can do it. That's where developing a culture of a level field for the entry level, and then let the chips fall where they may, but give us that first, give everybody a clean first entry."[#25]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "They should focus more on smaller companies. Because that's what it comes down to, it comes down to the buyer sitting in the seat looking at these bids saying okay, I'm going to compare only the price, the bottom line. I'm not going to compare the company itself. I'm only going to compare the bottom line. I'm not going to compare whether they're close to me and live in my area or not. And that's a problem. They should be supporting their local people first in my opinion."[#29]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "With subcontracting, it would be an unfair business practice because I recommend dealing with the Commonwealth directly with small business. Because with the subcontracting, you're pretty much playing favorites. So, what's going to happen is, a larger business has a favorite smaller... and it could be a buddy of theirs, and they're just sending the contracts out to them. But dealing with a small business directly, that takes that unfairness out of the equation."[#35]
- The non-Hispanic white male representative of a majority-owned construction company stated, "Going back to a comment I made earlier, we pursue work that is value based with customers who have these requirements, when you get into some of the Virginia procurements that are... beat a low price against 10 competitors, I think it's really unfair to make some of those decisions and still win. It becomes absolute lowest price, all the way through. And then often times that requires the bidder who wants to be successful in that work, to make bids they even know are irresponsible in order to win and then, that's not good for anybody. It's not good for the prime, it's not good for the subcontractors or the subcontractor community and ultimately, it's not good for the State to have firms on that project that aren't successful, that aren't profitable. What's the best way to say this? You

end up a lot of times with firms went in at the bare minimum or less, who engage subcontractors either didn't have the correct price, have an irresponsible price, or missed something. Then as that work moves forward, you get a team that's trying to cut corners throughout construction in order to be... to try to achieve some profitability or success on the project. And when those things happen, I think safety, quality, a number of things suffer on that project."[#38]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "It always come down to the money. They're always looking for the lowest price and want the most for it."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "And one time, I mean, I had to go out and get a DBE vendor like to do some of the support for the buses. And it was a vendor out of Ashland. And we met, and we even, we partnered with them twice. The first time, he was like a sub for a contract. The second time, we put him as the lead, and I just knew we were going to win it. I mean, our buses were better. And we lost it by 11 dollars per unit. So, if you bought a bus with the same specs, it was 11 dollars with the competitor who had all the business forever. And our new company... And I believe in competition, because that keeps the cost down for all taxpayers. And we lost it by 11 dollars. I started to lose my mind. For three days, I couldn't quit saying 11 dollars they had the lowest. But the quality of their vehicles were so much less. So guess what? Everyone that... You know, we're not dumb. I was out there talking to the people that were going to buy the buses and working with them. And they were saying, "[Interviewee's name], look at this bus. We got it delivered. It's been in the shop since the first day." You know, so they're buying buses that won't even operate. And I said, "Our buses are not like that. They operate. They're not in the shop all the time."[#45]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't know how other people go about it and so I don't know whether I should have been taking somebody to lunch or whether I should've made extra phone calls. I've kind of taken everything literally and I think that might not be the way to go all the time. I've gotten some, but I would say my percentage, my batting is 10% or 15%. I don't know whether it is the quality of my RFP or whether it's the presentation. I don't what makes the final decisions, I guess."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "We don't have visibility of how the contracts have been evaluated to know. So that's another area where if there is a very transparent process of what has been submitted and who got it and how it has been evaluated, so that way not only that people learn what actually is the issue with their contract, but also what is the positive side of the contract that has been owned by someone. So there is no transparency. So once we submit, you get explanation that certain things are not there, you don't... Which is more of a formal way of denying. But then it doesn't help you to really get the transparency like so how do you improve yourself? How do you... The ones who got it, how did they got it? Why they got it? It is the government contracting federal money, or state money, public money, more transparency should be there. There's more way of getting... People have more understanding of the entire process. So that way there's no preference given to certain vendor, or even the first place, even after submission. So those things can be avoided."[#58]

- A respondent from the availability survey stated, "The state takes the lowest bid and gets the crappiest work. They really ought to go for quality." [#AV]
- The female owner of a WBE-certified professional services firm stated, "Sometimes you'll submit a bid and you don't receive a communication back from the procurement offices as far as, 'Hey, how can I do it better? What is the brief or debrief from them on pricing or the best value evaluation?' So I think that we can be a little better on that as far as within the procurement offices and also just being a little bit more diverse in the selection process of who they go to for certain services or supplies. You often see that it's a repeat of individuals that they choose to select. And it may be just about who you know, or them being familiar with those companies. But I think those are areas that can be an approval upon." [#FG4]
- The female owner of a WBE-certified goods and services firm stated, "The reality is when all that gets turned in, if it's not based on price, we all think maybe it would be better if it isn't based on price, but there's four people in the room and they're grading those and they know who they're grading. So if they know who they want... I saw one that was, can't think of the word, but it means that they, every different part gets a percentage. There were four graders and the one guy was so disparate on their grades, this guy got a 94, and these people got thirties, that he single-handedly moved the decision. Everyone else's are eighties and nineties, this guy is nineties and thirties and when you average those together, I'm a math major, he made the decision. It was very clear. Now I learned a lot in that bid review, because what I learned is you want to know who those decision makers are. And if you don't, if you haven't had an opportunity to be in front of them and convince them that you understand the work, you could get a grade like that, this one's not worth your time. So we've gotten very good at the go, no go decision for those bids. But from the city's perspective, they've got people making this decision that there's probably a good old boy mentality there." [#FG4]
- A respondent from a public meeting stated, "Our company tends to do businesses with schools and universities. We have experienced situations where, for example, a Virginia public school has shown us an option to do business with companies that are out of state. Is there something that can be implemented that guards against that happening or requires public institutions to do business within the state?" [#PT1]
- The male owner of a professional services firm stated, "I complained shortly after becoming a SWAM and eVA vendor that the Virginia Department of Criminal Justice Services (DCJS) was not adhering to procurement policy. I had retired from there as the state Subject Matter Expert (SME) in Crime Prevention. I opened my business to provide crime prevention consultation and training and discovered none of the crime prevention training that was contracted was being advertised. I would have bid it and at a much lower price, one of the courses was less than an hour drive from my home. I have other friends who provide the training and they too were upset that they did not get to bid the job. They are also SWAM business. Not only did we not get an opportunity, they contracted with a trainer from New York who hired a subcontractor to provide the training. I attended the first and the subcontractor (who knows me) announced that the class was fortunate in that they had me in the class, that I was an expert. As I understand the procurement rules for small purchases if it is under \$5000 for a single quote can be obtained from a SWaM vendor, unsealed bidding via quick quote can be used if it is between \$5,000 and \$10,000. I believe in

emergency procurement they can award the job but make whatever competition that would be practicable and for Sole Source a determination in writing that there is only one source that can deliver in the time frame and that is available. I have taught these courses for DCJS as a staff member for almost 12 years. I was the Subject Matter Expert for this topic and even developed the mandated CPTED checklist that schools must use yet I was not given an opportunity to bid the job. I was and am available, would without doubt be less expensive, at least for two locations as no overnight travel would be calculated into my bid. I had notified DCJS once I received the SWaM, Micro and eVA certification. Perhaps most importantly, I am a Virginia based business, small business, micro business and veteran owned business, yet the agency went to a New York company for the training. I provide training by contract as well as individual per person."[#WT7]

- The Black American female owner of an MBE- and WBE-certified goods and services firm stated, "I have applied for and written contracts for over 10 pharmacy related Commonwealth solicitations. It appears that all the contracts are being awarded to the same companies year after year without a competitive process. There are very few announcements of contract renewals and most just roll over year after year. Most of the pharmacy contracts are awarded to one company that is Virginia headquartered and a large Minnesota headquartered pharmacy chain. These companies are not minority owned. There have been occasions where I was the highest ranking or one of the highest rated companies in the bidding process for a Commonwealth solicitation and twice to my knowledge the committees went back and rescored our evaluation to a lower score and the contracts were awarded to non-minority owned pharmacies. This occurred with a major Community Services board state contract, which is very detrimental to my business and all independent pharmacies in the state of Virginia. This decision reduces our opportunities to compete for pharmacy State contracts with the Commonwealth of Virginia. I am in the process now of finding out about the evaluations of the other RFP proposals that we submitted. I believe that we are competitively prejudiced by unreasonable evaluation and selection decisions, our proposal evaluations were unreasonable and misevaluated by evaluation agency committees."[#WT13]

5. Personnel and labor. Thirty-seven business owners and managers discussed how personnel and labor can be a barrier to business development [#2, #3, #5, #6, #7, #8, #11, #14, #16, #18, #19, #20, #21, #22, #23, #24, #25, #26, #28, #29, #30, #32, #34, #36, #40, #43, #44, #47, #48, #53, #56, #58, #59, #60, #AV, #FG3, #PT3]. For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, my guess is, and this is just speculative, is that if somebody just finished college, there probably aren't that many applications out there, so we might be able to really find some talent. So I'll tell you in a few months."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Recruiting is challenging sometimes, especially in our market in Lynchburg because it's a smaller area, so you don't have as many people necessarily here. And there's other firms we compete with. So recruiting is probably our hardest challenge that we have. I mean, for us, it's probably hiring a headhunter really. I mean, if we really want a prime candidate to fill a position, we haven't gone there in the 15 years we've been in business,

but if we had to make a key hire for a key position and definitely someone that was really experienced, we would probably have to [go] the course of a headhunter. But it's an expensive venture, because we have exported in the past."[#3]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Yes, finding staff can be difficult. It would be fantastic if the state had like maybe a list or an available... I'm trying to think of the right word. But some kind of log where people looking for positions in the state of Virginia with a certain amount of years of experience could log in and say that they're looking versus then companies that could log on and say we have a need."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "We can't find enough people. Indeed, Facebook, we have a really robust recruiting internal recruiting incentives. If someone recommends a friend and they come and work, they receive a financial reward for that."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "No, we've always had a struggle with getting truck drivers. That is hard to come by. Now with the 9/11 and things that have happened, we have a lot of base work and government work, and it's hard to get approval to get on a base if you're a convicted felon. So, some of our truck drivers are not allowed on those jobs. It's a little difficult when a felon applies for a job and they're not allowed to get on certain ones. I think our number one problem is getting drivers. CDL drivers are hard to come by. The DMV changed the law, and now you [are not going to] be able to get your CDL without going to a class, and now they're going to make it mandatory to go to a class which means you have to pay for it. Yeah. I know the prison has a CDL program now, which I think is excellent. The prisoners that are getting out are able to get their CDL before they get out, and then you're able to hire them. I think that's a great program. You have your veterans who are getting out of the military that can get grandfathered in as a CDL driver, because they don't have a CDL, but they drive all that heavy equipment. When they come into the private world, they can drive it, but they don't have the CDL."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's a little hard to find labor forces. Our industry kind of hires people when they have a contract and we don't do that. We maintain a permanent staff just because I think it gives us a better quality control, and it keeps us from having to go and... I mean, it's really rough hiring people continuously kind of thing, so one of the reasons why we offer the benefits and stuff. But it seems like there's not a lot of people going into archeology, and since the other companies just kind of hire you to go work on a project, it's harder to find just staff that live in our general area or people who want to live in this general area. Most people just want to live wherever they want to live and then they go to the projects. I think maybe the schools could do a better job at trying to reach companies like mine where they have degree programs to help people find employment. we did internships for a while with William and Mary and that worked out pretty well, and then they kind of did away with that program, I guess"[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "It's a skilled trade, so it takes average, it takes one of my installers about one to three years to

learn how to do it and be independent and capable of installing on their own and being able to produce money for the company."[#11]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "Maintaining that workforce has been a barrier. Luckily for me and the type of stuff that we do, it's pretty sexy. So it's easy for us to retain and bring in talent from other places of the country and that's kind of what we've done. And because we have locations in northern Virginia, Florida, Stafford, and other parts of the US, it's easy for us to bring in talent. Plus we've figured out how to, even before COVID, how to work remotely. How to work virtually. And so this is not very new to us so we're embracing it. And the next generation coming out of college now, man these kids are phenomenal. I mean these kids are coming in with so much skill and so much drive and so much talent that they're running... And I'm talking about the last year or two. They're running circles around the millennials."[#14]
- The Black American male owner of an MBE-certified construction company stated, "Well I commonly just register with the parole system in Chesapeake. Sometimes they'll call me up and say hey, I've got a guy, he's not a bad guy, he was just in the wrong place at the wrong time, so I give them a chance to get up on their feet, do a little bit of work instead of getting back into trouble."[#16]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "And having 15 years, I will also tell you I don't switch contractors. I believe in loyalty; I believe in keeping your word. I'm big in that and that's a lot in this industry. So, all my crews have been with me between 10 and 15 years."[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Well, we touched on that in the beginning. Some of them, the interior designers, some of them over the years have had experience, that come from similar firms. Some of them are right out of college, so they have the education, but they don't have the experience. So yes, we train."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "It depends on the contract we bid or we win. It depends on the year. Again, finding labor is always a challenge, finding good labor. I've said, you can always find labor but finding good labor is your challenge, finding the right person for the right job is always a big, big problem. We're lucky because a lot of our labor came from people leaving the service and Navy veterans that come out, or any kind of veteran that comes out. They're highly sought after by people in my industry. Because they really know the equipment they've been working on this equipment for years and they know the system. So it's really advantageous for us to really go after those types of people. But we do bring in a lot of young college kids, a lot of engineering students coming in, we bring them in early and we train them. But the problem with us training those young engineers, as soon as we get them up to speed the government steals them from us entirely. you have a really good engineer in the system and not only are you keeping them going but he's going to spend 20, 30 years in the government, they're going to get out and it's going to help small businesses again. So it's one way."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "One of the biggest issues we have today, and this has been going on for a while, this is

nothing new, is the lack of competent and skilled people. If you were to pick up a significant amount of work, then you're faced with finding people to do it. And that's been, that's nothing new. That's been going on for a good while, but it doesn't seem to be getting any better. Let's put it that way. I know there's a lot of programs out there if you want to pursue them. We've got a community college here in our backyard and they offer a lot of programs that are good programs We try to help them get up to where they can help themselves as far as the money and that type of thing. And I think the thing that I see is you've got... I know there's a lot of young people, good young people, don't take this the wrong way. But there's a lot of people who think that 'If I go over here and get a job and whatever I'm doing. I'm driving a truck, driving a tractor, whatever I'm doing. If I'm driving that tractor, I should be paid the same as the guy who's been doing it for 20 years.' And it's difficult to explain to some of these people that, 'Look, just because you can make it move and... There's more to it than that. And as you learn, you'll increase in pay.' And the other thing is the younger people, they're... I shouldn't say, I don't need to classify everybody, but they're not dependable. I mean, they don't seem to have the work ethic that older people have. It's just like I said, they are late for work or they don't show up. It's just one of those things where you try to explain to them, 'Look, this is your job. If you want to get paid and want to move up, I mean, you've got to show some degree of ambition.' And it's just like I said, we have some people that just... I know I interviewed a guy several years ago and we go to work at seven o'clock in the morning. And I told him, I said, 'Well, we're going work in Blacksburg and we start at seven o'clock.' And he looked at me and he just said, 'Well, I can probably get there by eight.'"[#21]

- The non-Hispanic white female representative of an uncertified MBE construction company stated, "I will say the biggest barrier nowadays, and I know this sounds like an old person remark, but young kids don't want to work hard. Now, we're very lucky with ours. We actually have one mechanic in his forties and the rest of my guys are in their twenties, and they all work very hard and they all seem to enjoy the work and they're all... We put them all in school so they're all over at Norfolk Vo-Tech taking the electrical courses. They take four years of it. They seem to really want to, but we have had times where it is so hard to get somebody who wants to not just work for the money, but care about the work that they're doing. Everybody wants to come in and work their 40 and make their paycheck. It's the same thing with the vocational schools. I went to vo-tech for fashion design in high school. I think that the vocational schools are starting to suffer because of the academies. Don't get me wrong, the academies are wonderful. My daughter's in an academy. They're wonderful, but how about an academy that encompasses blue collar work?"[#22]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Most of them come already trained or we find people who are trained and capable of such things. And yes, I have both a bachelor's and a couple of master's degrees."[#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "My biggest concern, as a business owner, is staff or managing subcontractors that's the other reason why I want to continue to be independent, because, when you have a business, you also need to take time to train people the way you want them to work within your organization. And that takes time, which means I won't be making money. So that could be an obstacle that I may face. And that could be a reason why I'm not looking at

expanding and adding, I wouldn't say personnel, but subcontractors, for example, because you still have to make sure that they can do the work according to what your specs are, and your expectations are."[#24]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I am very specifically trying to get another either architect or architect in the making somebody that is in the process of getting licensed, but I very specifically want either a minority or a woman, or a woman minority, so I'm being very careful as to how I let people know that because if, you know, I am kind of worried how people are going to take it but we try to make our firm be very diverse- I want to maintain the diversity in the firm So what's happening is I am having a hard time. I've contacted a few people and they say, 'Oh I have somebody in mind,' but I haven't gotten anybody to actually give me a name or anything. If you know of anybody who is gone to architecture school and has experience, and that's the thing, I need somebody with experience, that's a minority or a woman, woman minority, send them my way. Getting more minorities in the profession. There's not a lot. And getting more women in the profession, that would be good too."[#25]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "I think what affects us more than anything is the labor issues here. Well, it's just labor here is difficult, and it's hard to get people to show up for work. And with the, this is probably an internal business thing but, we have issues with getting people to work or paying them, and be able to pay people a good wage. And I think that's just based on our market, it has nothing to do with everybody else. It's just based on our market where the competition sometimes will lower the rate to a point where it's hard to make any money. But that's an internal business thing, that has nothing to do with any outside force."[#26]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Oh, my goodness. Yes. Yes. So, here about eight months ago, I put in a Craigslist ad. I needed people. You just couldn't find. This was prior to COVID. You could not find decent wholesome guys or girls, I don't mean to sound discriminatory there, that really wanted to work. And what we do is hard work. And [I] put an ad in Craigslist, starting out without experience, starting out at \$12 to \$13 an hour, will train, concrete technician, must have valid Virginia driver's license, must pass an eight-panel drug screen. Zero replies. Zero. So about four days later I paid the \$5 dollars to reorganize the ad, and took out the drug screen and then it went back to the top of the list, a fresh ad placed. It was the same ad but I took out the drug screen. We had 12 inquiries. 12. Remember, when the drug screen was listed on that ad, zero. Take it out, I have 12. We talked to all 12, a couple of them did not have a Virginia driver's license, so we immediately excluded those. If they can't read the ad and interpret the ad when it said it was required. We narrowed it down to three people. Two men and one woman, and set interviews for them to come to the office, fill out an application and have an interview. Of those three, zero showed up. So I'm just using that as an example to tell you that [it's hard to find people]. When I started this business where you found employees, you put a classified ad in the newspaper. The younger generation looks at me and says, 'What's a newspaper?' I'm really struggled here finding employees. And the only way I've really found decent employees is through brothers or brother-in-laws or close friends of current employees. A couple of those have worked out nicely and are still with me. A couple haven't worked out. Bailed or we... or bailed by their hand or my hand within a couple of weeks. But that's been a real challenge, finding people who want to work and

meet my requirements of being drug free, alcohol free, and really a driver's license, although that I can put down on a lower requirement now because of my six, four have driver's licenses, so there was a period here that I only had one of our six guys that had a valid driver's license."[#28]

- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "My area is very depressed. We don't have white collar workers here. And like I said, for 50 miles around me there is no big industry. We're in a very rural area. So I don't have educated people to draw upon to help with educated things. It's very limiting. So I don't have people that I can hire to do certain things at my business because they just don't have the knowledge, they're just not here to do that."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "That can be a tricky issue, finding qualified people. Typically, all of our employees are long-term employees, and we realize how difficult they are to find, so we keep them busy even if we're not. So it's a challenge, and I'm not sure exactly... There's several programs out there to try and train people. I don't have a particular answer for that."[#30]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "That is, because we're just a really unique niche industry nationally, and globally, honestly. That is difficult. Again, we have all professionals at work. So you have to be competitive in the marketplace, and then you also... It's pretty intense training in order to get somebody. Getting the right employee and not having a lot of turnover is critical."[#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "We're so busy we can't keep people working. There is a lack of people willing to come in and work. We have a horrible time finding mechanics and shop help in this area. The qualifying factor there is experience. We want someone who has a little bit of experience at least and that's non-existent here. Unfortunately, like I said, retiree area. Except the few of us who were born and raised here, a lot of times when the people get a degree or they get some type of technical training, they leave. They don't come back to work so our problem is finding a qualified workforce."[#34]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "You have to get out and hunt people down."[#36]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "We consider that our number one problem. We consider that to be the most difficult thing we have. So because a lot of our folks have to be cleared also that could be a problem. That may have to have certain certifications. We are a huge Cisco house, so we have to have certain Cisco certifications for our staff for certain contracts, for certain products that we sell, and for certain services that we offer. So what ends up happening is, is that this area especially, the northern Virginia/DC area, people honestly are way overpriced. We end up having people who apply for jobs really just to get their employer to pay them more money. Or I have non degree people who walk in here and expect \$200,000 a year just because they have a certain certification. And unfortunately, they will get it somewhere, somebody will pay. We this year have lost a couple of employees who were long term employees here, who went somewhere else and really everything they had here

they had the same benefit, the same tele work situation, but insurance was a big deal. Because our company, we're smaller, we can't compete necessarily. And so even though we pay like 50% of the employee and the family, there's still places out there who are a large company who pay more for the premium, or some are even free. So that's an area where we really have had trouble, is recruiting talent."[#40]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "One of our issues is workforce preparedness. What we're finding is that, and this is an art business too, for me to have a great employee that can evolve. I don't hire people, even if they're 26, 27, I don't hire them if I can't see them actually owning this company one day. Okay? So I'm looking for a skill set, but it starts with basics that I learned in high school that I, that we're not giving these kids today in high school, and that's a sense of... One of the reasons employers look at a transcript of a student is you know, did they work? How involved were they in the community and what were their grades? So if you got some person that was involved in this program and this program, independent of college or high school, and they still maintain straight A's, and maybe they even played in a sport, what's that tell you? You have a very disciplined young person."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "What's happened in the last 10 years, from what we've seen, is very evident. And the state already knows this problem. Everybody went to this virtual training where these guys, all these... They backed away from the real apprenticeship programs where you work with the mechanics during the day and got to school at night. They went to this virtual learning where the kids started taking their classes online, getting all the certificates and stuff like that. And what we're seeing, a lot of these people out there that do not have a clue to what they're doing. It really affected the skill level of the trade. And the state has recognized this fact. I have talked with a few individuals that do work with the state and the apprenticeship programs, and they're trying to bring the apprenticeship programs back and make it a big deal. Finding qualified help, it's really hard. And this summer, what I've noticed this summer, and I know the country needed it. We had to do it. But several guys I talked to because we're looking to add-on, we need to pick up two guys. I need a good service technician and an install tech. And several of the guys that I tried to recruit after they'd got laid from the big layoff when this COVID started, and man they would get \$938 a week to sit at home. And they told me, 'Why would I go climb up an attic and kill myself all day long?' He said, 'Until this stuff's over,' he said, 'I can sit at home.' Get \$930, what was it? \$938 a week. \$338 from the state and \$600 from the government. He said, 'Why would I come back to work right now?' The number one barrier we have is being able to sustain employees between the off-seasons. So you're just hiring people and laying them off, which a lot of companies do. I don't like doing that. Because you're messing with people's lives then. That's probably the number one issue in the HVAC trade."[#44]
- The Native American male owner of an uncertified MBE construction company stated, "It's a constant struggle. I guess kind of like VDOT, they offer small, different programs to cover an employee's wages, to get them in the door to a company like mine, to train them for the training process and stuff. But those programs are incredibly hard to get into, and I haven't cracked the code yet."[#47]

- The non-Hispanic white male representative of an SBE-certified construction firm stated, "You betcha we have. Construction, even right now, with all this stuff going on. Well, it's even worse now, of course, because they've made the big mistake of doing too much and then giving all of the so-called laboring people, hourly folks, about \$600 extra per month. And that, along with their regular unemployment insurance makes them more money than we were paying them. And most of the people south of, let's say, Washington, DC, all the contractors, businesses, and everybody else, they're in the same boat, because our whole pay structure is lower down here. And our prices are lower on everything. But nevertheless, the point is that there is no labor out there right now. They're all back home. Either they're out doing a little construction on their own, picking up extra money, building porch decks and adding on rooms and stuff."[#48]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think mainly it's because of where I am. Because I'm here in Staunton. If I was in Charlottesville or in Richmond, or Northern Virginia, somewhere like that, I would more easily be able to find people to help here in the office, to work for me. it would be as an apprentice, as somebody to do drafting work, somebody to handoff work to so that I could grow larger. But the problem is, those tend to be young people, in college or maybe right out of college, or with a little bit of experience. But they don't tend to be here. They leave this area and go somewhere to get a job at a larger firm, because they want to be there. There's not that much to do for younger folks here in the Valley. And I don't blame them. I'd probably be the same way."[#53]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "For good quality skilled labor, it's challenging to find. as a construction company, good skilled carpenters. it needs to be more taught in the schools. When I graduated in 1985 from the high school, I'd gone to Massanutten Technical School in Harrisonburg. While I was in school, I was a carpenter. At their graduation, they went through the people who were going to college, the people who were entering the workforce, and the people who were going in the military service. The commencement speaker basically made the rest of us, that were not going to college, feel like we would never be successful in life. That's just not true. I think we need to do a better job in the school systems of promoting trades, as not as an inferior education or an entry into the workplace, but it needs to be more positively approached. In this area, plumbing, electricians, and HVAC mechanics are the three trades that are very deficient, in the Shenandoah Valley particularly."[#56]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "So the way we wanted to do this was to get some sort of a funding, some sort of project from government or local authorities so that we can utilize this opportunity to employ more people of minority to help them as well. And also, not necessarily just minority, but it could be anyone who is qualified. But that's something we wanted to do it, but we haven't gotten... We actually applied many places. We haven't had the chance, luck yet."[#58]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "I'm basing this off of a very good friend of mine, who's also a general contractor, employees, off quality of employees, and- is one of his big problems. I would say 10% of the time, people

don't show up and they take...I'd say 10% about right. They call in and they got this problem, or they don't call in. I'm basing that off of his experience, not mine. I would say, if he has the issues, I would say, I would have the same issues. Well, they're trying to in the school systems. They're trying to get some courses that are work related, like electrical and plumbing and so forth. Several years ago, they invited me to talk to the seniors about what was available in the construction industry. And the whole graduating class I taught, only two people out of the whole graduating class came to me for advice for the construction industry. Everybody is computer oriented now and laptops and whatever, all the other technical stuff that they called. The construction trades pay well, and in general they're very secure, but the younger generation doesn't seem to be interested in them."[#59]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Qualified, yes. What we try to do is, we try to find people early in their career and then train them. But it's been interesting really trying to find people. And this isn't necessarily the Commonwealth of Virginia's problem. There's just a shortage of people in cybersecurity so we have to train and grow our own. I don't think the community college system is the way to go, which is an unpopular view. I know a lot of the workforce development has gone through the community college system. I think that there needs... If you really want to help out in this area there, it has to be easier for kids to get a four-year cybersecurity degree, because a quick certification program through a community college isn't going to give them the information. It's not going to give them the background and the information they need to be successful. Essentially, what they're going to do is think that they get the cybersecurity certification, they're going to go out there, because these are hot item careers, right? What ends up happening is, they end up getting stuck at a help desk. Well, you paid all that money for the certification and it didn't really help. Now, if there could be a, especially for minorities and women that are extremely underrepresented in cyber, if there was a grant program to encourage them, to help offset their tuition to go into these programs, that would be phenomenal. Then that in large, creates other cyber companies, and that's what we really need. We need more people in cyber. There are many four-year schools in Virginia that have what's called a National Security Agency certification, NSA certification. If you go through their four-year program, you're pretty much guaranteed a job. That's JMU, George Mason, Virginia Tech, does VCU have one? I think those are the big four that immediately come to mind, oh, ODU. If a kid goes through those cyber programs, they are costly as any four-year institution is but when you get out of it, you're pretty much guaranteed a salary of \$78,000 a year because there's such a shortage. And even the worst-case scenario if you get a job at 60,000, how many college graduates are starting out at 60 grand?"[#60]
- A respondent from the availability survey stated, "The labor shortage is going to kill [business]. People are too lazy to work when they get more at home on unemployment than they do from [working]. It's hard to hire engineers due to high demand and scarcity. Finding qualified professionals as employees is very difficult. I think the promotion of STEM activities will assist in this deficiency. We've had challenges acquiring skilled labor. Everybody is hiring but no one wants to work due to unemployment. We have a tough time finding qualified engineers. We also have a tough time finding access to growth capital. The hard part now is finding people who WANT to work. With the stimulus that took place a few

months ago, people said they made more money staying at home and I could not get one person to fill out an application."[#AV]

- A female respondent from a focus group for trade associations stated, "The things that they are facing is, one, workforce. Either in the skilled trades, they cannot find enough workers in the skilled trades in the particular region that I work in. I am a regional employee. I cover the Hampton Roads region, Eastern Virginia. It's a lot of shipbuilding and ship repair. So it's very difficult to find enough welders. They're always in demand. That's been an ongoing issue. It's a national issue, but it really impacts the state and this region. Also, tech talent is hard to come by. This region and the state competes for tech talent but loses a lot to Houston, Silicon Valley, Boston, Research Triangle in North Carolina. So workforce development is the biggest issue that my clients have. So they're just a lot of skilled trade positions in this area, and there just isn't enough talent. And the talent that exists, they're aging out. They're in their fifties, sixties, they're approaching retirement. And there's just not a lot coming behind it. We've found, we think, that there was a period of time where the skilled trades really wasn't pushed in K through 12, leaving us a gap between the amount of people, just the quantity of people that are eligible and trained and ready for those jobs that are needed. We've also found that it's not a Virginia, exclusively Virginia, problem. We looked at other places like Biloxi, Mississippi, or Detroit where the auto manufacturing industry, and they too have some of the same issues. So it's about developing a pipeline, but it just takes time. The other thing probably is about the workforce record. To get a clearance, you can't have any infractions on your criminal record or it's very difficult."[#FG3]
- A respondent from a public meeting stated, "You cannot get an engineering degree in civil, mechanical, electrical or fire protection engineering at any Virginia HBCU. That's a problem for minorities entering the profession."[#PT3]

6. Working with unions and being a union or non-union employer. Seven business owners and managers described their challenges with unions, or with being a union or non-union employer [#2, #13, #23, #28, #30, #35, #48]. Their comments are as follows:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Yeah. I will tell you, on some construction, on a lot of the projects that we work on that are federal grants, we use Davis-Bacon wage rates in the specifications, so contractors need to use them. And I've found that in our area, the Davis-Bacon rates are almost exactly the same as the private sector rates, and so that is not a barrier. When you go across... We're close to West Virginia, so you go across the border, and the Davis-Bacon rates are, like, three to four times higher than the private sector rates. And that causes a lot of problems for them. But our Virginia rates are solid, so that's not a problem."[#2]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We don't even say the U-word here in Commonwealth."[#13]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "The company has had one union issue in the past with a contract that was supposed to be a union workforce but a union decided that they thought that they should be able to represent our people. And later, it was found in court that the union had no right

over them. It still cost the company significantly for all the legal fees. So we avoid them as much as we can."[#23]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Like Yokohama Tires that I've been at for 15, 16 years. They don't even shop us anymore. But it used to be, we go in there on a shutdown period and repair potholes in their concrete and that sort of thing. Well, their union saw, and so the unions then they got a maintenance department that is union also. So the union started raising Cain with some of our simpler work out there, just mixing up some product, pouring into a pothole, something their maintenance staff could do. So that sort of small work at Yokohama was withdrawn from us and they do it in-house because the union raised Cain."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "We haven't used them as a source necessarily for getting employees, but as far as training and providing benefits to the employees that we have that are members of the union, it's been good."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I would prefer not to because it's more of a headache, pretty much someone telling you what to do. Actually, it would kind of not give businesses a chance because there's always going to be someone out there not following the unions and all that stuff, and they're going to be underbidding."[#35]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "I was mostly unionized, and that was back in the '50s. But I had to give it up, because you couldn't be competitive out in the open market. I did that because we had a lot of industrial work at that time, and they insisted on us being union to come into the industry. That requirement is no longer there since Virginia has a right-to-work law. Now I understand our dear governor wants to do away with that, and that's going to be another great impediment to business in this state and also to our ability to attract new industry."[#48]

7. Obtaining inventory or other materials and supplies. Twenty-two business owners and managers expressed challenges with obtaining inventory or other materials and supplies. [#6, #9, #11, #13, #18, #19, #21, #25, #26, #27, #29, #30, #34, #42, #44, #46, #47, #48, #51, #52, #53, #54] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "When I'm bidding a job, the material suppliers quote me, the material calls for the project, and then I buy from them once I'm awarded the project."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "But what I've found is I typically stick with one or two of the local dealerships, so I have face time with them. We know each other. I know the personality to these places. They know the equipment that I have, because I've purchased it from them, it's serviced through them. They're all the same brands. So parts do interchange a little bit more frequently and things like that. So I typically use one or two suppliers as far as equipment goes. They are also the same people that I rent through when I do need rental equipment and things like that. And that's been a godsend to be honest. Just because they're really good people in both

areas, both franchises. And then just good equipment too, I think. I got lucky in that sense as well."[#9]

- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "So there's a couple of local places that we can get a lot of stuff that's been another huge impact with COVID is getting supplies. Everything first happened, it was, we use denatured alcohol to wipe down and clean vehicles prior to applying decals. And it just became a lot more expensive, hard to get, just a real struggle. And there were several other things like that, that we deal with that became more difficult to get as well. And then shipping times, there's no guaranteed shipping times right now. And so something that we used to get in two days might take four days. So that could put a burden on the schedule as well. Because you're ordering material for a job that's on Wednesday and they can't tell you whether or not they can have it to you or not. So then you got to push the job back and stuff like that. So that's had a pretty significant impact, I guess, as far as that goes."[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We look for other small or minority businesses, woman-owned businesses like ourselves, to purchase from. In fact we've gotten a number of businesses onto the SWAM [program]. We'll say, 'Have you considered doing this,' and 'Have you thought about that,' and they're like, 'Oh, we didn't know anything about that, thank you.'"[#13]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Yeah, so we had the issues about a year ago. Remember people driving? And they were talking about the 18 wheelers and how... Do you remember all that going on in the media? How long are these drivers driving? So when they put those restrictions on it, I'd already felt it. Yeah, because you know they have those time things where the 18 wheelers can only drive a certain amount of time now and all that, so I'd already seen a delay but I had already adjusted my company to make that work. Here recently, I have noticed my suppliers haven't been carrying all of their stock. Yeah, once the coronavirus shut down, they might have had two people working at the shop. I would say about a month after coronavirus, because they never truly shut down because they were construction... However, they were very limited and I would say about a month afterwards, I started noticing an issue on my materials. Which, it sucks when you need that one little screw or that one little elbow that you're short, or it's damaged or whatever, and they don't have it and they normally would. I've made it work to where I've put my orders in basically two weeks ahead of time so I should get my order a week ahead of time that way if there's any issues, I'll know and not wait 'til last minute. . I don't have a quick turnaround anymore. I have too much money out there. I'm not collecting. It's not turning around as quick anymore because of the material issue, because I'm getting the material ahead of time, making sure it's right. Then, I got a delay and then it sits there, and then I got to install it and then I've got to pay it. So, I've got two or three weeks of materials just sitting there and it's because everything is special order now. The stock is limited. Very limited."[#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "[The Commonwealth should] help a small business financially to fund the front end of the project. Some of this furniture takes eight, to 10, to 12 weeks to arrive. So they're asking a small business to come up with \$600,000 to fund this project or this furniture. Manufacturers aren't going to take that big order without upfront money. And the state will

not help the small minority women owned business with that. So, it's kind of a catch 22. If they're not getting solicitations, those are the three reasons why."[#19]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I think the big thing that we've found or I've found is if your suppliers... And they're very aware of what's going on and they're not in the dark. But I think if you keep them apprised as far as what your needs are and when you're going to need it, that helps as much as anything. I think you pick up a phone and call a guy and want something tomorrow and it's... You don't know that he's going to have it. So the big thing is just making sure that everybody realizes, 'Hey, we need this next week or next month or whatever,' and make sure they're aware and make sure that there's not any issues with it."[#21]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I'm being very careful balancing getting the new equipment, with not spending my money, you know I mean in reserve. Because of the software we use it's a very expensive software, I'm telling you it's like one company that produces and sells it and it's a monopoly and it's crazy what they do. You have to finance it. I usually try to wait until I absolutely have to upgrade and this was the year. thankfully, we had assistance from the PPL and the EIDL so that I could do it. If this had been last year or if I hadn't gotten that assistance, I don't know what would have happened, because I really had to upgrade my equipment at this point. I don't know that I would have had the funds to do it. I mean, I guess I would have had to borrow more money from high interest rate companies."[#25]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Well yeah because if you don't have the resources, you can't obtain equipment."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "As far as me, I would think more updated equipment."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "as a small business I always have issues with financing and trying to obtain equipment that I need because you can only get certain loans and my situation is a little different. We were involved in a flood over 20 years ago and six feet of water inside our business here in our little town. The entire downtown area flooded. All businesses were destroyed. And for 20 years we've been trying to build back from that but we had to get an SBA loan and for 20 years they're first on all of our mortgages so you can't get additional loans because they won't release it. So you know, whatever we do we have to pay for it outright. So without that kind of capital we don't do, so we will not grow because of it. I have equipment right now I need to buy to further advance my printing department for personalization items for customers and I can't do it. Someone I could call to say this is where I live, how do I find the offices and the buyers in my area?"[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Really, that goes back to the financing. Not actually finding the equipment or finding materials or supplies."[#30]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "Aside from the prices of parts and these cars' costs being through the roof, that's my only problem. Parts [are expensive] it's abnormal, nothing has changed. Some we

have to order because of our area, others it's no big deal. Just the pricing of used cars and trucks. We purchased mainly all of our inventory at an auction in Richmond area. And it's just been super expensive because right now people aren't buying new, they're buying used now so my prices are sky high."[#34]

- The non-Hispanic white male owner of a majority-owned construction firm stated, "Some things have been getting a little scarce, because shipping routes are still not actually open, you know what I mean? Everything we get is from fricking Japan or China."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We are struggling to get parts. We're basically having to beg for equipment. There's only certain allocations they send out. You only get so much pieces per week or per month. We're just now getting equipment that was ordered and expected for delivery as far back as June the 5th. We picked up two system Friday that we've been waiting on since June 5th. The manufacturers have sent us notices that... What they're seeing, because naturally they shut down their factories down too, they had run a stockpile between January and, let's say, the end of February, first week of March. When we first started, yeah, it was tough. It was tough because our credit limits were low. A lot of times the systems would cost more than what our credit limits would allow and stuff like that. So it was tough. But I had a good relationship with a lot of the vendors. And they worked with us."[#44]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "When you first go out in the auto sales industry, you don't have any cars, other than your personal cars, to sell. So, I thought I'd come up with money up front to go to an auction, or a wholesalers, just to buy inventory. So then you can sell it. And then hopefully you then buy something that's going to sit on your lot for a month. Hopefully, you got something that's going to sell fairly quick so you can make a little bit of money. And then move on and continue to make money. That's a big thing there. that's an expense. You need tools, shop tools, to car lift. You need, for example, AC machines, you need alignment, to be able to perform on auto repairs. Even though we work with all that stuff because we were mechanics, but we used the other shop's equipment. So like an alignment machine, by the time we were done, that's the \$20,000 piece of equipment, and that's on the cheap side. [Equipment] and stuff. And obviously we know how to do alignments, but we don't just have a \$20,000 machine sitting in the garage waiting to open up our own shop."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "[It] would be a good idea is if the Commonwealth took it upon themselves to furnish materials for their contractors. It would be a pro for the contractor, it would be a pro for the Commonwealth, and it would save them an astronomical amount of money because all these contractors are doing is purchasing these materials, and they're selling it back to the Commonwealth at a 20% markup. Where the Commonwealth could go straight to the source and purchase the material themselves, and save that money, and it would give smaller contractors like myself, it would be less financial burden on us to take on larger projects, or just take on projects at all directly for them, where it would bring contract totals down as far as value, because you are taking the materials out of it. It would be easier to obtain bonding and stuff like that to be able to get into this work"[#47]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "Our son was just telling me this morning that the price of lumber has jumped like crazy

because the major suppliers like Lowe's and... Oh, heck, what's the other big lumber and building supply out there? I'll think of it in a minute. They just can't supply all these guys that are out there freelancing right now. It's just gotten to be tremendous. And so not only is the price of lumber being run up on us in the middle of our jobs, which is very atypical, typically we can hold a price through the course of a job. But he was having to renegotiate this morning with an owner for that very reason. The price of lumber on the portion we were doing up in Charlottesville, and we've done most of it, had about a \$25,000 increase in the last month or so."[#48]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I had to spend... [on a new software], which is what most of my clients use for their design, that's two grand a year, for just a minimum one that I use. You can spend more on it, if you want, but that's all that I usually need. One thing is, and I could definitely see this for a younger person starting out, maybe a minority starting out, 'I got the skills,' but have got less money than I had, because I had a second income with my wife, but say I didn't have that. Okay? I could definitely see where the states and the federal government could work with companies like [a different software] and things to have some sort of a license that is cheaper to start with. You know what I'm saying? They're charging me basically almost as much as they're charging some huge company or whatever. And I use it very sporadically. So those costs, it's like, yeah, you need this but I've got to pay for it. You can cancel and renew it, cancel, renew it, but if you keep it, they keep the lower price that you originally got it with. So they're keeping you on that. The carrot's still there. They're holding that carrot there. And I'll use this on a project for maybe a month or two, and then I don't need it for the rest of the year, sometimes. So I've got it. I paid for it. And then I'll get a project like, they may call tomorrow and say, 'I'm sending you to the plants. We need you to look at,' and I need it. So having something like that available, either through the supplier or whatever, the vendor... I know that the state of Virginia used to do something with Bentley, because they have a design software that everybody uses. And they used to use that through VDOT, where you could get certain licenses through VDOT for the companies working there, so that if you didn't have... especially for a small business. 'Okay, I'm not going to buy it, but I can use it through the VDOT website,' or something. So things like that could help."[#51]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "We have a lot of vendors that we have to work with, and these vendors, what they do is they are also checking your credit. Even for me to go to, let's say a subprime lender, say hey, I want to submit applications for the customers that come in and want to finance their vehicle, even they are looking at our credit. So if you think you've already applied for this loan, that loan, it's going with the vendors also pulling your credit, between the two of them, the score goes down. We don't have bad credit, we have a lot of credit, and a lot of inquiries, so it's like, nope, you have too many inquiries on your credit. So I was like, well, I can't do this under the... and even with some, with the business, they pull your personal information. It was truly a balance, because you're being told you have too many inquiries, and your credit score is low, and it's low because everybody's pulling my credit, even this lender who wants me to submit applications to them so they will get the money are pulling my credit. So that was a big challenge. So it was like okay, now I got to select one or two vendors that I can deal with, let them pull my credit, and I have to wait several months, not let anybody pull my credit, so that kind of limits the product that you

can offer because you can't have multiple... as a car dealership, you want to have a couple of subprime lenders that you can submit applications to for your customer. But if all of them are pulling your credit, then it's pulling down your score. It does not help when you need funding for your business. Because they're looking at my personal stuff. So that was another big challenge."[#52]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I haven't had any big problems with that. I don't need a lot of supplies. Sometimes I need a new computer. If I do, I get one. I would say that hasn't been a big problem. Although, it's getting harder. I still do some hand drawing, and it's getting harder and harder to find what you need to do the hand drawings. They're just not making the stuff anymore. It's a dying art. I have an electric eraser, you can't buy the erasers that go in it anymore, unless you go on Amazon and pay \$10 for one eraser, which is crazy."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Maybe some available grants, or some loans without high interest [would help me acquire inventory]."[#54]

8. Prequalification requirements. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Eighteen business owners and managers discussed the benefits and challenges associated with pre-qualification [#5, #6, #13, #14, #21, #27, #28, #29, #30, #35, #37, #43, #47, #49, #AV, #FG1, #PT1, #WT5]. Their comments included:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "That has been a bit of a barrier, yes. And that's experience, like I mentioned previously. Well, I would only suggest that that qualification... There shouldn't be a distinction between private and public work. If you have the experience and it's not public experience but you have the knowledge to perform an operation or a task, it shouldn't matter if it was done in the public sector or private sector. I believe so, yeah. Because what seems to be the determining fact there is paperwork and if you have the ability to file certain paperwork or if you've done that previously as opposed to... In my mind, if you can cut out that requirement, if you've done public work before and understand our format, then you may actually get better more qualified people at a better rate or a better cost."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Others might face barriers coming into the industry of being qualified"[#6]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "The prequalifications are the very ones, the standard set by the Commonwealth of Virginia. Then from there it depends on, what do you call it, basically site-specific requirements. The federal government has a tendency to dictate people being of a certain age and things of that sort."[#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "It always does. I mean the hardest part about starting a new business is you have no experience or expertise. And until you get that experience and expertise no one's going to give you a contract. So we did, when we first started was we bid so low the customer, the prime contractor had no choice but to say he look, we're going to make a ton of money off

these guys, we need to bring them in. I mean, the first few years we made no money. We lost a ton of money, but we knew that we needed to get that past performance and pre-qualifications to bid on other contracts and that's why we're where we are today. You're not going to make money coming out the gates. You got to figure out, again, like I mentioned the strategy is important, but you got to figure out how to keep it going, keep it afloat. Most small businesses, they're out of business within the first three years."[#14]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I talked to the girl because it's some of the stuff that they were asking for... And I understand, a company like ours that's been in business for as long as we've been. And when you have to basically document that you are an existing business that... I mean, I can understand maybe they want an FCC document or something that verifies that you're in business, you're in good standing, whatever. And then, I mean, it got to the point I mean some of this stuff was just... And I finally called and I said, 'What is this about?' I said, 'We've been around here forever.' And they said, whatever this new system they got, they said, the initial certification is pretty lengthy but they said when you renew the next time they won't be that way. So I'm waiting to see so. But it was extremely, well, I guess frustrating wouldn't be the right word. But it just took a lot longer to put everything together than I think it should. if you've got a company that's been around as long as we have, and have a history of that we have, I think there should be something that would benefit and just say, 'Look, you've been in business for however how many years and we're not going to ask you to go in depth as far as the history of your company and the structure of the company and all this kind of stuff.' It's just something that I think it would be a lot, as you said, a lot simpler way to get prequalified or get established with an agency than what they do right now"[#21]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I did initially the first five years because sometimes on a State contract, they'll say, 'Only engaging installer with five years' experience.' But no, that's not a factor for us now."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Absolutely because they require you to get a certification for this and a certification for that and it doesn't really apply to me because I'm a small company so I'm not going to go out there and spend thousands of dollars to get some sort of certification I'm not going to need for a job I'm not going to get. Because they don't look at me because I'm so small."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "No. Generally VDOT requires a pre-qualification to be a VDOT-certified, which is an annual process."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah. Initially, when I look at it a couple years ago, the contract firms and the requirements for bidding on certain projects mandated that the company had been in existence, some of them for five years, 10 years, stuff like that. So, they weren't very friendly to startups. So, if you don't meet the requirements, you don't have no chance to... Most of them were run that way."[#35]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "So either I do that and take the job, or if I don't have the personnel or the

certifications to do it I leave it alone. It really is about research. If there are qualifications that need to be met, you do some research on exactly how to obtain the certifications or have...and I've got an employee who has the certification, and what exactly is that that they're requiring. The devil's in the details, and there's not a program, there's not a thing you can do other than to be attentive to what it is that your customer wants. And they give you the definition, a set of certifications, go look at the, the certifications, go look up the requirements so that you can figure out what you need."[#37]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I got a woman-owned business that I represent, it's been in business for 12 years. They employ about 212 people and they're cyber security experts, and Virginia will not look at them. Because they don't have the resume in Virginia government and... They have overcome the procurement vehicle part, which is a license to hunt, but because everything is controlled so tightly within one organization, they don't have the resume. And they never will because the attitude won't let them develop a resume. the attitude is we just go with what folks have known in the past and don't try new If I'm going to get shot, if something's going to fail... if something's going to fail and bullets are going to be shot, I'm going to be able to cover my tail. You can't get fired for hiring IBM."[#43]
- The Native American male owner of an uncertified MBE construction company stated, "My work being 90% subcontract work, I don't get into that a lot, but I can tell you it would be a barrier if I was trying to get pre-qualified for a job today, it would be a barrier."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "A lot of times they'll write the RFP or Request for Proposal in a very narrow window that only one or two contractors can fit. Then they'll put that on the street and say these are the specifications, so no one else outside of this, if you don't have this certification you can't do the work. No one can prove it per se because it happens behind closed doors. But when it reads in a certain way and you look at it like or okay they want such and such to do this work, so I'm not even going to bid it. I've run into that quite often. A lot of times it is written for the big communication companies. One of the common things they'll say is, you have to have at least 10 employees. What difference does it make, as long as I can get the job done in a timely fashion? So if you got to have 10 employees, that knocks out the typical small business owner or the minority business owner. I was just saying it's not a lot of minority owned companies that has seniority in the communication industry because you really don't need a huge crew to do this work. But the bigger companies, they're spread so thin doing five and six different projects at the same time, they have to have 15, 20 technicians. Whereas a smaller company like myself will have four or five, typical and will run the project. When they're writing policies or quotes, things of that nature, don't go by the boiler plate. A lot of times I'll see the boiler plate. I'll say that and I think you know what I'm saying because you laughed at it. Say the city of Richmond will put out an RFP for a contract. Then Chesterfield wants to do something very similar, they'll just call Richmond up and say, 'Hey, you guys just did this right? Hey, can you send me your contractor over?' What they'll do is change it from the city of Richmond to Chesterfield right across the top. Everything else is boiler plate straight down and you're reading it like, I've read this before. Then you go through some other quotes you're like, oh this the same thing Richmond gave me two years ago. So if they can write it, it's okay to use the same thing. It's just don't write it in such a manner that a minority company cannot respond to a bid. The requirements, this is one of

the main ones they get smaller companies. They will have like in our certification, Dixie is one of the certifications that is really high on our list. Most of your small companies, they'll have one Dixie certified technician. It'll be written in the scope of work, everybody's got to be Dixie certified. I don't think there's one minority owned company that has every technician Dixie certified. That's only reserved for the larger companies. Because it cost so much to have a technician go to school for Dixie and get certified and keep the certification up. So, hypothetically speaking, when I got my certification back in 1999, it cost my company, which was Verizon, I believe it cost them 5,000 per technician. But when you're Verizon and your rate is a hundred something dollars an hour, you can afford to do that. The smaller companies cannot."[#49]

- A respondent from the availability survey stated, "[Virginia] is not geared toward small business. There is a consolidation of all business and industries, and the prequalification requirement for small business is unfair. It is pretty difficult to be considered as a subcontractor because most of the bids require that you've done the same kind of projects in the past 5 years. If you are a new business, basically it is impossible to bid because you don't meet the requirement of having prior experience."[#AV]
- The Black American male representative of a business development organization stated, "But in order to build a bathroom, or have a track record of building a bathrooms, you got to build one?"[#FG1]
- The owner of an MBE- and VBE-certified professional services company stated, "Minority veterans and the knowledge and experience [are] the two areas around technology and in particular IT, cyber and things of that nature. So the question I have, is why does Virginia not honor that experience and knowledge when it comes to looking at past performance? ...I worked for some of the major agency, three letter agencies, and different companies that I know in the Northern Virginia area, we have worked and have done the work and can prove we have done the work. So why doesn't Virginia honor that?"[#PT1]
- The female owner of an MBE- and WBE-certified firm stated, "Same qualification criteria are established for large companies such as IBM and Deloitte as for small businesses, which puts small businesses at a significant disadvantage e.g. 3 prior projects of similar size and complexity. The entry criteria for small business could be 1 project of similar experience vs. 3 or similar size and complexity."[#WT5]

9. Experience and expertise. Fourteen interviewees noted that experience and expertise can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification. [#4, #5, #6, #8, #10, #13, #17, #18, #19, #20, #21, #27, #35, #AV] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I think what impacted, the difficulties I'm having, it's very difficult to actually... understanding of the contract requirements. Yes [training or a mentor would be helpful]... Yes, definitely. Not necessarily, maybe some guidance or some readily available resource would help. I went to the Old Dominion University offers classes, but they're not... What's the word? They are not offered enough, I should say. There's one today, you can't make it, then you have to wait for another one a good amount of time for another- Yes, more

frequency and more areas for you to get those help or the resource for assistance. Yeah."[#4]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "But what we've noticed is without having a good marking team in place and somebody that understands how the paperwork process works on the public side it has been virtually impossible to go after public work. We've tried. We put together RSPs and RSQs, but we've not been successful with maybe very few exceptions that are like private/public partnerships. And then, not understanding necessarily the process. For instance, maybe military type work or federal work. There's a very specific process that has to be gone through and taking that on and understanding it. You have to have a consultant group that does that for you, because it is a complicated process and much different than the private sector. So to break that barrier and get into that process the first time around is very difficult. Because it seems to me that there's a lot of dollars spent in learning someone's particular process or, like I said, paperwork as opposed to actually performing an operation or a job to the best of your ability."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "An RFI is request for information after the job's awarded, and that's when there's a conflict with the plans and specifications. That comes through experience. Once again there's no school or class you can go to. That's just being a part of starting off as maybe a foreman superintendent, moving up to project manager, a project engineer. And through that time, you gain that experience. An RFP is a request for proposal, which is pre-bid and that is a whole different game. And that takes a tremendous amount of experience. And no one had to determine the cost to build a project and prepare the proposal. And there is a specific skill set, and that is a taught skill set, as well as being able to prepare a proposal. But most of that is through on the job training and promotion, just through a normal course of your job."[#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "No. I think sometimes the RFPs and quotes, the proc quotes are not as bad, but the RFPs are very labor-intensive, and you have to put in... they just want a ton of material. It's not unusual for people to spend \$30,000, \$40,000 to respond back to a lot of these quotes and it's not always very clear, the instructions, and they just throw out... there's 20 copies needed to be done with tabs and just all that kind of stuff for a small company, who doesn't have a marketing department, that's pretty difficult to put together. I think they should streamline the process somehow where a lot of the stuff that they asking for is... I don't really think they need that into the thing. Full resumes, that really tells you, and most... all companies have full resumes and they want it all in these formats. And I think if they just had some... they could streamline the process, that would make it a lot easier."[#8]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "And I think it's adversely affected our poor communities the most, because when you don't have the family structure to learn how to maintain a checkbook, maintain a budget, work a job and get a degree when you don't have the family support, you don't see that in your family, then the public school system is the only place you're possibly going to learn it. And they're not teaching you that. They're teaching you what was needed in 1950. And we still need that as a base, but we need to add on top of it. And so anyway, sorry, I

went on a little rant there, but yeah. Basically learning how to learn and to being flexible are all critical life skills."[#10]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "[It's] challenge filling out government contract requirements, because you just have to have, you're either doing it right or you're not, and doing it right is something we put a lot of effort into. Well, it was the training, and then it's only providing one service. By being very specific, we're always targeted, and by doing certain aspects of our industry regularly and routinely and consistently, you build experience, and as we built experience we had a more interesting story to tell, and as our firm hit five years and 10 years and 15 years and became very good at certain things, you target those things. So we became really known experienced specialists in our targeted field."[#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "The level of paperwork and the intensity that it takes to do it, you have to have people that are highly skilled at it and if they're not... I've missed an RFP before because they missed one block or one this or something and it's just like corrupt. The level of that paperwork is tremendous. Other than... I don't know if you just do it but that you have the... sometimes entities will do the here is the past performance criteria and you're the low bidder or you're the low three bidders, you will be expected to turn this in within five days or within three days. That means that everybody, if there are 10 bidders, not everybody is doing all of that paperwork. Or you've got it, you're prepared to do it, you're close but you haven't had to go to that extreme effort. The thing is not everybody understands, bid day is about as crazy, as crazy. You know how your house is on Thanksgiving Day and you're having to get all of the food ready and everything all at the same time and get it on the table right at three o'clock when everybody is going to show up?"[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Of course, the other problem is nobody wants to use me as a sub because the minute I get that experience, now I'm their competition and they know it. So, nobody wants to be the mentors. Nobody wants to take me under their wing, and I'm used to it because I come from residential and I fought my way through men, so it's not a problem. I'll get my answers. I don't care but those are the issues I've been having. I want to build and I want to work next to strong women, and I'm telling, we can organize, we can multitask, we can be five steps ahead. Women are just diverse, and I think that the government all around, even the federal, states, all of it, we have something to contribute in every aspect of it and I am a person, I'm a walking talking truth of that. I don't need the financial. I need the guidance. I need the expertise. I need the knowledge. I need the education. That's what I need. I need a mentor. I need somebody to say, 'Hey, this is the skills you have. Hey, this is the agency or this is the...' You know what I mean? On government stuff that says, 'Hey, this is what they're looking for. They need this, this and this built and here's a contractor.' Or that person to say, 'Hey, I know how all of this works. Here's where your efforts going to be most beneficial.' I don't need any of that. All I need is for somebody to say, 'Hey, these are the agencies that are going to use you.' Because I don't need to go after the agencies who do agricultural. Okay, I'm not a farmer. I'm not going to build crops. So, I don't need to go down that route. Somebody that's just experienced with experienced business owners that are really trying to go from residential or commercial into the government. They don't have anything for that. I do know that there are certain programs, and I don't know enough... This is where I

need the education... somebody that's going to say, 'Hey, these are the programs that you qualify for. You need to go and get them.' Because I do know I'm a leader in women in construction, so it's much like a need because if I don't fulfill those shoes or if I don't go after those then the government looks at it like there's not a need for it. The experienced companies that are trying to go specifically after government work, there's nothing. Nothing. They have it listed as small business, large businesses. Another thing I have found, I don't know which person does what. They have Office of Small Businesses. They have Business Management. I'm talking city and state, locally. They have Office of Small Businesses, Small Business Utilization, Minority Business. Well, which one do I qualify under?"[#18]

- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "Locally here, when I got the government contracts, I didn't have a mentor. I didn't have anybody. So, kind of learned by flying by the seat of my pants when it was just me. But these very, very large submittals do take a lot of knowledge. And can't say that we had any formal training or mentor on that, we just sort of put our heads together and figured it out. And each and every one was better. And now, it's like a well-oiled machine."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "That's huge. That's next to financing in a business, past performance is probably your most important. If you don't have that past performance, then you can just about forget about bidding on it as a prime contractor. You've got to get the experience from working as a subcontractor to a major client for instance, if you don't have that you don't have past performance you're not going to do anything and the government and you're not going to succeed. You've got to build that over time. I think the most important thing is to make, not make, but require the major businesses in the state, like mine, I'm not a major business but I'll be talking about the big guys like General Dynamics and a few others, require them to bring on small businesses and they do, and get that past performance locked up as a subcontractor. Like if the state of Virginia would give some kind of incentive to those big businesses, doesn't have to be mine it could be anybody else, I mean, we're talking about the big guys, Booz Allen, General Dynamics, the shipyards and stuff like that, but if they could make sure that those guys get started with past performance. That would be the biggest benefit to small business. If you don't have the past performance you may as well hang it up, you don't even bid on it. I don't see anything else that would stop anybody from going out to a contract except for past performance, as a person are you going to have the right personnel too. But no, that's all I can think of."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "But some of these websites, and trying to get documentation, and trying to get answers and that type of thing, it gets pretty... It just goes on too far. I don't know what the answer to that is from the standpoint, it's better than [Microsoft] word, I guess. But it just seems sometimes it's just too rigorous to go on a website and try to find information that you've been looking for."[#21]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's kind of hard to explain, because I know I went to one of the things [trainings], in Norfolk one time on the tunnel thing they had was coming to Hampton Road. We went to one of the seminars for it. It was broken down how it was going to be paid and whatnot. So I

think if they would call me ahead of time and train me on how to go about to being on the jobs or something, it'd be more helpful also."[#27]

- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah, especially other companies who are not familiar with doing business with the Commonwealth, not familiar with where to start and what website to go to and all that stuff. So, I believe if the Commonwealth, I guess, for every business formation... This is just an idea I just came up with, actually. If they can send out welcome pack, detailing how to do business with the Commonwealth, just basic recommendations and tips for new businesses. I guess, if each company registers with the FCC, we can just [get the FCC] to mail out a packet, just a little envelope packet, just introductions, recommendations, and recommendations to become a successful business in the Commonwealth. I think that would be a lot helpful to all these businesses out there."[#35]
- A respondent from the availability survey stated, "The state needs to do a better job at rating the class A, B, and C contractors. This takes away from the contractors that go through all the schooling and training. It's difficult to go after public work through proposals because to win that work you've had to have done that work before. Small businesses do not get credit or are perceived to not have the experience of the nationwide firms. Despite the owner who has experience who is on every job site. It takes five years to get established. It takes work. Branding and expanding is very important because you have to grow. You can't stay in one spot and grow."[#AV]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Eighteen interviewees discussed whether licenses, permits and certifications presented barriers to doing business. [#2, #3, #6, #9, #14, #15, #16, #18, #21, #24, #26, #34, #44, #45, #46, #51, #55, #AV] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, it is, yeah. We have to have professional licenses, and what we do find... Again, when we get to be world rulers we're going to change this. So one of the things that is a little annoying is that each state has professional licenses for, say, architects, landscape architects, et cetera. But what's funny is, I mean, and a lot of them have reciprocity, so if you're licensed one place, you can pay another state \$200 and they'll license you there. But then each state has its own way of keeping up with all that, et cetera. And there probably really ought to be more of a national licensure, because I... Bluefield, West Virginia is just 90 minutes away, but I can't practice there unless I get completely registered there, when the truth is it's the very same as the license here. So a lot of the architecture and engineering professional licenses I really think could be expanded to the national level, and it really would benefit everybody."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "The only thing that I'm aware of that came up one time was the SWaM certification renewal. We had a couple of construction contracts that were bid, and it wasn't us personally, but we did some work for [VDOT] and the Office of Diversity that issues those SWaM certifications was backlogged and behind on approving re-certifications. And I think they were behind months. I don't know if they had a staffing issue or what, but that's the only thing that I know of that was an issue; VDOT almost couldn't award the contract

because that certification wasn't in place, and the person had sent it in months before they did that job and it had not been processed."[#3]

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Okay. A license is issued to an individual or a corporation to perform work. And then a permit is an instrument that allows the government to monitor and inspect the work. It is kind of like two different things. In order to be licensed you do have to have knowledge in the industry. You have to take an exam and that's just showing that the individual is competent to perform the work. Now to do the permit, is a lot easier because you've already shown that you are licensed to do the work and therefore the entity is allowing you to work in their jurisdiction to perform the work. Does that make sense? I have not heard of there being a problem. Once again, if one can share the aptitude and have the resources, then the license is automatic. It could be, because yeah I have a class A, B, C. Yeah one would start off with a class C license, which allows you to do work say up to \$50,000, I think is the threshold. And then B allows you to go up to the next level maybe a million I forget. And then A is unlimited. Nearly every company would have to start out in a C and as you have the financial resources available or the bonding capability, then you could keep increasing your license status."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Licenses and permits. So permits for example, you have to go through whichever county you're in. So in my little world here, there's Botetourt County, so you work directly with their development office. Roanoke County. If you are in Roanoke City they have their own thing within that. And then Salem City is the same way. Vinton is the same way. Franklin County, which is actually where the business is located, they actually... It's interesting because when I was in Roanoke County they required a business license. And then when we moved, and Franklin County is an adjacent county, but when we moved to Franklin County I went to go ahead and set all that up again and they didn't require it. You're kind of registered with them, if you will, but there's not a fee, which I thought was crazy. There's always a fee. There's always a fee somewhere I feel like. So yeah."[#9]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "ITAR is International Trade and Regulation and rules for providing technology from US businesses to other countries. And we were able to get all the licenses. I mean, it cost thousands and thousands of dollars, but we couldn't sell our products and services outside of the country unless we had these licenses, but now we do. And honestly the state of Virginia is such a great state to do business. The Virginia economic development partnership, the EDT, and all the development programs they have in place have allowed us to get access to the right resources we need to sell internationally and that's what's so great about Virginia."[#14]
- The Asian American male owner of an uncertified MBE professional services firm stated, "So my partner is a licensed architect, so we as a firm we need to have licensed architect in order to seal the drawings. For certain drawings, like for commercial project especially, if you want to get building permit from the city, you need an architect to put their seal on the drawings. So an architect has to be licensed in the state you are performing the work. So my partner is licensed in three states, that means we can take on work in those states."[#15]

- The Black American male owner of an MBE-certified construction company stated, "We have to have them, yes. It is mandatory. You don't work here in the Commonwealth and not be licensed. Now, which I'm so thankful that they're doing, what the Commonwealth here is trying to do, is do like the state of California, that's what they're trying to do. And it's working in some cases, but before you can get a city license, usually anyone can go down and get a city license, but now you cannot get a city license now unless, you got to show them proof of workers comp, general liability, and a Commonwealth state contractor's license. You cannot get a city business license unless you've got those three. Because now they're controlling everything, they know everything about you now. But it's cutting out a lot of [station wagon] people. Which I'm glad they're doing it; you should be licensed to work. It's the same, you have to have your license to go downtown and get a permit. If you ain't got it, you're not going to get a permit. When I go to other states and work, the first thing I've got to do is go down to city hall, whichever state I'm in, and get a permit. And they will not give you a permit unless you've got a state license to work."[#16]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "To travel. Now, I'm just trying to go after the work and literally I'm so new to it, I had to get all my certifications. That took me a while and then NAICS, trying to get all my certifications, I was on the backside trying to really get on a job at the same time because there's so much out there. There's no resources."[#18]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I mean, and I know this is COVID driven, but I mean, it's, like I said, you can't get a hold of the DMV right now."[#21]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "When I have difficulty, I believe it's because I was using an employer ID number that had expired, literally, because I never did anything with it. And I was still giving it to potential, and to companies that I contract with, and then they had a tough time paying me. So I had to go to a bookkeeper to find out. I told her, 'This is my situation,' and she asked me a few questions. And she said, 'You know what? You need to get a new employer ID number.' So I did, so that's all set. I registered [with the State Cooperative Commission] in 2015. Because I stopped working independently for a while, three years, I didn't do anything within that, then realized that I was supposed to renew it every year. So I just ending up paying \$400, because I had to reinstate it."[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "As a matter of fact I think Virginia needs to have more enforcement on licensing. I don't know if this is a huge problem here but it is a problem here, I just don't think it's being treated as a problem. But in New Jersey, illegal movers are a huge problem. Where you have a lot of people who just go out and get a truck, and throw up a sign that says moving company. They have no license, no insurance, no office, no anything. They just hustling. And there's actually enforcement up there to catch those people. And they're given heavy fines, and sometimes if there's enough time they will be charged criminally. There's no enforcement here for that. So you have a lot of companies who are just out here hustling and giving the industry a very bad name, and they're lowering the prices. So let's just say I'm charging \$150 an hour, well I have to do that if I'm fully licensed, insured, bonded. I have a lot of overheads. But the guy who just goes out, rents a truck and is just hustling.

They don't have overheads. The only overhead was the truck. And so they can dilute the prices and now charge \$90 an hour. Well to 90% of all consumers, you're just looking for the best price."[#26]

- The non-Hispanic white female representative of a majority-owned goods and services company stated, "The biggest thing is that DMV is closed, but now I do my thing of if I pull a vehicle, I put tags on it and do everything right here. That hasn't really concerned me as our business. Now, personally, my husband's a tow truck driver, and we had to wait an extra month to get an appointment to be able to get his CDL renewed and that was a headache, but our business has not encountered any issues with that."[#34]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "That's always a barrier. And every locality's different. As far as our regular licenses with contractors and stuff like that, no. The state's always been great about that. The annual license and stuff like that, they need to have some kind of classes for that. Because we like to add our gas license and maybe put plumbing and electrical on with our contractor's license. The additional forms and training for that would be very helpful because they do make it very, very difficult."[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I've asked can I get my project manager to be certified as the PMP. Well, that's an expensive undertaking. Like, over \$4,000, I think. And guess what? That's what everybody that wants us to bid with them wants somebody in my company to be a PMP. And I can't afford that right now. And so, that's a real barrier for me. And it's frustrating because how come I can't get that approved? And I have to fill out all that paperwork. And they're supposed to give up to \$10,000 a year for help."[#45]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Also getting your Motor Vehicle Dealer Board License takes money. It takes time to apply for"[#46]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Permitting. It's like a yo-yo, depending on administrations. And all these projects, they have a long design time, a long permitting time. And what happens is if that spans administrations, either within the state or within the federal government, things can change two or three times during that permitting and design period. So these companies are reluctant, the bigger projects, they're reluctant to go and even start them because they're going to spend a lot of money and they don't know if they can ever get something done or whatever. I'm sympathetic with the environmental issues about getting more clean energy, but you got to figure that you could build solar fields all over the place and windmills all over the place, and you could be doing it for the next 20, 30 years and still not fulfill the need for that. So there's a balance, is all I'm trying to say. Depending on what administration's in there and how people are reading things, this goes back and forth. It's like a yo-yo for these companies. So it's really hurting. What we need is just a stable kind of, 'Okay, this is the way it's going to be, and it's going to be this way for the next 20 years,' so everybody knows."[#51]
- The Black American male owner of an uncertified MBE professional services firm stated, "I was a Class-C because I was a construction manager, so I never could bid anything over

10,000. So I just recently became a Class-A, so now I'm good to go. The whole DPOR class deal is crazy to me because I remember when I first got it I was so happy, and I went up to Fredericksburg or whatever, took my class, whatnot. And I was thinking at the time, 'I've got this cash.' And then somewhere in 2016 the licensing requirement changed. And I understand you want to make sure you have somebody who can really do the work. I had a commercial builder's and a residential, and they changed the classifications. I used to have the one combined, a builder's license. And then they changed to residential builders and commercial building contractors. No problem, don't mind putting in my work to get mine. However, I was like [how do I pay for] the books for the dog gone test, anywhere I go are over \$2,000 just to get the books. And I remember the lady saying, 'Hey, you can return it for half.' And I said, 'Lady, I'm the breadwinner in my family. I carry a lot on my shoulders. I've got a lot of bills to pay.' I couldn't find anything to help me with that, no grant, no nothing, no library that carries the books to even just study for the dog gone test to be able to stay in business and get certified to do what I want to do. Some kind of grant money for these testing centers or these prep centers, for the exam prep centers or for people so they can go out and get the materials to realize their dreams, because just starting up is very expensive. Just starting up from getting the requirements you have to have for insurance, bonding, the materials just to take your test, and then just to even register at the city is \$400. And they you're having to pay whatever you're having to pay out every year just to maintain your license. It can add up really fast."[#55]

- A respondent from the availability survey stated, "A lot of construction workers do NOT have the proper licenses and certificates or credentials and skills. I am state licensed. It's difficult to start a business [in Virginia]. The license requirements are tougher in Virginia than anywhere else. I am also licensed in Pennsylvania and Ohio. I am ready to hand over my business to my sons, but they don't want it because of the regulations and requirements to get in business in Virginia. I think Virginia tends to be a difficult state to get started in because of the trade certification and license requirements. It benefits established companies like ours. For newer businesses there is a lot of red tape starting out."[#AV]

11. Learning about work or marketing. Twenty-eight business owners and managers discussed how learning about work is a challenge, especially for smaller firms. [#2, #4, #5, #8, #9, #11, #13, #14, #17, #20, #21, #27, #29, #32, #36, #41, #45, #53, #54, #55, #57, #58, #60, #AV, #FG1, #FG4, #WT11]. For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "This is something that's been much better recently too. I mean, since the invention of the internet, it has been easier for smaller firms to make themselves known and to make themselves... sort of level the playing field. With a few hours' work, I can make our firm look every bit as good as a thousand-person firm. And so that has tremendously reset the playing field. And so that's made things easier for small firms like us to compete. Now I know Virginia, some of the colleges have banded together, and they will have these open houses, especially where SWaM firms are invited to come and visit. I know UVA does these, and I believe Virginia Tech has started to do these, and maybe VCCS. And so the good news is, I haven't ever felt that we were hurting enough to go, but I've always known that they're there. So to me, that's a real barrier breaker. If you really would like to invest a day or two to go, it's there,"[#2]

- The Black American male owner of an MBE-certified professional services firm stated, "There's no barriers, except again, the same issue. There's not many resources besides the internet. You have to use the internet a lot to figure it out. Sometimes people [want] talk to someone face-to-face or if you're going to an office and say, 'I need help with this.' It's a lot easier for people to talk to someone face-to-face rather than just Google."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "That's a good question. I'm not sure how I would overcome that other than bringing on a staff person. But again, the state does a good job of typically listing out available projects and those lists can be researched easily by an office manager or staff people. It doesn't actually have to be somebody that's marketing the company I don't believe."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "A little bit with the state, yeah, I would say so. I mean, have the EVA, which is not the easiest program to use, again, it's maybe if they had it where it would generate when they had something that kind of matched you, that they sent it to you. It's very rare for them to have projects that deal with our side of it, so it's not something we do on a daily basis, go look at it, you know?"[#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Well, to be honest the most, let me say this, the most effective is actually my CPA. My CPA is an amazing guy and he does some, outside of tax season he does some construction projects and what not. Like small stuff, he'll flip houses and things like that. What he'll do is he'll call me and initially, kind of sampled my work for some projects that he was doing, and then started to distribute my name, and the company's information, and stuff like that. I use social media, but I'm very, I would say, I'm very limited on it. When I first started, obviously like I said it was fairly lean and just trying to get going. I was using all avenues. So I started a Facebook page, and put it out there. And I've gotten leads through that and met some people through that, and I do have followers and things like that. But I still think the word of mouth initially through my CPA, and then I think it grew. Then other contractors. It's not that big of a world. So names are passed around and I fit into kind of a niche that I'm pretty good at. I'll just put it that way."[#9]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "We have a couple strategies of targets that we go after, but when we're solicited for an RFP, then typically we're following by their guidelines of what it is that's needed in order to submit the bid. And then that's where we have a really strong backgrounds where it's past performances of doing other large projects like that that make us pretty reputable and can include those to give them a better idea of what it is that we're actually capable of."[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We just market to them continuously and regularly."[#13]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "We got all the right systems and little vetting things to be able to do that. But that takes you got to have the time and things like that."[#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "They'll say, 'It's online, go look.' No [personal contact]. You're missing that human touch I think."[#17]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "No, no. I think, it's all up to the individual hiring and marketing firm. And I think, we did it the right way, we didn't grow too fast. You can grow too fast and really it could be convoluted as you grow. That would be a disaster to a good firm, but you've got to measure what you can do at the time you can do it. And the marketing, we never had a marketing department until now. We just started one after 15 years. But I think the way we grew is as fast as we could grow and not get sidetracked."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We just get constant requests for proposals or quotes. And it's just, I mean, the only thing about is you get them from all over the state. And we don't work all over the state. So we just... I mean, if I had to take a guess, I'd say I probably get on average a half a dozen requests a day, to quote work. I've had people call me from Tidewater, from different areas in this state and just say, 'We can't find anybody to quote this work.' And I just said, 'Well, I'm sorry. I just, I'm not going to drive the state to do work.' But like I said, that's not an issue as far as knowing where the work is and knowing when it's coming. Like I said before, your actions speak louder than words, so to speak. If you can do the work and you prove yourself and you develop a history of being able to do the work, that gets you more work than anything."[#21]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yes, ma'am. That has. Kind of like throughout me riding through the day or something, I'll see a construction site or something going on. Or I try to go on Facebook and try to surf the web and see what's going on, and it really don't give me enough information right then what's going on, because you really have to go out there and see what contractor and find out who's the prime contractor out there and try to get in on it. If I could get my name out there to a lot of big contractors before they come in or when I first, if I could find out more when the job's coming up and my name already be in the kitty or something for to get a bid or try to get a bid in on it before it starts."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Competitive, constant advertising, social media advertising. That would be the key. Because all they see on TV is Office Max, Office Depot, those sorts of things. I can't afford to do that kind of advertising so my growth is going to be limited because I can't advertise like I should. I don't have people who can do the social media advertising and so forth even for my local area. It's just my sister and I and we wear all the hats so there's very limited time to dedicate to that. Plus we don't have the funds to hire somebody to do it, so it's advertising is what I need. But they would need like I said for example the social media advertising. I need a person who can come in and take pictures of the products. Because I also am a gift shop now, I've expanded to be a gift shop to help with more walk in. So I need someone to come in, take pictures of my shop, pictures of my product, come up with the advertising slogans and so forth, put it up on social media on Instagram and Facebook and so forth, reach out to the local radio station and go in and do advertising force there, work with them to put that together. I need somebody who can come in and do that and I need somebody who can teach them those things because at my age those sorts of things are beyond me. It's not something I'm trained to do personally. Absolutely because being the age I am, I am not familiar as to even how to contact them. They have these little reports on eVA that you can go through and you can find people that

are buying your supplies but everybody buys office supplies. it's kind of hard for me, it would be nice if they did it by geographical area. For example, say okay [a county] has these offices with these buyers and this is the buyer's contact information. It would be nice if they broke it down a little easier for me to find so I can focus on my particular area. a ton of small communities within five, 10, 15 miles of me that I can certainly service with the office supplies but I don't know who they are. I don't know how to get in touch with them. I don't even know how to find them."[#29]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We get calls. We get emails. We get mail for all kinds of different companies selling services to, or saying they have software to make sure you get contracts. Really, again, there's no services. Or through a lot of interviews with a lot of different agencies, you quickly find out that their practice is about having you sign a service contract with them. They may or may not find you contracts. So basically they're mining the multiple databases out there that send you contract opportunities. it's really figuring out their eCommerce and how that system works. I do see that the way that these are set up, whether it's the Federal government or the State government. It's really hard, as a small business, to stay on top of those systems. How they change, where the opportunity's coming from. Sometimes it's frustrating. As you know that big business has a team of people, an entire probably office full of people, that their job is to look out what's happening, what's happening politically. That's a huge disadvantage. Because we, as a small business, just don't have the time or the resources to dedicate to somebody staying on top of those. So that's a big fear of mine, is the eCommerce and how bids are being sent out and how we're becoming aware of them before they're gone and we never knew they existed. I think it would be really great to have like a small business liaison. Through the agency that's using their system, it would be really nice to have a small business liaison, or a department that would be available both for training, putting out information, making us aware of what we need to be aware of. Because it's an awful lot of information to mine through to figure out what's applicable, right, to you."[#32]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "You certainly have to hunt the work down. I'm in a niche area, right? So just having a website alone is not near enough. You have to talk to them, show them the benefit. You really do have to get in front of them to show their process. Whether it's a state or local, they need to gather people together because no one person is the decision maker, right? So let's say I'm going to pitch a capability to the state of New Mexico. Well, you're probably not talking to the Governor. You're probably talking to some emergency management guy. Him alone can't make a decision, so he brings in three or four of his people to [inaudible 00:27:58] and then you maybe have to come back again. So it takes a lot to get out there and get people brought in to do that. So there's sometimes a barrier in the sense that when you get to a decision maker and how do you get these decision makers. No matter what your socio-economic class, that's a difficulty, right? You have to be able to get to people who have decisions that they can hire your company. If you just wait until somebody puts out a wanted ad or a solicitation, a request for information, or a bonafide RFP, sometimes that work's already been ear marked. In addition to that, sometimes already being ear marked for a company, you don't really know just from what you read, what do they really need? So how do you get together the winning proposal?"[#36]

- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "I basically been spending personal money to advertise. And that's the thing, trying to find a market. That's what I'm saying. I've been trying to find a market. I've given them and talk to other people and trying to but the people who I give them to sell, they keep theirs. They don't want to send them out. And that's just if you... if you got one, maybe you'd understand. But it's, 'Oh, I'm keeping is for keepsakes.' So it's not the people I know that I can get to market. And then the other thing is advertising. Suggestions about your marketing. And that's what I got off of, I want to say that IRS website or the state. I can't remember that. But how to market. Ingredients for your marketing. And that was real helpful."[#41]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "You know, if you're from very, very basic information in terms of creating your own website, how to use Panda to create your own graphics quickly. do think that would be helpful for other small businesses, because it took a lot of time to get my website up and running and to get a logo created, and you know, just the basic type stuff."[#45]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Usually public work is advertised, and a request for proposal is put out or something. I guess if there was maybe more of a direct, if there's a listing, that there's a more direct advertisement, or notification that this project is available, so that they know to go for it. Because larger firms, they'll have a marketing person or somebody like that, and it's their job to hunt down all these things. But a small firm like me just doesn't, there's no way they'd have the time to search for advertisements and stuff, and all these different public entities what their projects are. I could spend all day doing that, and I would never get any work done."[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I could do more advertisement. And sometimes my children even tell me, 'Mom, why don't you do more advertising?' And I'm like, 'If I did more advertising, I may end up being overwhelmed with too much work, and I would have to grow, which means I would have to get an office space somewhere and pay a fee to occupy another space.' And that's something I don't want to do because I enjoy working from home."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "I don't have a good marketing plan. I could probably use some help in that department. I talked to a friend of mine down back home where I'm from in Georgia who is also refocusing and starting his business, but he's doing it full-time. And he recently told me, 'Hey, there's a program at one of the colleges down there that partners with small businesses and the school,' the school down there. So the kids are learning and marketing, but they actually are doing his marketing plans and marketing your company and all that. And it's under the direction of other businesspeople. So, that was something that I was thinking, 'Man, I wonder if they have that up here or access to that,' because even though I go through SCORE, the mentors are great, but a lot of times they're on the list as a mentor for a business plan. However, that guy is booked-up. And you get a mentor, and this mentor, he might be a nice fellow, but his field is totally different from what you're trying to do."[#55]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think one thing that becomes a big question, especially when you run a small firm, is 'advertising.' If you're a small firm, you really don't want to hire somebody who's just your PR person. I don't really know how the State would help anybody with that. It's hard to have somebody who... There aren't a lot of people who are great at putting together a set of drawings and figuring out details who's also great at presentation and is out there soliciting work."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Right now we don't have really the resources to put ourselves in front of people who are in the... who are decision makers in the government. So we're not actually going to them and saying, 'This is what we can do.' This is what we should be doing, actually, but we don't have resources to... Have a person who is in sales to be able to go and reach out."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Well, there's an Information Security Conference that's put on every year through VITA that we participate in. Unfortunately, we are precluded, which I think is important to note. Small businesses are precluded from participating in the big IT conference and the Commonwealth called COVITS every year. The reason that we're precluded is twofold. One is, it costs \$10,000 for a business to attend. They used to have a situation where if you were a small business, especially if you were SWaM or certified SWaM, you could pay \$99 to attend, and it'll allow you to network. Then they got a new conference provider to stop that, because they said that it was cutting into their margin. So what you find is that the biggest IT Conference of the year, you're getting only large businesses. Because how many small businesses are going to write a \$10,000 check just to show up and to sponsor? And then on top of it, you have to pay everything as far as marketing and all that so by the end of the day, it's like 12 to \$13,000. They have pretty much gamed the system for the larger businesses because smaller businesses can't participate at that price tag. And that's where a lot of the IT people are coming to find out about new services, they're coming to find out about what's changing in the market, to make relationships in the Commonwealth, and small businesses are automatically excluded from it. The ability to, especially in state agencies, the ability to directly market to those agencies, especially in IT. Now, you'll talk to some vendors that are like, 'Okay, we do special tangible goods,' things like that. It's not really precluded. But if you were an IT and VITA finds out that you are directly marketing to the agencies and campaigns and things like that, you can be kicked off the contract."[#60]
- A respondent from the availability survey stated, "Most of the time we find out about bids when it's already too late to bid. Marketing is really tough and making connections as a small business is very difficult. I haven't gotten any subcontracts because there's too much competition. [Primes] have so many small businesses that are trying to partner with them that it's a struggle. As a minority contractor I have limited access to information about when the bidding process begins and limited access to information about the bidding process I live in Richmond and I have found it difficult to find solicitations from entities within the state even though I live in VA. I would love to do business in the state of VA but I have not yet been able to do so."[#AV]

- The Black American male representative of a business development organization stated, "It's not who you know, is who knows you, which kind of circles back to that networking piece right there, I tell them so you can know everybody you want to. But if they don't know who you are, you're the Invisible Man or the Invisible Woman in the room. So make sure they know who you are, and be prepared to present what can you do for them as far as that goes. And we stress this by having things such as a capability statement, something very, a short snippet of what you do, when you can provide and those kind of things right there too. And we tell them that, take advantage of every opportunity there is from a networking perspective, because a lot of deals are made outside the office. They're made in other places other than the office, so I tell them join me group, you want to let him know who you are, present yourself. Be very aggressive is not going to come to you. You're going to have to go and hustle and make things happen like that. But I gave a long answer. This by listening what everybody was talking about. So much just to a lot of minority owned businesses, take advantage of it. Take advantage talk to people."[#FG1]
- The Black American male representative of a business development organization stated, "People do business with people they know. So it's a matter of, especially for the state of being intentional for individuals to be able to get to know, me and other minorities if we talk about minority participation."[#FG1]
- The female owner of a WBE-certified goods and services firm stated, "So trying to build those relationships, there are a lot of construction projects where everybody, they've already got their circle. And it is very hard... you're right to say, 'I'm out here. I can do this. Give us a shot.' Especially in our industry, because our piece comes so late in the game that they want the guy that they already know is going to spend the time and dedicate the crew. So it is hard to break into that circle. I've been to a number of them [meet the buyer events]. ODU is always there and they aren't buying what I sell. They self-perform, they don't have any desire to hear about new stuff. And it makes me wonder if that's the best place for me to spend my time. I only have so many hours. So do I go to another vendor fair at the Convention Center and meet buyers that may or may not want what I'm doing? ...I think the biggest thing we just need to do is, is really, if there's a way to let us know what those opportunities are. If it was automated, 'Hey, there's a buyer out there looking for cards. Cards.' How many state agencies probably buy these? And I've never sold a single one. I've never seen an opportunity to sell a single one. They're buying them from somebody. But yeah, if we could automate something to where it was easier to go out there. eVA's great to let me know that something's been posted, but seven years in, I've never seen anybody, not a city, not a state agency that said, 'We're buying access control cards.' They're bundling that with something else or they're just buying it from the person they already have. Again, that's just an example, but... It's just letting us get our hands on and what those opportunities are. If I don't bid, then maybe I can at least get the bid review. That's another thing that might be able to be automated."[#FG4]
- The Black American female representative of a business development organization stated, "I think a caveat to that might be that when you're having small jobs [below the public bidding/notification threshold], if a bulletin board is created that just says, before they place an order for something, I don't care if it's copies, before they place the order, there's 24 hours they have to go post it on the bulletin board. So at least you'd have an opportunity to know that that was happening."[#FG4]

- A comment from written testimony submitted to the study team stated, "Vendors register in the Department of Small Business and Supplier Diversity database and e-VA under NIGP commodity codes that they do not provide goods or services in. This causes unnecessary staff time loss by government and vendor staff. Vendors also do not register under all the codes that are applicable to them. This may cause the firm to be missed in receiving the issuance of a solicitation or a buyer /requestor at an agency searching for nearby firms not have the firm show in the search by code. Vendors fail to remove codes no longer applicable when they make changes to lines of business."[#WT11]

12. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Eleven interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#2, #5, #6, #15, #17, #18, #20, #35, #51, #58, #WT11]. Their comments included:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "More and more to design and build really quality projects, the old-fashioned way was, you hire your design professional to design it, then you put it out for bids, then you hire a contractor to build it. And with more complex projects, people have discovered if you do a team build, where you hire everybody up front and then get them to cooperate all the way through, you actually get a better project a lot of times. Now, there's a law on the books in the Commonwealth that municipalities are not allowed to procure work that way unless they have an engineer on the town staff. Well, that doesn't really make a lot of sense because... I don't know why the engineer on the town staff would make a difference one way or the other. Larger colleges, like UVA and Virginia Tech, I think William & Mary, have all procured work in this kind of team build, and it works great. And even cities like Roanoke are really wanting to do it, but they're not allowed to because of this kind of glitch. I mean, it seems to me the idea of having somebody in the town hall that knows how to procure, your procurement person might be able to do that without having an engineer's license. So it's a little bit of a... it's kind of a quirk that's a new one, and we discovered it quite accidentally once... I think we had a client who procured us this way, and then found out later they couldn't, so we kind of had to undo the whole thing and go back through the process. So anyway, that team build has got a little bit of a booger in there. If you wanted to make it a little bit more competitive and easier for towns and for design professionals, you could take that part out of there that says you've got to have a design professional on the town staff to procure stuff this way."[#2]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "The only restrictions that I ever see in bidding a project is experience requirements. And sometimes those can be onerous. The owner just wants to make sure that there's such a huge risk in the project that the owner wants to make sure that the project can be completed as required, but that's on the very high level. I mean, very, very large projects on a smaller level. I don't know any restrictions that are really prohibitive. If you can show that you are responsible and responsive and have the experience, I haven't seen where any low bidder wouldn't be able to do the work, I don't know those restrictions only on a higher level."[#6]

- The Asian American male owner of an uncertified MBE professional services firm stated, "I guess our concern is really, you need to provide a lot of information, like fill a lot of forms and it's a consuming process. So if we are not confident about our qualification then we are very hesitant to bid on a project. I think, simplify the process and also I know there is usually a Q&A session in the bidding process that if... How do you say? Maybe in some way make it more flexible? So it can feel like one little mistake and it will make you not qualified. Does that make sense?"[#15]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Yeah. They have criteria in there... we ran into one, it ended up being a city job but they put them in there and then they'll say, this is how we're going to do things, this is how we're going to do things and then it's like okay low bidders didn't meet it but they're low, we're going to take it."[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I will say as far as that's concerned, they've [been wonderful. Anybody I've had a bid on, because I don't want to have my bid thrown out because I don't have the logistics. And me being so new, I didn't have that go-to person to check over my stuff. If the government would give me that, then I'd have a mentor just so I didn't look stupid, but I didn't so I wanted to make sure it wasn't going to get thrown out for something stupid, so I called the procurement officer and I met with them and they went through my stuff and they were like, 'Yep, everything's good.'"[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "[Some contracts require a] fee per hour, which is not a pretty good system for the contractor, cost per six feet has always been a good program or a firm fixed price. But when the fixed fee is a fee per hour and not people going, I mean, for dollar amount percentage that's when it gets to be a problem for the contract. What you can try to do is try to do the job as economically as we can. It's getting tougher and tougher out there with the government rules and regulations, as far as costs go."[#20]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Well, I have talked to other startups, and one of the major qualifications or barriers that they have come across in terms of government contracting with security is, on some of the contracts the government is wanting to see, I guess, a certain amount of money in the bank before they even talk to the firm about the contract. So, for a startup, that may be difficult. So, I believe if there was more contracts focused on startups rather than these large companies, that would be better. Yeah, that goes back to what I said earlier in regards to that, because usually they're pretty much filtering out the small businesses and only getting attention from the big businesses. Small businesses and startups do not have a chance in competing with that."[#35]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It's been good, except for the few that we had the fight over the warranty on professional services. Well, and engineer can only do the work to the best of the existing knowledge and standards and according to all the codes and stuff that exist when you do it. Okay? And it's a professional standard. It's been that forever. It's like, okay, say I'm not into the building design. Every once in a while I have to do something small, but say I was designing buildings. And my part of it is the structures. I got to design all that stuff going

vertical. But then on some other part of the project is a geotechnical guy who goes and says, 'Okay, this foundation's good. This soil is good for building on it.' And I design the building, and all of a sudden, in a year or two, all of a sudden the building starts slanting, cracking because the soil's not right. Some of the contracts, they want you to... They're going to sue everybody. And of course if your contract says, 'I guarantee that this work is perfect and it's not going to...' Nothing is perfect, when you're in engineering. Everything you do is to the highest standards you can do it, the best of your ability and best of industry standards, but you can't... You're not God. So in that case, if you say you warranty it, then you're going to end up paying some of that, even though you had nothing to do with that part of it, or you're going to pay lawyers, and when you're going to defend a client, sometimes they want you to pay their legal fees too, especially municipalities and stuff. It's like, 'I can't do this.' With a private owner, you can negotiate those things out fairly easily. They'll just put you in contact sometimes with their attorney, and you just hash it out. If you can't hash it out, you just don't take the work. But with municipalities, they can't change those things- They're like, 'This is all we can do. This is the contract, so if you can't sign it, somebody else will.' And people take that risk, and that could kill a company my size. If you take a risk like that and something happens that you... For instance, if you have anything in there that says, 'I'm available during construction to come out and answer questions, review things,' if you have that in there and you go out on a job, and somebody has shoring up, like for a ditch, and the shoring is not correct and there's an accident and somebody gets killed, and you saw that but you didn't... Well, it wasn't in your responsibility. You're not responsible. You don't have no authority in this project. Well, they can sue you because you saw it and you should have said something."[#51]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "RFP is written for specific vendor. So some people in government knows some people. People in government, they know certain companies. And they write in a way that they will be able to earn it and nobody else. That's one. And secondly is... I don't see that there's a fair chance for the newcomers like us."[#58]
- A comment from written testimony submitted to the study team stated, "Vendors often do not read the special terms and conditions attachment in solicitations or in awarded contracts. This causes them to be declared nonresponsive in quotes , bids , and RFP or receive major score reductions in one or more categories of an RFP. It causes issues on awarded contracts that may lead to termination of the contract or at least consume an hour or more of government staff time reviewing the matter and responding to it."[#WT11]

13. Bid processes and criteria. Seventeen interviewees shared comments about the bidding process for agency work; business owners or managers highlighted its challenges. [#4, #5, #6, #8, #14, #18, #19, #20, #21, #24, #37, #58, #60, #AV, #FG4, #PT2, #WT11] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "It's like you're requesting for someone to do something for you, but when the person is highlighting what you need to do, you're like, 'Oh, I wasn't sure what I want [anymore] and I'm going to change it.' And the person says, 'Go and redo the requirements that you want.'"[#4]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think the biggest barrier probably for our success in going after public work is there's not an opportunity for that first time entry. For instance, when you're going after work, if you don't have experience in public work, then there's not the opportunity to say, 'Hey, we're looking for first time folks coming into the public sector.' Most often they want you to have a proven track record of having public work. So there's a catch 22."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Yeah. I actually taught a class. Man, that's probably been eight, 10, eight years ago. Yeah. Eight, nine years ago to a group of minority businesses on how to get involved in the bidding process and showed those independents where to find the opportunities and how to prepare a proposal to a prime contractor. The information is out there publicly, jobs bidding. All of the prime contractors are required to solicit proposals from small minority contractors. The problem I see is we do not get the responses back from those small and minority-owned businesses to participate in the bidding of the project. We have to open up our offices to those who are interested. We have to give them access to the plans and specifications. And it is so rare that someone calls me and say, 'Hey, can I come by and make plans?' Or 'Hey, can you help me put this proposal together?' I would welcome that- Yeah. And any one of my competitors would welcome that. It's all about competition and if someone has a low quote to us, we're going to take it. We're going to go with it. And we would welcome the opportunity for those small minority-owned businesses to participate more."[#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think there is some... since our costs are very low, they just throw them out because we're not in line with the big firms that we're competing against and stuff, so that makes, I think, a big difference for us."[#8]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "It takes way too darn long to bid on things. The process is in my perspective ridiculous. I mean it costs too much. And we know a lot of customers that know what they want and they know who they want and because they know who they want and they know what they want, but they still have to do a bid is just a waste of government time and commercial companies' resources and time. And if they know they want Acme Inc to do this development, but they have to go out and get five bidders, well guess what four of the bidders have basically wasted their time and their money and their effort. And the government's time and effort because they got to review five proposals. But if they know Acme, they want Acme, well shoot give Acme a contract and stop the nonsense of oh we have to be competitive. Well no, it's not competitive. You already know who you want. Again, that's just me looking and spending and spending millions of dollars on bids when the customer already knows well, we're going to give it to Acme anyway. That's been the gripe for me for 20 years."[#14]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I'm never going to get something on this and I'm going to be completely honest, I will never get a state job and here was my first taste of how. I went and bid on an epoxy concrete floor and it was state through eVA, and it was great. I actually drove to Charlottesville, Virginia which is three and a half hours away to take my infield sights because I wanted to make sure that

when I bid this job, I was correct. What I didn't know because I didn't have any guidance, or what guidance is offered by the state that's free is not... They have so many on their plate, they don't have the time to really give you the expertise that I needed. I went, I bid it, I took my rural infield measurements. I priced it out, I subbed it. The whole nine yards. So, I submitted my bid. Well when the bids were released, there was a person that had the bid that won it and I looked at their price and their price was half of my cost and I was like, 'How is this possible when just for me to do the epoxy floor, just material cost is what their price is? There's no way.' There was a clause inside that stated price it exactly off this square footage, and they were off 2000 square foot... Off this square foot and then there's \$150,000 change order clause. So, me not knowing, I priced it there and then this other bigger company came in, low-balled it because they knew there was \$150,000 worth of change orders. Another thing is I can't compete with the people that do it in-house. I think the people that are posting this stuff, they have no idea of construction, by the way. That's something else. I don't know what the government needs to do but they need to put something in place where there's a middle person so when I'm calling and asking questions, I'm not talking to somebody that has no idea what I'm talking about."[#18]

- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "The bidding process, there isn't really anything wrong with their bidding process. It's their awarding process. Again, I feel very strongly that they should stay within the State of Virginia and support Virginia based businesses, versus going out of state. And the large projects are so competitively priced, they're going low price, no matter where the company's from, whether they have any experience from the company. Some of these companies are working out of their garages. They're not paying state and local taxes. And so, I feel that they should support state and local businesses and not go out of state. And financially, they need to back... If they want a SWAM based small business, they need to support them financially. And they need to provide upfront money for products that are being procured, once an award is made."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think the biggest barrier to bidding a contract is with the lack of knowledge by the bidder. And I think it probably should be some kind of a... I don't know if you want to become a small business and get through this, some kind of class or some kind of a program to teach these small businesses how to bid, I've seen a lot of bids come in there's a lot of people in it, keep a lot of people have them and it's just horrible. They didn't know what they were doing and that's bad, spending all that time and money to bid something and you don't know, and you're going about it the wrong way. And I think a lot of the companies, young companies not a lot, but a few fail because of that."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, I was talking to an attorney, we took a contract, it was a company that we had not worked for before and they sent us a contract and we took it to the attorney to have him review it before we sign it. Of course, he reviewed it and the first thing he said, 'Never sign this thing.' And I said, 'Well, if we're going to play the game, we're going to have to either do this.' And he said, 'Well, I'm just telling you.' He said, 'It's all set up one side.' He just said, 'Everything's in their favor.' And we've worked for a lot of national contractors and large companies and we've not ever had any issues to speak of. We sometimes feel like that the small companies are the ones where the problems are. In a lot of cases there is they're

trying to do something or they get involved in stuff that they have no business getting involved in. So like I said, we've run into that a few times, but these major national contractors and stuff, we've not really had any issues with them. Unfortunately, there's people out there that will take advantage of you. One of the issues that small businesses, they're so anxious to do the work and they're so anxious to prove themselves that they don't read the fine print. They get themselves in trouble because there's things that, and they're not stuff that's going to break the bank. I'm not saying it happens all the time, but it's just things you have to be aware of, of all the mumbo jumbo stuff. There have been a couple of cases to where I feel like they chose another contractor over us and I don't know why. There again, this wasn't just a bidding process. It was a, you presented proposals and they interviewed you and went through that and then decided who to give the job to. Like I said, it's in situations like that, I can't, it's hard for me to say anything, but at the same time they're spending public money. So it's something to think about, I guess."[#21]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "That's one thing I haven't done yet. That's a little intimidating for me, because I actually solicited, once, something from ODU. This was about three, four years ago But I still had to put in the paperwork. It was just really frustrating because I felt really lost. I really didn't know. I was way over my head. So all the verbiage and the vocabulary and all of that, I wasn't familiar with. So it was a very, very intimidating experience, to be honest. I learned from it, but it was like, 'If I went through that, imagine someone who has more of a language barrier than I did.' Even if it [the paperwork] wasn't [available in Spanish], just having someone there to work with. But when you're doing this kind of work, it's me and it's them. They can't go out of their way to make sure that I've got all my ducks in a row. You know what I mean? That's up to me. So who do I turn to make sure that, that's done correctly? If I had somebody to say, 'Hey, I want to do this. Can you walk me... Can you help me?' A tutor or a sponsor or something like that, that can help you walk through the process the first few times."[#24]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Call it training. Just we are the police department, or we are the school board, or we are whatever, and when we send out a requirement, this is the way we need for you to answer our questions, and these are the things we are looking for. This is how you need to do it; this is how you need to fill it. In other words, some training for some of the businesspeople when they get into it, so they can answer the questions in a way that's understandable to the government. Because I've found that that's usually the problem of why I haven't gotten work, because I didn't understand the question. And understand how they need their answer to be delivered. They'll ask, 'we need a blue anchor for a boat,' and so you give them a royal blue anchor but what they wanted was sky blue so it won't work. The government would behoove themselves to have more in-depth communication on what they mean in their definitions. Of course it's usually in the documents, they'll explain what it is that they mean, but at the same time, I went for one thing down in Loudoun county, where we had each one of the departments of Loudoun county come in and say, 'this is how we like this done. This is how we like that done. This is the way you need to send your paperwork. We don't like how you fax it; you need to email it.' Those kinds of things. So each department head came into the meeting, and whoever would come, and there was a bunch of contractors in there, and so it was very informative. And the other part of it is to

get business owners to take part in that. The addition to that would be, at the end of it we've got 25 different contracts we want bids on, and out of those 25 contracts, 25 people who are the head of the contracts, are they bid exactly how they want and how they want it."[#37]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "The bidding process, entire bidding process and working through what I... I wouldn't say that this is the engine of the situation, but when I have worked through other companies, and how they get their contracts, and why we're not getting contracts, is oftentimes there is a contract is written, RFP is written for specific vendor. I didn't get the chance to really learn the entire bidding process. I had to just expose myself and to learn about it."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Let's see, the first one is I would say competitive contract vehicles that are favorable for these agencies and organizations to use small businesses, small plans. I will tell you that it has taken me a number of years, and I taught myself the RFP process. The contracts that we hold, they're because I wrote the bid package. And I fell on my face a few times in the beginning. If you want to talk about a huge barrier to entry for small women and minority owned firms, it is responding to RFPs, especially in the IT services area. We'll just take one VASCUPP contracts. If you respond to it, that's probably about 100 pages in documentation just to get the bid package. Then you have to break it down in different areas. Well, for someone who is bringing a new technology or just a technologist in general, that's a whole different skill set that they don't have. It's interesting because when I was starting out, I went to several of these classes put on by the state and at the federal level about how to respond to RFPs. Do you know that they were taught by procurement people that had never had to answer an RFP? There's a difference between putting out the requirements of what you expect to see as a procurement officer, and actually having to build one. don't know how much you can streamline it because so much of it is driven by the Virginia Procurement Act and these procurement officers have to have certain things in there. However, getting these classes taught by people that have actually had to write them and won business is extremely important, and maybe hooking them up with a mentor because... I remember when I starting out and you're trying to figure out, 'Okay, well how do I sell my company,' in 100 pages. And I will tell you this, there are many times that procurement officers will reuse verbiage from previous RFPs, and they don't check it and it doesn't make sense. Well, if you're not used to the RFP process, you don't know how to respectfully ask a question that gets them to correct it. What you may end up doing is spending a lot of time answering it incorrectly. Or, you may just say, 'You know what? Screw this. I'm not doing this. I'll go put my time somewhere else.' That's what I could tell you. All these years later, that having stayed up till 4:00 am and rushing bid packages out and... And we get a lot of compliments on our bid packages now. But it took a lot of pain to get there and I think that the agency can help alleviate some of that. And maybe part of it is sitting down with... Why am I just blanking on that? What is the great procurement agency for the Commonwealth? General Services. The General Services Agency for Virginia, DGS and saying, 'Okay, how do we either streamline it to make it easier for people?' Because I don't think these procurement officers want to read 100 pages, but at the same time, they have to follow the law. Well, the law and that's interpretation comes from DGS. If DGS can sit there and say, 'Okay, how do we make this more enticing for SWaMs to be able to bid on it

without having to spend all of this time,' that would be a big deal. Because here's the deal, they will come back and they'll tell you, 'Well, there's a quick quote.' Okay, you have a couple different contracting things. One is, the agency can award up to \$5,000, put it on a P-Card, nothing has to be bid. For many small SWaMs that may be fine, especially if you're selling tangible goods. If you're on a quick quote, that can be up to \$50,000. And that's just a simple, 'Hey, here's who...' Very streamlined process. The thing about IT is that most of these are contracts are multi-year contracts, which means that you're going to exceed 50,000 in total spend. Then those two mechanisms that may work for tangible goods do not work in IT. Well, I think like I said, DGS in talking with the agency and saying, 'Okay, for these types of organizations that are providing services that exceed 50,000, how do we streamline it? Is it a way of taking the quick quote and expanding it to larger procurements in IT? Is it the ability to take a VASCUPP contract and allow state agencies to buy off of them without having to go through VITA?' It's taking a look and going, 'How do we make it easier for these executive branch agencies and localities to buy without having to do one big contract at the state level, one big contract at the local level?'"[#60]

- A respondent from the availability survey stated, "It's difficult - I have to compete with major companies, that have very large contracts, and a large staff, that can apply for those contracts. I have small staff and am a small business. There's too much red tape and bureaucracy, just the amount of paperwork to fill out even to submit a quote. The scope of job was not clearly defined, that placed doubt in my mind what was being asked of us, making our bid higher. They were not straightforward. The government sector should make it easier for small businesses to bid on projects. I'm registered the in the eVA quotes system but I'm in the sporting goods business, and all the sporting goods bids are written by the previous winner or with a specific supplier in mind. It makes it hard to bid on because the items are so specific."[#AV]
- The female owner of a WBE-certified goods and services firm stated, "I think the burdensome part on the city and state has been the package that you have to put together and the risk, the burden of being responsive. And what if you miss a signature? And that the concept that they could throw out your very reasonable quote, because on page seven, there was a line in a paragraph that needed to be filled in and you missed it. And I get it and I've heard the instructor in all these different classes say, 'Well, if you can't follow the directions in the bid, then how do they know you're going to follow directions in the work?' There's a huge difference between missing a signature line or a fill in the blank here, or what's your contractor number? And again, that's buried in a paragraph with a line for you to fill it in. And we're trying to compete against somebody who's got an entire department that does nothing but read those. So we're doing this sometimes at eight or nine o'clock at night. And then we notice, all right, we need four copies of this and in hard copy."[#FG4]
- The owner of a professional services company stated, "[I] have submitted proposal finances where I have reached out after the fact for a debrief and I have not gotten a response back. And that has happened multiple occasions or they close it without approving, doing any approval of a vendor. So it makes me wonder what the reason was, that it was then awarded. There was no feedback loop."[#PT2]
- A comment from written testimony submitted to the study team stated, "Vendors often do not read the special terms and conditions attachment in solicitations or in awarded

contracts. This causes them to be declared nonresponsive in quotes, bids, and RFP or receive major score reductions in one or more categories of an RFP. It causes issues on awarded contracts that may lead to termination of the contract or at least consume an hour or more of government staff time reviewing the matter and responding to it. There needs to be some online options for vendors to receive training on how to prepare a proper response to an RFP. There should be a half hour option and a 1.5 hour option. I have had SWaM vendors receive an evaluation score as low as 40 out of 100 and 20 of those points were for being SWaM certified."[#WT11]

14. Bid shopping or manipulation. Bid shopping refers to the practice of sharing a contractor's bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process, or a bid, to exclude fair and open competition and/or to unjustly profit. Eight business owners and managers described their experiences with bid shopping and bid manipulation in the Virginia marketplace. [#3, #16, #20, #21, #30, #35, #44, #55] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Nothing that I can think of. I mean, there are some clients that we've tried to work with through the years who, on the term contract, have been known to call two or three people and get quotes, as small as those jobs are. And I'm trying to think of the clients, I don't even know that I can identify them. As small as those jobs usually are, it's really not worth our time to compete with other people on those. That's not been a lot. I'm trying to think of what clients that is, but there's been a couple. Most of the state clients that we've worked with, that has never been an issue. And once you're qualified, they call you and you work with them. I mean, if we got to a point where we couldn't agree on a price or they thought our price was really high and they went somewhere else, that wouldn't bug me."[#3]
- The Black American male owner of an MBE-certified construction company stated, "There's another company, an independent contractor, I've bid with those people for years. They even told me okay, we're going to let you give us a low bid on this [contract], put it in and [skate] it. I said okay, sure. Next thing I know, I see they're paint contractor, they have their own paint. They had their own painters up there so I called them up. I talked to [them], I said hey, you told me I had that contract up there, what happened? Well, budget went this way, budget went that way so we had to do it in house. I said thanks for telling me. Which I know what the deal is, so I stopped bidding. A lot of these contractors around here, they will sell your quotes instead of give you the job. Say for instance, we've been on a hospital, a hospital quote is like 42,000. I'm coming in at first place for it, then they've got their own paint contractors and they can tell their own paint contractor. When he puts in a quote, he puts in a quote that's way undermine and then give him my quote and let them do the job."[#16]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "But I don't see that in my industry. I think it's been pretty clean going forward, except for with the possible personalities involved I'll put it that way."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I know it happens. I know it goes on. It's been going on forever and it'll go on forever. It's one

of those things to where you, after a period of time, you quote people and you give them prices and you get the feeling that you're not getting a fair shake. So how to solve the problem, I don't quote them anymore. It's just something that if you're dealing with somebody that's unethical and is going to do that, that's his problem. You can't solve that problem for him. I mean, like I said, it's going to happen and it's just something that you need to learn and just be aware."[#21]

- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "I've had my price shopped by a prime to my competitor, but they'll always pick a price. That's the problem with... If I submit the lower number to a prime, then the prime goes to my competitor and says, 'Hey, they can do it for this. You need to cut your price,' I don't have any control over that."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah. Basically, the bidding procedure... We're a service company, security service. So, basically, I have seen contracts that have been won over a penny difference. Someone bid \$18, and the next person bid 17.99. So, the guy that bid 17.99 got the contract, which is over a penny. So, imagine doing all the work, preparation, submitting your proposal, and you get outbid by literally... So, I believe if there was an auction style or something like that, then people can see pricing. It's fair. And also, focus on quality, I guess. If the Commonwealth could give us a quality score as well, service quality score, I think that would be good. Yeah, we have gotten those quite a lot. Like I said, usually, we get some story out there, and then we learn through the customer, or the actual customer would end up with the same story. So, it does happen. There's a lot of that. And we call that number back, the initial number, and it turns out to be a security company that was shopping around for a customer, trying to get our pricing and underbid. And then the actual customer themselves would call and it'll be awkward. So, let's say I bid at \$20 an hour for a service [contract], everyone can see that I bid 20, and then the next company bids 19.80, and then I can bid again. Kind of like eBay or something. So, that would be more fair and more competitive, until the last person, I guess, wins the lowest bid, and the quality score can be looked at in the final process."[#35]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We released quite a few bids to Cumberland County up here through the school system and the administration building. And what they basically used us for is pricing, and then they got their good old boys that they always call to come do it. It's kind of like all insider-trading, but I don't know if that's way everywhere in the world. But it is what it is."[#44]
- The Black American male owner of an uncertified MBE professional services firm stated, "I've put in a couple of bids, but either because I'm new I felt like whoever was reviewing that bid went with a known commodity because I see their number and I saw my number, and I was like, 'Their number is the same as mine.' ...It was a small cottage house. It was a drywall job, just about 2,200 square foot, very small. At the time I was class-C, so I knew I had to bid it under 10. I bid it right at 998. The job was probably worth at least 12-to-13,000. But me not having a whole bunch of overhead and stuff like that, I knew I could win the bid with my crew and do excellent work and maybe propel myself forward in the college. However, I found out about the bid the day before it was due. I went out there that day. I saw it then and I put the bid in that afternoon. However, when the bids were

published again, there was another company that had my exact number. And didn't think that was possible. I'm not saying it couldn't happen, I was just like, 'Okay, maybe somebody saw something else.' I think somebody said, 'Hey, this is the low bid, and we don't know this guy. But he's our low bid, and if you want the job this is what you've got to come in at.' I say that because I bid a job once out at Fort Picket years ago. I was also the low number, but the job was 'out-of-budget', and there was a rebid done. And I know that one of the, I won't say advantages, but one of the equalizers to being a small, disadvantaged business is just really getting a fair shot at a bid. So, I know this train is really leaving the station this time. The engine got turned on, but the train is leaving the station. All I want is what any other minority firm has out there, and that's just a fair, open competition, and actually winning the job."[#55]

15. Treatment by prime contractors or customers. Five business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#7, #8, #17, #21, #27]. For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "There's some kind of language barrier. We have a lot of Spanish-speaking people now, but we started hiring employees that speak Spanish."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We've had a couple of companies that were big companies that we went in with that needed the small, woman owned business part of it, and then they use our resumes and stuff to get the project and then they ended up using their own staff to do the project and there's no follow-through for any of that kind of stuff. That's happened maybe four or five times. I think they need to make sure that that is... in the process, somewhere along the line, they need to make sure that that is actually followed through. That the small business subcontracting elements of the contract is actually completed properly."[#8]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I mean we're talking major bucks and the thing is they pass it down to the small business. This is what I'm talking about is they hook the small business, nobody cares that it's the small business, the person who's going out there and built their business and they don't care that they're going to watch them lose everything. They don't care. If you're familiar with the bus station in downtown Norfolk, that really pretty bus station that's very... what's the word I'm looking for? Eclectic, it's very eclectic looking. The shelter, the part of it, all of that stuff out there, that's one of my jobs. Those guys in the city of Norfolk decided they weren't going to follow the specifications when it came to the testing of the dirt. They decided that, yeah we're just not going to do that. Yeah, and they were going to hook me, hook line and sinker for that concrete out there. People have to hold their own people accountable in house"[#17]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Generally we get into discussion, if you want to call it that, if the weather's bad or something and they think you ought to be working and you say, we can't accomplish anything. We're out here wasting money. You get into that. It doesn't happen every time, but those are the kinds of things. In particular, if you're a small contractor, there are some general contractors and they want to show you who's boss and they can beat you up. They

can make life difficult. The problem, if you set up some type of program to, let's just say that you, as a state agency, you set some type of review process or some type of something up to where you've had subcontractors evaluate the general contractor. As long as you can keep that [private], then I think it would be valuable because then you as a state agency could see, we've got several bad reviews or whatever. It's something that if you let it out, that this contractor gave you a bad name, then they'll never use him again. They believe it and the word gets out, that this guy is bad news and he won't ever get any work again. That's the issue with that."[#21]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "They'll take their trucks and move to another job site or something and leave you on that site and you're just doing that work while they're going out and getting other work in. They still getting a piece of your money because of the fact that you still have to be on this site with your truck and stuff. Yeah, it's been barriers like that. But you know you have to bite the bullet and you still got to eat."[#27]

16. Approval of the work by the prime contractor or customer. Three business owners and managers described their experiences getting approvals of the work by the prime contractor or the customer [#16, #20, #21]. For example:

- The Black American male owner of an MBE-certified construction company stated, "I don't know. Even the contractors that had the job was the same way. They kept changing their mind, we'd do something and they said they didn't like it so we had to do it again, they said they didn't like... they had like five people inspect up there. Five. And none of those five could come together and just say let's do it this way and leave it. And even when they did, it got up to the end and they'd say nah, I think we want to do it this way. I would tell the Commonwealth not to load up so many inspectors on a project when none of them can pull together. We had two women and three guys on this project that had a say so to do it the way they wanted stuff to look, and none of them pulled together."[#16]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "If you do a great job with the customer, they will love you. They'll want you back. You do a great job for the prime. They're going to love you and want you back. So it's all up to you to make that happen. You got to have the experienced personnel to make that happen, and it's critical."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Like I said, you can have a disagreement like that, but all the jobs we work on, there's documented specifications that you can go back to and say, 'Look, this is what you told me to do. Or the job says this, this is what we did.' There again, the small businesses, and I know, I guess they're all guilty to some degree, but you need to get stuff like that in writing. You need to sit down and just put something in writing and let the owner, or whoever you're working for look at it and say, 'This is what we're going to do.' And explain it to him and just say, 'Is that what you want?' Like I said, that's just common business sense, I guess."[#21]

17. Delayed payment, lack of payment, or other payment issues. Thirty-two business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#2, #3, #5, #6, #7, #8, #9, #14, #17, #19, #20, #21, #23, #25, #28, #29, #33, #35, #7, #39, #42, #44, #47, #49, #53, #54, #57, #FG2, #WT2, #WT3, #WT11, #WT22]. For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "When we went into the recession, 2008, we had had a lot of developers who owed us a lot of money that just said, 'Sorry, I can't pay.' Okay, here's how this works. Well, it's never good enough, right? And just so you know, the average bill from the average firm by the average client is collected, like, 83 days after you send the invoice. So with all of us in the consulting world have this kind of thing going on where there's all this trade credit out there all the time. And so what people do, you'll see this usually with people that are kind of new to the consulting business, they'll say, 'Well, we want you to pay within seven days of us sending a bill.' So here's how this works. If I'm the prime, you send me a bill, I'm going to send the bill that month onto the town, and then the town's going to send it up to the state. And then the next month, the state sends it back to the town and then the town pays me, and then I'll pay you. And I promise to pay you within seven days of getting paid. And in the industry, we tend to be all fine with that, because it just takes a while for these things to go on up the ladder and get back down. So it tends to be a tradition, and what we've had to do, the different consultants around, is just to have that agreement with each other. We'll pay you within seven days of getting paid by the client. And in fact, I've seen that picked up in some public documents. For example, VDOT now says if I'm the prime consultant, I've got to pay my subs, it's either seven days or 10 days, within a certain time. And I think that's a great idea, because then if everybody knows that, and VDOT's paid me and I haven't paid my subs, the subs have an absolute right to jump up and down and say, 'Look, you've either got to pay me or I'm calling your client.' And thank goodness, I've never had to have the occasion to do that, but I would imagine VDOT would come down pretty hard if... Because they're really there to help these small businesses. Now, we do have one interesting situation, and this is with DHCD, and... I think it's with DHCD, where they're all about helping little businesses. But they have a quirk in their system, which is that you have to be a certain percentage finished a project before they'll pay. And I probably need to take this up with them, because they're one of our biggest clients, but it sometimes takes forever to get to these milestones. And if they were really good about helping small businesses, they'd figure out a better way. It's really to help them, just not have to write a check for \$100 or \$1,000 when you've got a \$700,000 project. But really, small business kind of lives on those \$100 and \$1,000 checks. So we need to fix that. Yeah, we probably just need to bring it up to DHCD. It's probably one of those things like that high insurance level. It probably just hasn't occurred to them that that's a real problem for the small businesses, that the very ones they're trying to help... It does help the DHCD not to have to write a check every month, because if you have hundreds of projects, they're probably... It's going to need extra employees to kind of keep track of all that. But they're trying to help small businesses, so maybe that could maybe make that more of a priority."[#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "Occasionally invoices or things get held up, but it's nothing major. Again, if we identify it to them, they work through it."[#3]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Only with private sector folks."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Yes. We will normally pay when paid and normally on a 30-day interval. Now, all of my trucking subcontractors, which I use extensively most are minority, all get paid weekly. They can be repaid weekly if they request it because that is a requirement that I have in my minority and small business contracting plan that I'm required to have by the municipalities and the state, all this is in place already. Well, no, I disagree. Cash is cash. We need a certain amount of income every single 30 days. I don't need it on a weekly basis, but I need it every month."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "Well, you always have your customers that are slow or nonpayment. It's just like you when you pay your bills. So, no. We get our money."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "But the one thing about the big company is that they can absorb the delays in getting paid. Sometimes some of these jobs are design build and so you don't get payment until it's like 65% complete or something and that means that we're basically bankrolling the project to get to 65%, can be six months and it's hard to hold invoices for six months. Yeah, especially with the design builds. I think that to ask somebody to hold... I actually the whole design build and the way they don't pay out payments until you're like 45%, 65% complete or whatever, is really not the way to go. I think they should do away with that kind of payment thing. It's due payments on 30 days or people can invoice monthly. I mean, it's not like... it's just a way for the state to keep more money in their pockets for longer, but it does create a burden not only for... and that's why I think they tend to want to pick big businesses because the big businesses can absorb that... they can hold that kind of money for a while because they have money coming in from all these different projects and they have multiple consulting groups out there, marketing groups like environmental or engineering or something like that. Whereas when you're just doing one service, it makes a difference. We've held money for up to six months to eight months before, nine months. Which is one reason why I don't really want to go for those projects. If I know that it's a design build, a lot of times I'll just tell them I don't really want to do it because I can't hold the money that long."[#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Yeah, most of the time. Most of the time that's the case. Usually there are a couple that I just know that's their process, it takes a little bit longer for them to turn that payment loose. But it just depends on the project. And I think that's on me to go into those knowing that that's the case. Yeah, be patient. Be patient, and try and see it from their perspective. If they've got a multi... If you're working on a housing track well they probably need to turn some profits, it's going to take 30 to 60 days, it's just the process. They've got lots of subs other than just me, I get it. I get it. It doesn't just turn right away There's a market out there for the pay as you go type projects, but I wouldn't argue that they're sustainable if that makes sense."[#9]
- The Hispanic American male owner of an MBE-certified professional services firm stated, "That's probably one of the worst things that happen in businesses. You have a team in

agreement and you've negotiated terms and the government is the worst at paying on time, but the government will pay you interest for being late, but now it the world of high tech and everything being ran by a computer, there should be no [delays] because this is costing the government money for delayed payments because they're paying interest on delayed payments. It's all computerized. It should not be that. If I had a net 15 terms and you're paying me in 45 days, you're paying me 30 days of interest on something that could have easily been done by a computer. And that's a waste of tax dollars and plus that's... I'm not getting my money in time, I don't need that two percent interest, I need my money. I mean there... Everybody is using a special certain system now for invoices. Most of them. I think there needs to be a process established or set in place that may allow certain people to approve invoices because currently there's obviously checks and balances. Anything related to federal spending, I think those checks and balances need to be lifted a little bit to allow program managers to approve invoices."[#14]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "Probably the biggest thing is just... it's like anything else, it's the whole it gets lost in the technology which we all understand. Heck, I didn't even have my computer plugged in, okay so I can't say a thing. Most of the time it's just a technology glitch, yeah."[#17]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "No, it's net 30 days, as long as everything is delivered and in working order and we fulfilled our obligations. They're pretty true to their net 30, as is the federal government. General contractors operate in a different way, but that's not what this call's about."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "We've had a couple of problems back in the younger years, but we had even one prime trying to hold us and make us go bankrupt at one time. I have seen that, but that was the personality thing with a major prime that tried to do that to us. And again, it was just trying to take the contract away from us, but that's the story that was years ago. It's gotten most of it, but I don't know, I don't see any barriers now."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I guess what we do as a subcontractor is, let's just say that you are working on a school or whatever, school site, and you go out and you do your work. You may finish your work six or eight months before the general contractor finishes his work, but they're going to hold your retainage till they're finished. So you're sitting there, a lot of cases and all the state agencies now, hold 5%. I'm not sure if VDOT holds 5% anymore. When they get strung out in particular, if you're working for somebody, and we do work for a number of people that hold 10%. Like I said, those are the kinds of things, we've got one customer right now, they're great people. We do a lot of work for them, but their payment term is 90 days. I've asked the question, how did you come up with that? Well, the sad part about it is, we've told them and they've told us, we said, 'We're adding money to this price we're giving you because it takes so long to get our money.' Yeah. I'd do the same. I'd do the same thing. I said, "'All right. If that's what you want to do.' But the payment on state work, I've never had an issue with state payments. It's always a private company, or federal government sometimes gets pretty slow. Other than that, that's it."[#21]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "For the most part, the US government is a pretty good customer. In most cases,

they pay their bills on time. There have been a couple instances where they have not. And I would say we've had trouble with about four occasions in the past year of being paid on time by the US government."[#23]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "We do a lot of what's called design build work and we were doing some projects that our receivables were close to 120 days, so it wasn't as if the money wasn't going to be coming in eventually because we could show the invoices and we could show that most of our receivables were government. But it was because of the type of work. There were delays for the contractors getting paid and we don't get paid until the contractor gets paid. It's kind of a paid when paid type of situation and there were so many delays that we just got into a really, really tight cash flow bind."[#25]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "Yes. These big general contractors sit on the money just as long as they can. I'm still chasing my final \$52,000 on that VA job and we've been done for six weeks, but that's through a general contractor, mind you. It's not through the VA."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "A big company can afford to wait 30 days to get paid. A smaller company needs to be paid up front. So certain amounts should be able to be put on a credit card. I know they have credit cards have been limited over the years. It used to be 5,000 or less they can put it on their credit card. Now it's gotten to be a much smaller amount so they want to charge everything and they want to send you a bill which means me, a company with two people, has to wait 30, 45 days to get paid where I had to pay for the supplies up front so now I'm out of pocket immediately and I'm waiting 45 days to get that money back."[#29]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I do not know when in the state or the government you can go to get anything. I cannot work. The last job I did for a store at [a shopping mall], they still owe me \$40,000. The guy is refusing to pay because the job is already done and the store is running well. He said he doesn't have enough money, when he has money he will pay. I put a lien against the store, and he got an attorney to fight to take the lien out. Now, was there anything wrong with my job? No. They are happy with the job. We gave them [everything] and nothing is wrong with the job. But we have not been paid as agreed. So those are some of the things that we run into as contractors. Let me one thing that you have to also highlight on your items. In the Commonwealth of Virginia, if anybody complains against the contractor, they put you under investigation immediately. I mean, they fine you 10% or 5% [and then] guess what, they take your license. That is what they do in the state of Virginia. Now, if any member of the public, a customer does something wrong against a contractor, the board of contractors in the state, they have nothing to do for the contractor. You have to go hire an attorney for \$5,000 minimum, which is what they all charge. The minimum was \$5,000 retainer fee. That's to collect maybe 3,000 or 2,000 or 5,000 or the 40,000 that they owe me. So if you already have no money, how do you go sue someone? You cannot defend yourself. You need an attorney to defend you. You know"[#33]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I'm not sure with current... okay, in regards to payment, but I guess if they were to

pay quicker, that would be a lot better. Because I believe, I'm not sure, but the last, which was a few years ago, I think they were something like net 60 or net 90. If it was net 30 or a little bit quicker, that would be definitely better."[#35]

- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Don't ever let yourself get behind that deep...there has to be a set point for your company that you're just not going to go beyond. If you're going to go beyond that and they're not going to pay you, then you got to go to them and say, 'Okay we are at X number of dollars, and I cannot extend you any more credit. You have to pay us or we cannot continue your contract.' Up front, it's always good to give your customer an amount that, if it falls behind...in other words, a credit amount. I wouldn't even use the word credit in that venue, but you just say, 'If it goes beyond this amount,' and put somewhere in your paperwork, your proposals, that the work stops until payment is brought up to date."[#37]
- The Black American male owner of an uncertified MBE professional services firm stated, "That may be business as usual for them, but it has a bigger impact on small firms and could hurt them in pursuing other work and also keeping their workforces engaged with slower payments. I wouldn't necessarily say it's deliberate, but there is a lack of recognition of when dealing with small firms, the impact of late payments like some of the bigger companies"[#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "There's always some shit with that. I got one guy now is still owes me a \$1000. I got to go put a lien on his house."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "And with a small business if you're doing a big job, if you're waiting 90 days to get paid, for a small business that does... And it's a big deterrent for us. If you have to wait 90 days to get your money and 4000 people have to sign off on it before you even get paid, or whatever like that, that's a giant hurdle. That could wipe a small business out. That's a big deterrent if it's going to take you up to 90 days to get paid. A lot of the agencies have gone to electronic payment where after the job is complete you can be paid within 24 to 72 hours, which makes a big difference."[#44]
- The Native American male owner of an uncertified MBE construction company stated, "It takes large amounts of capital, just because some municipalities and vendors, they take a little bit longer to pay. If you don't have that capital stored to pay all your bills, your payroll and your materials, but you've got fuel, and if you are purchasing materials, you've got to take them. They don't sign a contract with you saying, 'Paid when paid.' They're net 30, net 60, and sometimes you get into contracts where you're not getting paid for 90 days, they'll hold your money. They will take advantage of that situation, and the large corporations can because they know that if you don't like it, the next person that comes along will be fine with it. Yes, ma'am. To overcome those barriers, they've just got to pay faster. Even as a subcontractor, I try to give incentive to my contractors to pay me faster. I would give them discounts for thirty-day terms, 15-day terms, stuff like that. I've cut 5%, 10% off my money, just so I can get the money in the door."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "I know a lot of companies don't want to pay you for 90 days and that's a deal breaker. That's

a deal breaker. It's kind of hard for a small company to float 90 days' worth of work and not get paid for it until 90 days... [They say,] 'We'd like for you to install fiber for 30 miles.' We have the capability of that. One of the first things I would ask for is net 30 terms. A net 30 term is then at the beginning, we would ask for a mobilization fee. We would charge them a mobilization fee. Basically what a mobilization fee would do for us is one, it puts money in the bank to buy the materials needed to complete the first 30 days. That way we invoice after we finish the first 30 days, we'll have money then flowing every 30 days to an invoice. That way everything just kind of rolls uphill if you will, or downhill whichever way you would call it to make it easier. But a lot of times the larger companies will say, 'Well no, you got to float your own 30 days so we're only going to give you a net 60 or a net 90.' If it's a smaller job, they'll say, 'Well, we're not going to pay you until you finish.' That limits what we can and can't do. Both [public and private work]. Again, it depends on the client, what they want to do and what their budget says. I don't know why they do those net 60s, well I know why. The longer they keep money in the bank, the more interest they build until they spend it. So it boils down to dollars. If it's a multi-million-dollar job and they can keep it in the bank for 90 days, they make a pretty decent interest on just the money sitting there."[#49]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "That tends to not be the residential projects. Those people almost always pay on time. It tends to be commercial. Commercial people, usually they take, even if they pay on time, they take the full 30 days or whatever. But then I have had cases where people haven't paid me for a year. For more, and I've had to harass them, and call them. There's been one time where I went to court, and I never got anything out of that. And I tried. Because the guy disappeared. If you check out somebody, maybe you could find out that somebody else had trouble with them, and you either avoid them or you get a retainer ahead of time before you do any work. I've done that with people who have paid, but who have been very slow, or I've had to bug them about it. I did work for them again, but the next time I made them pay ahead. Which I usually don't do"[#53]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I've had issues with that, but normally I don't give my work away until they provide the payment, because I've had experience where I've provided the drawings that they've needed, and then they hold off on making the payments. And I learned from that, so I don't do it anymore. I get a retainer up front. And then once I complete the drawings, they have to pay when I give up the drawing. I would tell them to make sure that everything is in writing. That they provide all of their scope of services, what they're going to provide, and what their cost is, and the time it's going to take to provide that service. Put it all in writing, and have your customer sign an agreement or a contract, and get a retainer before starting, because you do so much research and preliminary sketches before you actually come up with a design that you could lose a lot of time and money if you don't have that retainer up front. At least get that before you move into construction documents."[#54]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "What I've come away with is, that on all my invoices, I say must be paid within two weeks and if it's not, then I call, trying to head off if there's a problem because that's the other thing, a lot of people don't really know why they're not paying or they got mad because of something. The communication needs to be there, because no project goes through without

a bump. You'd have to be able to say, why are you holding my money back. What did I do? How can I fix it, or did you realize that this wasn't my issue, it was the sub-contractor's or whatever. I think that learning to communicate very boldly and quickly and I've found the two-week time frame to be about the right one."[#57]

- The non-Hispanic white female representative of a business development organization stated, "With COVID, we're definitely seeing folks have delays in having invoices paid. If you're not the kind of business who is... If you're not restaurant or retail, somebody who pays cash on the barrel, we're seeing those folks really, really have a hard time collecting payment."[#FG2]
- The male owner of an SBE-certified construction company stated, "We were subcontracted by [a construction company] out of Virginia Beach to do the mechanical and plumbing on a state of Virginia project [at] the new Eastern Shore Community College... We finished this project in December of 2019 and the building was turned over and occupied by the owners. Well here we are almost 6 months later and we are still owed \$51,098.70 on our contract, retainage and change order work we were directed to do. We have been told by the general contractor that they have not been paid by the state and they don't know when they will be paid. We have not received any warranty calls or notification of any substandard work we performed on the project so that cannot be any reason we are not getting paid. We are a registered small business [with] SWaM... and we need this money to remain in business in the state of Virginia. I am not sure why the state of Virginia feels that the contractors that perform work for them under contract do not deserve and need to be paid. I am positive none of the state of Virginia employees go without being paid when they are working. I have reached out to the governor with no response and my next option is to reach out to the local news channel 10 on your side to see if maybe they can find out why the state of Virginia will not pay for work they have under contract when it is complete and the owners have taken beneficial use of their building."[#WT2]
- The female owner of a WBE-, DBE-, and SBE-certified firm stated, "We have consistently had issues with timely payment. In our 22 years, there has been only one project for which we received payment in a consistently reasonable and timely manner. Our expectation is to receive payment 30-60 days after submitting an invoice. We pay our subs/staff within 30 days of receiving their invoices and we should be able to depend on receiving OUR payment within at least 60 days to cover our fees plus the fees we paid out of pocket to our subs. The prime contractors we work with earn DBE/SWAM points for having our services on their teams, yet, as a small business, we typically are paid after 6 – 8 months or longer, even though we submit invoices monthly! For one project in Richmond with a very well-known prime contractor, it took more than a year after the project's completion to get paid for the final months of effort. It's very difficult for a small business to survive on this payment scheme. You must be losing DBE small firms if they are not receiving payment for far too many months and who yet pay their 30-day expenses on time and carry all the expenses. Very late payment "after" we have been selected on a prime team and earned DBE/SWAM points for the project however as a DBE we get paid 6-8+ months later. Most often, as a sub, we are unable to figure out where the problems lie. There is a lot of finger pointing – prime says the agency is sitting on invoices, the agency says the prime has not submitted the invoices correctly or on time - the truth is somewhere in between. Often, we find out that the prime has been paid, but has not subsequently paid their subs. This is very difficult to

prove since we do not know when our prime is being paid. We have heard every excuse for why payment hasn't been made – all too often we hear, 'We can't find the invoice you sent, can you send it again?' or, 'We switched accounting systems.' Suggestion: Prime should carry a majority of the expenses (especially if they are "pass thru" the DBE). Another accountability of payment excellent practice was implemented by the FAA: it required the DBE to notify the FAA/agency the exact date and amount we received payment and which did keep everyone getting the invoices paid to the sub quickly and accountable as payment was trackable. "[#WT3]

- A comment from written testimony submitted to the study team stated, "Vendors do not format invoices correctly requiring resubmission. The proper format is in the special terms and conditions if awarded by RFP, IFB, or request for quote."[#WT11]
- The female owner of a WBE- and SBE-certified firm stated, "And omissions in which our work was not involved. Excessively late payment from prime firms for work completed in general, with no legitimate cause for delay and no adherence to payment of finance charges. Significant payment delays for work completed where payment on the same prime firm invoices had been withheld by the Virginia state agency because of errors"[#WT22]

18. Size of contracts. Eighteen interviewees described the size of available contracts as challenging. [#2, #4, #5, #8, #14, #18, #21, #26, #27, #28, #30, #36, #44, #49, #55, #59, #AV, #WT11] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, especially small consulting firms I guess you have to say, probably would be leery about trying to take on a project that's enormous, because we're just billing an hour at a time. We can't ramp up quickly enough to do it, so it kind of limits itself. If we want to go after a great big project, we usually go find a prime consultant that's really big that we can be part of as a sub-consultant."[#2]
- The Black American male owner of an MBE-certified professional services firm stated, "No, it's just the only issues I've had with a contract is just the scope of the contracts, they aren't exactly clear and they change a lot. They would post the scopes, what they want, and then two weeks later they would change it again. The whole process I'd have to start over. Yes. I said, most of these contracts, they are they say small business but they're more like medium sized business contracts, which I would say, the majority of them are."[#4]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "There have been a few. We've done a pretty good job of teaming up with groups when that maybe is an issue. But again, we haven't always been successful in going after those types of jobs either. I mean, we've tried. We've done some bids with architectural firms or other engineering firms and haven't been successful in obtaining those. Excuse me. Again, I think that's... I think we could be very competitive in the public sector, if they were willing, if those larger jobs would be willing to allow for teaming with large firms and using smaller firms like us... that don't have that experience with public sector."[#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The bigger dollar contracts, we would go after those, but again, there is that bias, I think, within the people who are doing the contracting to not hire small companies for big dollar

projects. They feel like you can't do it, you know. No. The private sector doesn't seem to look at that like the public sector does."[#8]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "As we grow, it's going to hamper us. I think once we get over 27 and a half million which will probably happen in the next two years maybe, we're not going to be able to bid on small business set asides. I think the small business side standard needs to increase. Honestly, I think a small business should be categorized by its employees and not its revenue. I've strategically done the things I've done spinning other businesses off so I don't reach that size standard so I can still stay small."[#14]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Another thing is, is I can't compete with the people that do it in-house. Think about it. When I do a whole construction site, I bring in the engineers, I bring in the architects, I bring in the foundations, the steel, the whole nine yards. I can do it all. Well, I sub all of that out. What ends up happening is I can't compete with these bigger companies in Virginia when they do it all in-house. They're a specialty epoxy company. I'm subbing an epoxy company out. See? Because I can do it, but epoxy company, they do it all in-house. I don't have those means."[#18]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, there's a big difference from the standpoint, the one thing about, particularly VDOT work, is the fact that most of all of the work, all the work you do is on a unit price basis. So whatever you do, that's what they're going to pay you for. You get into these private companies and even the municipalities, they're lump sum contracts. You're obligated to do whatever is on the plans. In some cases, that leads to some disagreements as far as what actually was supposed to be done, what's not. But that's the beauty of VDOT work is the fact that the way they do it is its they pay you for exactly what you do. Oh, well, that's one thing that, there again, it's just observation more or less, it appears a lot of cases that particularly VDOT, they tend to want to make our award these big projects. I mean, huge hundred-million-dollar things. Somebody in our position, I mean, like I said, obviously we're not capable or not interested in it really, of doing that size work. The smaller jobs seem to be few and far between."[#21]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Here it is now, we are trying to break in to where we could get rid of the old boy network or the nepotism or just all those factors that go with not allowing us to have a seat at the table. But it's difficult now because when you say, 'Okay' you put out an RFP for a four or five million dollar project. Well you have to have resources to be able to even sit on it and complete the job, execute the job."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "When I go out and try to get with a lot of these contractors and they already have these big companies already in there. They got about 20 or 30 trucks or 15 trucks or something. I just get knocked back, because they already got all of their trucks in there."[#27]
- The non-Hispanic white male owner of an uncertified SBE construction company stated, "We still do some residential work, so I got two small residential proposals going out today."

Typically, that's the smallest job we do is about \$3,500, but this year in 2020, we completed a big project at the VA hospital here in this valley and it was a few \$150,000 contracts. So, I'm anywhere between \$3,500 and \$300,000, but those big ones are really rare,"[#28]

- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "There's really no low limits, but generally up to three million dollars would be the top, two to three."[#30]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "There's programs that we see that are multi-million-dollar programs, or we know to go after, but we just don't have... Although we have the background, we just don't have the internal [capability]."[#36]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I guess because of the size of our company limits some of the work that, I guess, companies would feel about giving us. A lot of people like the big boys. They want to have companies that got 100-200 people."[#44]
- The Black American male owner of an uncertified MBE construction company stated, "It depends on how they want to pay out. The smallest company can do the biggest amount of work if they're allowed to work within a certain perimeter of finances. This one I'll give you. At this time, this was back in 2007, 2008. We won a contract for the city of Richmond for \$3.4 million worth of work. One contract. We won the project and of course we're a real small company. We hadn't really grown a whole lot since '03, was on the third year. But we won the contract. In the contract I wrote out my stipulations on money's. I would do a mobilization which will get the project started and will run me the first month and a half and they allowed me to invoice every three months So the size of the project really does not matter at that point. The only thing that really hinders a small company from being able to do the job is one of two things. One, barring if they have the knowledge, that's no issue. But being a small company, if they don't have the knowledge to do the work, that will be a hindrance. The other one is financial. If they're allowed the frequency of invoicing that the small company needs, there's no issue, at least not with my company."[#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "Where I feel comfortable is anything that's between 10,000 and a million and a half dollars' worth of work. I've managed projects up to 89 million, but just me on my own, don't want to get something I can't chew on. So, for my business when I came in my business, I was seeking government state work contracts. And my experiences with them are they come out on the Eagle, which is a great website. But I feel like the competition is definitely fierce on the Eagle, not scared of it, but it's definitely fierce because that's where a lot of small contractors go. I didn't see a lot of micro bids on the CFG micro bids. It'd be nice to have more of those for those type people because we were out there. That was one thing that I was like, 'A micro bid maybe come up every blue moon.'"[#55]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "The largest contract we had was over \$2 million. At present, the most of the contracts we're doing right now are in the small range, probably two to \$10,000."[#59]
- A respondent from the availability survey stated, "I considered [pursuing public sector work] and have worked on public projects with other companies before starting on my

own, but had reservations about pursuing public-sector work as a sole proprietor because of the size of work available and work for company of my size."[#AV]

- A comment from written testimony submitted to the study team stated, "Many orders are \$2,000 or less. Some micro and regular small vendors do not bid on many if any of them."[#WT11]

19. Bookkeeping, estimating, and other technical skills. Eighteen interviewees discussed the challenges back office work such as bookkeeping, estimating, and other technical skills present. [#2, #6, #9, #20, #21, #22, #24, #26, #27, #29, #36, #42, #44, #53, #55, #57, #58, #FG2] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "Well, not most projects. Now, VDOT is interesting, and I guess you'll be reporting back to VDOT. VDOT has a very strict way that they do accounting, and if you want to work on VDOT projects, you've got to do it. And so what they'll do is, they'll audit your books once a year. You have to get a professional audit. And that usually costs about \$5,000, \$7,000. It's different from the tax accounting. It's like, the specific audit to help you do VDOT work. And so if you want to work for VDOT, you have to have that done annually. And then they have a very complex way of working up man hour loads to work on projects. The man hour loads, it doesn't really bother me that much because that might make sense. But the annual audit, it may be a way... If you're an enormous firm, maybe that's a good idea. But it may be a way to not require the rigorous audit for small companies. And so that might be something that VDOT, it's probably... If you're VDOT, you're thinking, well, we just do it for everybody. And I guess that's fair at a certain level. But that might be a place you could say, 'Well, if you're just going to work on small projects for us, maybe under a certain fee size, we won't require the audit,' because that's about \$7,000 a year that every firm has to pay that maybe doesn't really help much at all."[#2]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "We have an accounting system and we have AP and AR just like, I guess any other company would have, and that's scaled to the volume of the work you're doing. It goes anywhere from grandma doing it on the kitchen table to a whole staff of bin counters. It all depends on the volume. I do know that there are resources for small businesses to do subcontract those items out. So you don't have to carry that labor burden. And I think that's becoming more and more common. Those resources are available. Estimating that generally speaking has to be done internally."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "Estimating it's on me, that's my show. So there's a lot of late-night stuff that goes in there after the workday is done. There's a lot of scouting. I've found that taking a set of plans out to the site and orienting yourself goes a long way. So there's time, there's time, and you need to factor those... I factor those costs. There's a cost there. You got to get a plan printed full size. You got to take the time to get in the truck and go out there and scout it and do measurements and do things like that with the plan in hand. Those things all factor, and there's a cost. Whether it's fuel, time, whatever it is. So they need to be prepared to do things and then factor that into their take off, and factor that into their long-term grades,

and things like that. I do, I use QuickBooks, and then basically add everything into that, and then go from there."[#9]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "We've had those problems, but no matter what we do, we set out to do a contract, we're going to do it. Again, we've had a bunch of losses because we overbid the project. So you've got to learn how to bid something that you're going to go after. That's probably one of the most important parts of a bidding on a proposal. You've got to get the personnel that know how to do it on board. There's companies like mine that will help anybody that comes along in that aspect if they want help. And I think that that's one of the ways that the state or the federal government can make small business successful is getting those bigger businesses to help out."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We do all our in-house accounting ourselves. Again, I guess one of the things that, and it seems to be more or I've been seeing it is more prevalent every day, is the use of technology on these job sites. I know the smaller contractors just aren't in a position to take advantage of that sometimes. It's just something I think, going forward, those types of things, a lot of these things will help a smaller contractor come along just to keep up with the work and the job itself. Well, if you've got a small business and you don't have anyone or don't want to hire anyone, I mean, of course, you've got these payroll companies that will do your payroll for you, take your taxes and all this kind of stuff. Which I think it's a big thing for small business because I could count on my hands, I guess, the number of small business that got in trouble with the IRS because of not paying their payroll tax. So like I said, if you work with somebody like that and it eliminates the problem like that, so that would be a benefit. I know the community college here does, I mean, they offer a lot of training of Excel spreadsheets, Word, that type of thing. That can really help you in the bidding process or the estimating process. And if you can learn those types of things, you put yourself in the position that, it's a lot more efficient, and the big thing is it's a lot more accurate. And so, like I said, those are the things that small businesses, somebody should recognize and take care of some of that stuff."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "I mean, we use [an accountant] like for the end of the year taxes and whatnot. I do everything else. It is expensive just to have one and then there's that level of trust. I mean, you're trusting someone with all your personal information, all your money information. I naturally trust everybody, but it's just when it comes to something like that, can make a difference between whether or not I have a roof over my head. We use the QuickBooks software system. It's pretty much adaptable to any business. We use it for what we need it for. We don't use it to its extent, but we use it for what we need it for. It keeps us on track, keeps us in line. Again, because we're small, I'm not as overwhelmed. I mean, it does still take me every day all day, but I'm not as overwhelmed with it. I'm old fashioned, I'd be happy if we went back to paper. Yeah. Other than more affordable software or more just a universal software, honestly, I don't... Again, there's so many options with the internet and everything, there's so many different ways that you can do things now that I think it's available to just about everybody. I mean, I know contractors that run their businesses without secretaries. They do everything themselves. I mean, it's time consuming, but again,

it's all about what you can afford and how much authority you want to delegate and how much you want to keep in house."[#22]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I think a lot of small businesses, even though they don't have staff, they contract out whatever they need. I mentioned accounting. So I may have to work with an independent bookkeeping firm to do my bookkeeping."[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Definitely. If I had those resources, and I mean this is the argument for all small businesses. I mean minority or non-minority we all lack those resources at times. I just think if I had that, this business could really, really go places."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Because if they say this job would be six months or a year or whatever, and I try to base it on everything I try to base my wages on is by the hours, and they want you to give an overall bid or whatever on a job or something, which I can't do that because of the fact that I be trying to bid on it by the hour or something, so I can try to break clear or something I if go out there. So I will underbid myself or overbid myself."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Well it certainly has been a barrier as far as the learning curve is concerned. My sister is the one who handles our accounting, QuickBooks, does our taxes, and so forth. Like I said, we're a small company we do everything. It would be nice if we had some sort of training, free training that we could access for QuickBooks which is I guess the most [common]. And some of the other ones. And for tax purposes too"[#29]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Your employees need a 401K, they need health benefits and then all of a sudden you have to go out, this is my business. Those things get very expensive, right? So what happens is your overhead cost as a small business get high because you only have a few employees. So all of these expenses are pretty high. Just my expenses for 401K or for health insurance, and even taxes in some way are pretty high. They're needs in my mind, and I'm probably giving you more information than you care"[#36]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "You just got to have somebody to learn it. I mean, there ain't nothing that they can do for that. There's so many things out there like QuickBooks and all that, it simplifies it to a point, but you still got to learn to do that and so on and so forth without making mistakes where it's going to come back to haunt you. I think on the mistakes with first time business owners, like the first two to three years, that they ought to be lenient in the states and stuff and more of a learning experience, then pound you into the ground and take everything, because that's normally what they're going to do. They're going to tell you what you owe. They're going to give you a time period to pay it, and if you don't, hopefully they'll work a payment program. If not, they're going to take everything."[#42]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The computer internet, with all the new changes, the technology grows so fast. My computer skills aren't what somebody that graduates college and comes away with an MBA or anything does. The computer training classes, the internet. A yearly update class, every

two years we go to update our licenses and stuff and we always do a training class that's every year for an update on equipment. It would be great if the state operated like a communication. Just a skill level class to train small business owners like, 'Hey, this is what you do. These are the changes that have made in the market or in the world. This is how you keep up.' With all this Microsoft stuff, all these 'Join Me' meetings and stuff like that. [That] would be so beneficial."[#44]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I suppose only in the sense that I have to do it all. Because it's just me, I'm the janitor, I'm bookkeeper, the accountant, and I'm the designer, and I'm the production person in the office. I have to do everything. Now, I could hire out to an accountant. I thought about doing that, but I haven't. I've done it myself."[#53]
- The Black American male owner of an uncertified MBE professional services firm stated, "It's called LivePlan. It's a business plan software. It helps you do everything from the summary all the way down to your mission and the hard numbers, things that I know a bank would want to look at or people want to see. But it also helps me to channel and focus my energy on what's market. I can tell you all day I want to do construction management, I want to build. Eventually I want to be a construction manager or a GC-type person or firm. However, I cannot focus-in on what market, residential, small commercial. I know I want to build small commercial spaces, get in that niche of small commercial spaces and residential building. But I can't tell you how the trends are flowing or anything like that, for me, personally, looking at a chart because I have no type of experience with that."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I need a Business Manager, because I'm not trained in that. I'm sure that I've made many decisions that are not the right business decision. Again, when you're small, you learn as you because taxes, managing the money and keeping the book and making sure you have all the insurances and having health insurance. Those are just sideline things and they probably should have more focus on them to do a very successful business and that gets back to if you get to be a bigger business, you can have those experts. When you're a small business, you can't really have those experts."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "[I] didn't get much off the guidance in terms of how to do the bookkeeping, the requirements for businesses, insurances. Simple thing as you need to have worker's compensation, all of this. You learn all of this by okay, you don't have this, you don't have that. Okay, I didn't realize I should have that. So this is a harder way of learning."[#58]
- The female representative of a business development organization stated, "One of the things is access to their information. For instance, if they are having an opportunity to apply for a loan, the ability for that banker, or wherever they're getting funding from to get a completed packet. When you talk to commercial teams about minority businesses, or really small, independently owned businesses, their ability to get a completed loan packet back to the bank to process and go to underwriting, prohibits it from being fast tracked. They don't have that bookkeeping all together. Not that they're showing up with everything in a shoe box. But there's somewhere in between that and a completed packet."[#FG2]

20. Other comments about marketplace barriers and discrimination. Sixteen interviewees described other challenges in the marketplace and offered additional insights. [#6, #10, #18, #20, #26, #27, #29, #32, #42, #43, #46, #50, #56, #AV, #FG2, #WT3] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Virginia is not quite well and providing opportunities for anyone. There's no barriers. I see. Whether it's on the municipal state or state level, the opportunities for small businesses are probably a lot more than what I have. I've answered this question. I've been part of a number of discussions on this subject with [VITA] for many, many years, and been a part of a number of different programs or initiatives and the one thing I do see is there are not, there are not enough minority-owned businesses that participate in our line work. It's very unusual and our biggest resource for minority in small business would be say in trucking or hauling but actual direct contribution to the projects. There's not a lot of small minority businesses to pull from. To get started and working on our level. It does take quite a few resources, take some risk but that would be, I guess just getting started because, like I said every one of us are required to solicit subcontracts and material quotes from small minority-owned businesses. That's a requirement. We sign every single bid I've turned in. I signed it up."[#6]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "And so I couldn't even consider doing federal state or local contracts because I don't have the resources. I don't have an administrator. All of the rules, the compliance, the data, retention, all of the rules, again, remember what I said earlier about rules. All of the rules that come in that have a good purpose, I would have to add 10 people just to be able to administer the contract. I'd love to help out the federal, state, and local government, but the rules and the bureaucracy are just too burdensome for someone who's trying to stay light and flexible. And I mean, you can see the effect of this. But look at a lot of the large companies. They all have a separate division, a physically separate company, for handling government business for him, and then another separate portion for handling commercial business. And the reason is it takes two completely different types of contracting and administration to do that effectively. And you can't use the same people."[#10]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "And the other thing is there's no resources. There is no resources anywhere for women in construction. Every person I have talked to that is in construction as women have either come into it with a different certification and then switched, or they're only a sub. I can be a prime."[#18]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Yeah, maybe, maybe in the smaller companies with a laundry list of fees, if the guys just starting out give them a little break on cost, in other words, if you get a small business that comes in here and has about 20 people they're doing a great job and they win a contract, give them some kind of an extra, whatever it may be, extra fee because they're small, let them grow a little bit. I don't know what extra fee, but you know what I'm saying? It's just getting a little bit more than you would give somebody my size."[#20]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "My experience was, I was working with a company... They have a united

van line station. They've been around for 40 years. They have contacts with the military, okay. So the new game is to not have any staff as far as labor, or a minimum. you want to contract it out. When you contract it out, you don't have to pay workers comp, you don't have to pay unemployment taxes, you don't have to pay all those different insurances that comes with carrying an employee. So you contract it out. So basically all you are, is someone who is able to go bid and get a contract and then you're going to work a 60, 40 split. Where all you're doing is servicing the contract. The contract is in your name but you're not doing any other labor. there needs to be some time of enforcement to say, when you get these contracts you have to state if you will be subbing it out and what is the split with your subcontractors."[#26]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "I'm not aware of any. That's why I'm like now, I have a lot of time because this COVID thing and everything going on, that I have a lot of time now to try to look at a lot of different things and try to read up on a lot of different things. I don't have updates or stuff. Where I live at, I don't have Wi-Fi. I don't have high speed internet and stuff like that. I use that disk to go on my phone and search for different things and stuff my wife and I we try to read up on."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "The taxes they need to be for micro, in my opinion, for micro companies the taxes need to be rated differently than companies these huge companies. We're at the same tax rate as Office Max. We are definitely not the same, we're definitely not in the same realm as them but we're taxed the same. It's hard on us to come up with a big tax amount for such a small company because our rate is so high. It should be lower."[#29]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "The time it takes for government contracts, for work with the State, those types of things to get established, it is an extremely time-intensive processes. It's a confusing process, and you have to make a lot of mistakes along the way. Forgetting to dot your i's, cross your t's, you know, research [the contract]. So it's really capital and time. A small business doesn't have a lot of extra time to do those things. That's a big deterrent."[#32]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "There's so many people right now out here with the stuff going on, that's running around doing my line of work with no insurance, no business license, no nothing. They're running around and cutting our throats, trying to get work, taking money out my family's mouth. It's hard to compete with that."[#42]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Get out of our way. And I think you hear that a lot. The people who defined the regulation have never operated a business, and there is this attitude in government that business is the enemy. when the law is created or the executive order is created, you need to have people who are responsible for creating the rules understand, look at it from the point of the business and what they have to do to comply. What's a business want? We want predictability. We want to know what it's going to cost; we want to know how long it's going to take. We want to know what we gotta do, and don't make us do things that are unnecessary. It's a tough balancing act of people to expense, and one of the biggest things, it's a federal issue, it should be and to a lesser degree a state issue, corporations are allowed

for retained earnings. Our tax laws encourage us as a business to spend what we make and not have anything in the bank account for next year. Which we had a lot in the bank account this past year, which comes in and becomes an income for the owner, even though we're not spending the money, it is income and the IRS and the state tax it as income. So as owners in order to keep money in the bank so that we can sustain our employment base, we all took cuts in pay. And that's a problem for anybody that is not a full incorporated business. The tax laws are broke. The tax laws, they have no consideration, they just sit there and say if it's profit, it's yours and you pay a tax on it. So as a small business, we ought to be allowed for retained earnings to a reasonable extent to where we can... that money can fully be reinvested into the business and the jobs into job retention, et cetera."[#43]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "The biggest one I would say is probably taxes. Payroll taxes, income taxes, all that stuff. Just because it's small business you have, when you start out, you have overhead, you have rent. When we start out a business, there's a lot of costs associated with it, including starting out insurances and mortgage, all that stuff. Right off the bat, you got a bunch of expenses without generating income. And then, on top of that, you also have to worry about taxes, and payroll taxes and social security and all that stuff associated with it. Which I wish they would do, for new businesses, five years tax exemptions or something like that, just to help small businesses get on their feet. Because that was the biggest struggle, knowing that we're working our butts off and then, on top of that, we still have to pay Uncle Sam's."[#46]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I'm telling you it's really hard to make any money in this type of business because of the payroll taxes and all of the big overhead. I mean, it just about sinks us to be have two employees and be paying \$1,200 a month in payroll taxes. That's where they kill us. . There should be some breaks for businesses with less than 10 employees or something to help people stay in business."[#50]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "Early on is that and then as you grow a business, I would say regulations and stuff. Trying to stay up to date on changes that the government puts in place, from state and also federal. Local regulations as far as construction goes. Since we're in the Chesapeake Bay Watershed, there's a lot of restrictions and stuff, making sure construction sites are safe."[#56]
- A respondent from the availability survey stated, "Every county has their own construction and estimate department, so a lot of the time when you estimate projects in those counties there are local companies who have already developed a relationship with the local government. So depending of the county it may not be worth [pursuing]. The biggest impediment to working with the state is excessive government regulations. We are forced to do all the paperwork, down to a screwdriver, with no compensation. Obtaining work is difficult. The business is veteran and Hispanic-owned. We have to compete with bigger businesses who get lower prices from manufacturers because of volume and scale. Business is slow right now because the state and county officials are backlogged and have not been able to process work plans and rezoning permits. There are a lot of barriers to entry and a lot of expenses. All of the government regulations are very crippling - it is very hard for a small business to do work for the federal and county governments because of all the

regulations. At the present time, it's extremely difficult for a very small business to be able to handle the considerable amount of paperwork that goes along with dealing with government agencies, especially the federal government."[#AV]

- The non-Hispanic white female representative of a business development organization stated, "I thought about barrier, our folks over on the western part of the state, there's quite a few that don't have internet access. It's just not available to them. So, to try to do these virtual classes that we did, or virtual networking like you were talking about, they just can't participate unless they get in their car and drive 30 minutes and go somewhere, and some of them do that, but that is... I don't know the answer to that. Some of them even have difficulty with cell service on their phones, but definitely internet. It's not because they can't afford it necessarily, it's just that it's not available, it's not accessible."[#FG2]
- The female owner of a WBE-, DBE-, and SBE-certified firm stated, "FAR audit requirement for non-Architecture/Engineering firm DBE is bad for business. Our understanding is that a FAR audit is not required for Public Engagement firms – however, for some projects (those using VDOT funds), we are subjected to the same rules for FAR that our prime A/E firms are under. As a small business and not even an A/E firm, we cannot afford the several thousand-dollar (20-30 hours x \$100/hour) rate audit to verify overhead. After having been in business in Virginia for 20+ years and having paid for FAR audits for over 10 of those years, we have established a market rate. For non A/E DBE firms, it would seem a better practice to allow them to show several recent projects where the rate has been charged. It's like fitting a square peg into a round hole especially requiring a payroll register when work has never been steady and the firm may only be a Partnership. We even experienced an agency (MWAA) that decided after our expensive FAR audit to cap our rate anyway at what they wanted to pay! And, we recently had to decline a project AFTER award since the City of Norfolk was receiving funds from VDOT and thus every sub under the firm also was required to have a FAR audit. We were not in a position to pay several thousand dollars without the firm knowledge that planned work was forthcoming to our firm."[#WT3]

I. Information Regarding Effects of Race and Gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority- or woman -owned firms:

1. Price discrimination;
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of contracts;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environments for minorities or women;
9. 'Good ol' boy network' or other closed networks;

10. Resistance to using minority- or woman-owned businesses;
11. Fronts or fraud;
12. False reporting of participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Nine business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials and supplies. [#8, #15, #26, #29, #30, #47, #49, #55, #60, #FG4, #WT5] For example:

- The Asian American male owner of an uncertified MBE professional services firm stated, "I wouldn't say there is any obvious discrimination encountered and also I don't know whether this is because we're a minority firm but sometimes some people might approach us because they say our fee is lower but this might also because we are a young firm, so they think this way may not just because we're minority. So it's really hard to say but I would say we didn't encounter any very obvious discrimination, we would say. But definitely there are in some cases we could sense it's possible because of this but we are not sure."[#15]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "I'm bidding against bigger companies who can buy larger quantities so they get a cheaper price than me who can't buy as large as they can buy. So I don't get the same price. I'm a little discriminated against as far as because I'm a small company. I don't get the same pricing that Office Max does because they buy more, they buy larger quantities. So I don't, I can't purchase the quantity they can so I don't get the same pricing they do. Everybody buys these cartridges, HP cartridges. The combo packs and so forth. The manufacturers had decided to only sell the combination packages, the combo packs, to the big box stores. So me as a small independent retailer, I can only buy either the black cartridge or I can buy the color cartridge but I cannot, I am not allowed to buy the combo packs. They only sell those to the big box stores now. So that is definitely being discriminated against for being small."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "The cost of entry to our business is such that it's difficult for anyone to get in. And then you can see it more, especially difficult for a minority."[#30]
- The Native American male owner of an uncertified MBE construction company stated, "Well, it's always a constant struggle bidding against the larger contractors. They control so much, they control material pricing and stuff like that to where I never even had a chance coming out the gate, even if I could do the work for the same price that they could, I can't get the materials for the same price. Stone, asphalt, pipe, stuff like that, the larger corporations buy so much, and a lot of times, they're in cahoots with the vendors. As far as aggregates go, stone, asphalt and stuff like that. They buy such a large quantity of it; their rates of purchase are much lower than that. it's held me back. I told you that the majority of my work was subcontracted, and for that reason, the main reason being that material. I subcontract work from larger contractors, and they purchase the materials because they can get their materials cheaper. It's not all a bad deal, but it keeps me from going out and trying to bid upfront. I feel like that I'm discriminated against solely on economic status. So,

not being the larger, prestigious company is what I'm trying to build towards. Not being there, I think I get discriminated against, and not allowed the opportunity to prove myself in doing the work."[#47]

- The Black American male owner of an uncertified MBE construction company stated, "I do believe there is some discrimination there."[#49]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I will tell you that some of my counterparts, some of my other people that I know that are SWaMs really struggle in being able to get IT hardware and components at favorable pricing because the more you buy, the greater the discounts. Well if you're a smaller firm, you're not going to buy much. don't know if that's anything the state can do. But in many of these larger companies that want to have a presence in Virginia like CDW, which is a huge IT hardware license provider, folks like that, they will contact Virginia in order to establish headquarters here in order to get tax breaks. Well, I think part of that package needs to be, 'Okay, are you going to give favorable pricing to SWaMs?' That could be part of the give and take for them getting the tax breaks in Virginia, especially some of the larger IT organizations that are in Northern Virginia?"[#60]
- The Black American female representative of a business development organization stated, "We also have to recognize that systemic racism does still exist and there are still policies on the books that deal with red lining. So there are still certain zip codes and certain areas that are limited. They're actually blocked off to say, 'This is not a good area to invest in.' Until today, that still exists. So when we're talking about, if you're in a community where you're trying to be of assistance to your community... I moved back to the neighborhood I grew up in. There is no way that anyone's going to give me any money if my business was actually located where my home is."[#FG4]
- The female owner of a WBE-certified professional services firm stated, "My father, he's a business owner. He told me the exact same thing. Wherever you set up, make sure it's in a nice area. Make sure then when someone pulls up, it's a nice building because of those reasons as far as possibly not being able to receive funding for what you're trying to do. I think for me personally, that's why I kind of, with our business, we've kind of shied away from trying to go to the banks and receive a loan, at least for right now, just because it may be a hassle to jump through those hoops and try to receive approval. Right now, you see an uprising of a lot of women funding women, whether it's angel investors, or other avenues, or unconventional methods to be able to provide the funding that a lot of the small businesses need. But I think it's definitely something that we need to look into, whether that'd be another initiative or whether it be grants... Just so much is needed within our community, especially for women owned businesses. There's so much more that we could be doing."[#FG4]
- The female owner of an MBE- and WBE-certified firm stated, "Large businesses are often awarded contracts sometimes at 2 x times the price of a small business award for the same/similar labor category. "[#WT5]

2. Denial of the opportunity to bid. Six business owners and managers expressed their experiences with any denials of the opportunity to bid on projects. [#18, #21, #45, #51, #55, #60] For example:

- The non-Hispanic white female owner of a WBE-certified construction firm stated, "What I've experienced, people laughing basically at me and nobody just giving me... I don't care... an opportunity. You have a tile off; you have a doorknob that needs adjusting. Let me show you. I think that there should be a set aside for these companies like me that are coming in where that it's specifically made for me because with my qualifications, what am I supposed to do? Go after \$20 million dollar jobs? I'm not doing that because I don't know what I'm... I'm not committing to something that's over my head. A million-dollar job? Yeah, I'll do it all day long. \$2 million, \$5 million, \$10, I'll do it all. But I'm not taking on a multimillion dollar job like that if you can't even give me doorknobs."[#18]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The only time I ever recall that happening was a project that they had such a... cumbersome's not the right word. Such a detailed and in-depth qualification form, prequalification form, that we finally got to the point, we just said, 'We can't fill this out. This thing is beyond what we can do.'"[#21]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "Because you really got to prove yourself. And sometimes, it might take two years before people start giving you the time of day, because you don't give up, yeah. I think it exists. And I think that it's a challenge. It's just hard to put your finger on it, because you know, men are just used to dealing with men. And especially in the work that I do, transportation, and bus sales and all. And therefore, they just don't know what to do with you, until you put your foot down and explain, 'I'm a real businessperson. We got to talk.' So, yeah."[#45]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, sometimes that would come up at the interview stage. Even within our company, if the project manager would happen to be black or somebody who... That would mostly happen, and this is a while back, that it would mostly happen in North Carolina. It would mostly happen in the southern parts of Virginia, they were along the North Carolina border, where you could just do... They would be interested until you actually showed up for the interview. And then they saw the people that were... And all of a sudden you could see the people pushing the chairs back and their eyes glaze over. It was like, 'We're not going to hire you.' Yeah."[#51]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Let me put it to you this way, it still happens. I've experienced it. People are a lot smarter about it. It's not the old days where when I first started out, they were blatant about it 13 years ago. Now they're smarter about it, but it still happens."[#60]

3. Stereotypical attitudes. Twenty-seven interviewees reported stereotypes that negatively affected small, disadvantaged businesses. [#1, #8, #17, #18, #22, #24, #25, #26, #33, #34, #35, #36, #38, #45, #46, #47, #49, #51, #53, #57, #58, #60, #FG1, #FG4, #WT13] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "Well, the barriers were pretty much as African American, reaching out to a I guess white company, they may give the opportunity to a white PE before black PE. I can't say definitively that's what happened, but in the back of my mind I scratch my head because I know a lot of guys that have a PE, and they always had work outside of work. And I was like, 'Well, how come I can't get work outside of work? What's different about me? I'm doing the same thing that you're recommending.' A lot of buddies told me, 'Well, what you need to do, send letters out to all the companies. Tell them you're a PE. This is your background. This is your work experience.' You could include your work experience, because they know that's where you come from."[#1]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think some project managers within the states just prefer to work with men, so I think there's that kind of just discrimination kind of thing. There's a tendency to be more argumentative with us and our conclusions and they're more accepting of the men-controlled companies kind of thing... It's just they're more accepting of what the men say and then they argue about what we say."[#8]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I think it's just the typical underestimating. Meaning they underestimate that they won't get any pushback. because you're a woman"[#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "That's what my problem is. Then when I do go to these people, they don't see my potential. I don't know. I don't think they take me seriously. I don't know. But yeah, it's because I'm a female and I'm young. And I can tell you, I will call five contractors and tell them I'm a builder and I'm looking for a new contractor, and I know out of the five of those people, two, maybe two, will call me back. Yep, I've had to kick them off. Yeah, I've had to kick them off. They've told me I wasn't the builder and my dad was the builder and it pissed me off so bad. He goes, 'Well, his name's on the sign.' Well, I owned half the company and I'm the builder. I'm the one with the license. All he had was the finances. Excuse me? I'm the builder. And he wanted to run off at the mouth and I said, 'Get off my job now. You're fired. Get off my job.' And I started throwing his shit in the street, and literally what ended up happening was I was going to call the police. I called his boss and let him know, 'I will not put up with the disrespect or the belittling. You tell him get some act right and he can come back tomorrow, but if he can't, don't you ever send somebody disrespectful to my job.'"[#18]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "I've had doubts in the past that somebody complained because the first guy I sent was of a certain color and what have you. I choose to be the bigger person and just move on. I got to say, just in general, I know it's there. I know that certain people don't get... Certain jobs again, women don't get certain jobs because men are like, 'It's a man's job.' You still have these old, excuse my slang, redneck people that run companies and don't want to hire the black guy, don't want to hire the Asian guy. I see it, I hear it, I try to ignore it as far as just not verbalizing my opinion on it. But I mean, as far as the way we run our company, it's all for one, one for all. Honestly, other than just being a woman and being in a blue collar, swing a hammer kind of job, that people just assume they can't carry the load, they can't carry the heavy stuff, they can't climb, they can't crawl. It's just that perception is that 'Well,

you can't do this job,' but again, I think that is being slowly but surely gotten rid of, because women are proving they can do that job. They can be Marines. They can be electricians. They can be plumbers. I mean, I've seen more and more women in the construction sites on the side of the road. I love it."[#22]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I have found that, when folks are looking for people to work for them, they're looking for people to clean their rooms and do their maintenance, in the Hispanic community. And I find that offensive. I see it a lot. Always. In all the groups that I'm members of, people are looking for cleaning ladies and for people to do odd jobs. So where are these people who are professionals, and you could present and share this information? They're there. They're incognito. They have their companies. They have their certifications, and they go and get the work done. But there's a lot of people behind, who could be self-employed, and work really well if they have more access, and they weren't looked at as someone who has limited knowledge. So I find that, when it comes to the Hispanic community, the majority of people think that people in the Hispanic community are just blue-collar, or support. I don't believe that they see us as professionals..."[#24]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I think more on the stereotypical, stereotyping thing. It's truly interesting, like you said you're an African-American woman, and as a Hispanic woman we are looked at very differently. First of all there's the whole, 'you're a woman' thing, which we share, but for Hispanic women all of a sudden you're the exotic, sexy type. It's perceived very differently from the way you are perceived. It makes for some uncomfortable situations because it becomes sexual very quickly. I'll tell you something new and I don't know if this is going to be discussed at all in this survey, but I am now older, I'm in my sixties, so what I have seen now is the discrimination of the older woman. That is very blatant and it's very sad. Thankfully, I'm a business owner so I have a level of authority. So now because I'm older it's not as much the whole sexual thing is kind of being toned down, and now I'm becoming 'the invisible woman.' That happens again and I think that that's just across the board with women. When women get to a certain age then it's all of a sudden, 'We don't want to see you, because you're no longer attractive, you're no longer appealing, and we don't want to deal with you.' However, older men are very different. Older men are wise, we want to learn from you. They're like, 'Oh you're powerful, because you've been around that long.' It's very different. That's something that I am now learning to navigate. It's new. It's new for me because I look younger than I am so it's new. It's interesting. It's been interesting. It's been very challenging. I think I'm now having to learn new skills to navigate through this season, as a more mature woman."[#25]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Oh absolutely. Discrimination comes from the stereotypical, as a person of color they don't think you're legitimate. You're just not as legitimate as the other races. They think that you're hustling. They think that you're doing something illegal. They think that you don't really have an office. They think that you're not to be in business. So that perception wears on you and hurts you."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "we know we have the ability to do the job. We like to be the prime if we can find the

work. But as I was telling you, I am a US citizen but I have an accent and though I have a license and a million in insurance, you know? You're understanding me and I'm understanding you. It's actually discriminating if you have an accent. The difference when I talk on the phone versus my employee is he gets anything he wants but when I talk to people, they don't give me what I want..."[#33]

- The non-Hispanic white female representative of a majority-owned goods and services company stated, "One of the things that I think is hilarious is my sister and I are here majority of the time. We're both female, we're both white, we're both young and a gentleman might come in and ask a question regarding a car that's for sale. We know more about the cars that are on our lot than our father does, and they still do not believe us and will not speak to us about it because number one, we're female, number two, we're too young and number three, we don't look like we have any knowledge of cars. So it's very disturbing and it happens all the time. And it's not intentional, they don't mean to do it, but they think, 'A female, they're not going to know anything about a car to be able to explain this to me. I need to speak to a man, especially a white man.' That's just the way it happens. No one's ever we've been offensive and nasty about it. They're like, 'Well, it's just a lie,' because like I said, we're local and a lot of our customers are like, 'Is your dad here?' and I'll be like, 'He's not, but can I help you with something?' 'No, I need to know something about a car.' 'Well, I can help you with it.' Nothing ever rude or out of the way, but it's definitely there that they're speaking to me like that because I'm a female."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "You're going to run across all walks of life out there. So you're definitely going to have a few customers that are prejudiced because of their own will. We tend to avoid those customers, if there's going to be a problem customer. So we just tend to work with customers that accept our officers and are friendly with our officers and respect the officers as well."[#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "A lot of people think of a small women owned company as maybe a bunch of ladies getting together and selling crochet things or something, and I think there's a stigma that I've never been that appreciative of. Again, I think setting goals, now a lot of places... and I go and see contracting officers regularly and talk to them about... Even when I was a business development guy, I did. So when I would talk to small business advocates at government activities, the first thing they would talk about is are they meeting their small business goals?"[#36]
- The non-Hispanic white male representative of a majority-owned construction company stated, "I think there probably does exist some stereotypes specifically where those firms are required, based on statutory limits or otherwise, that those firms may not be as qualified or capable as either larger or more experienced businesses."[#38]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "And not so much SWAM. I'm more focused on DBE, because that's a federal classification. And mainly through working the transportation field. And I just feel like they don't take me as seriously as they should. And that's disheartening. I don't know how to describe it. It's not gracious. They're not as welcoming. It's like they do the minimum."[#45]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "We have had stereotypical stuff. People will come in and just assume that, because we speak with an accent, that we're Mexican. Or they think that we're... I don't know. That our labor is gone from the dollar because we're Hispanic. That has happened. Or they'll just come in and they don't even bother to ask your name, they just automatically call you Pedro."[#46]
- The Native American male owner of an uncertified MBE construction company stated, "I feel like that discrimination does exist. I feel like I may have faced that personally, but definitely indirectly, it certainly does exist, and it's a barrier for not only me, but other minority employment owned companies"[#47]
- The Black American male owner of an uncertified MBE construction company stated, "I have seen it originally but after you begin to work there for a while, they see your expertise it tends to go by the wayside."[#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I work for a company in North Carolina that it was definitely like, it was almost like I was a director of engineering. And it was almost like the know mentality, where management knows everything, workers know just what they need to know or not even that and they treated minorities definitely different than they treated the white person that was born in North Carolina and then family was there forever."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I would say women in my field, and I think that's not as bad as it used to be, but I think maybe around here, because things are a little behind the times in some areas. But they may not get the respect that they need as an architect, by contractors, subcontractors, workers on sites, things like that. Because they're a woman, and construction still is dominated by men."[#53]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "There is a stereotype. Not really something that we have experienced because I have been working very closely with her and so I think that's probably the reason why there is an advantage. Working closely with her and putting our services in front of others, we don't see that directly. But I would imagine if my wife has to just go by herself, then that she would expect that. She would probably experience some sort of stereotyping and unfair treatment"[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Well, I'm in a male dominated industry. I've been able to get past that, but I will tell you that in other industries outside of IT, I see more discrimination on race. In IT, I've seen more discrimination on gender."[#60]
- The Black American male representative of a business development organization stated, "Sometimes it can be a matter of misinterpretation, it can be misinformation, there are some people that no matter what you say what you do, when they look at me, they go look at my outer shell first before to know what I'm capable of doing. And that's something that me personally from a black man perspective, that's something I've learned to deal with all my life. How do we get beyond that?"[#FG1]

- The Black American female representative of a business development organization stated, "A lot of men don't think that women are financially capable, that there's still this.. It's like when I walk into a room and someone says, 'Sweetheart,' or, 'Girl' and I'm a very polite, professional person, but that's when I feel the need to help put someone in check and say, 'No little girls here. That's not the case,' but that still exists and there's no reason for us to pretend like it doesn't. But the reasons why it exists, I can't possibly say."[#FG4]
- The female owner of a WBE-certified professional services firm stated, "Seems like we're often left out of the conversation. We're often on the sidelines looking in trying to understand, 'Hey, what are you talking about over there?' Or 'Oh, I didn't know that you would be interested in something like that.' You continuously, as a woman, have to assert yourself in the conversation and then if you assert yourself, then you're looked upon as, 'Hey, you're being too aggressive.'"[#FG4]
- The female owner of a WBE-certified goods and services firm stated, "We're seven years in and I'm very capable in our field. I'm certified. I can be a programmer. I've installed it. I've got my own cowboy hat, hard hat and I've got my boots and my truck so that if our team needs something, I can get in full construction gear and I'm out there. In recent years, I've kind of gotten the, 'Well, yeah. I'm really impressed with your company. You're out there helping them.' Oh, I think that was a compliment. This is the same, 'Oh, honey, that light bulb doesn't exist at the auto part store.' It's like, 'I'm looking at the book, dude.' Don't dismiss me without even looking for the light bulb. They would never say that to a man. They would never say that to the man. They would never have. If my husband were the owner and he went out, they'd probably stand up a little straighter like, 'Oh, the owner's here,' but they would never be impressed that he understood the industry."[#FG4]
- The Black American female owner of an MBE- and WBE-certified goods and services firm stated, "There are several barriers that exist for Black Women owned businesses that make it more difficult if not impossible to compete for Commonwealth solicitations, paramount of which is institutional racism. This is predominately based on what I have and continue to experience working in the Commonwealth of Virginia and competing for State and City contracts. I am faced with many prejudicial assumptions about my business capabilities: · · The assumption that we cannot provide a service because you are a Black Woman. · Disparate treatment in the contractual procurement and purchasing processes as compared to the treatment provided to non-minority owned companies. · The assumption that we do not have the financial ability to provide a service because you are a Black Woman. The assumption that you are not intelligent enough to write a response to an RFP. "[#WT13]

4. Unfair denials of contracts and unfair termination of contracts. Twelve business owners and managers were asked if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract. [#8, #27, #29, #33, #35, #44, #47, #49, #55, #WT3, #WT15, #WT22] For example:

- The Black American male owner of an MBE- and DBE-certified construction company stated, "I have had that experience before. I had a contract with Waste Management, hauling rocks into their landfill, which is only maybe about five miles from my house. I had the contract for maybe two years or about maybe three or four years. There was another firm, a bigger company, [a hauling company], out of Stony Creek. When the new CEO or the new

supervisor took over or whatnot, they canceled my contract. When it was time to renew it, they wanted to give it to this bigger company. When they got it and didn't want to work with them. Well, they wanted to call up, and I was like, 'Well why didn't you give me a 30 day notice or something?' Blasé, blasé. Then they were like, 'Well, we just did what we did for the best interest of our company.' After they got the contract and saw it wasn't paying enough for their fees and trucks. They didn't want to stay on that little haul, because they'll haul from here to Norfolk and they'll have a haul coming back. But I was just constantly carrying these rocks right to this place and everything. To make a long story short, they gave them the contract and when they got the contract, they didn't want it. Six months later, they're going to call me back trying to apologize. They're going to try to give me the contract back at a lower rate. I told them no, I couldn't do that."[#27]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "You can come with the best qualified employees to bid on these contracts. The Commonwealth will terminate and reject you based on the fact that you have people who are qualified, but the company does not like doing that kind of work. When me and you know that you were qualified. If somebody has a bidding and you show up there and you have the lowest bid, you get the job don't you?"[#33]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I have seen some in the past, but it wasn't towards my company, it was towards other companies that I've heard from other company owners. But I mean it does exist."[#35]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "one real estate job we did, I think that was it. He used that it was because we didn't have enough employees, but... Yeah. We had the best price but we didn't get the job because we weren't big enough and he was scared because it was a woman-owned company. Most of that had to do with size I think, but a lot of people, they see a woman in the HVAC trade they don't... For some reason or another, I guess the public perception or the persona that is a little odd."[#44]
- The Native American male owner of an uncertified MBE construction company stated, "I think that's all discriminated against as far as your economic status."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "It's hard to answer that one because once you get it, you don't know what they're looking at to say yes, I'm going to give it to this company or no I'm going to give it to this company. That's all behind closed doors and they don't obviously tell you well because you're a minority, we didn't give it to you. They don't tell you that. They'll just come up with a... I don't know what they'll say but they come up with something if you do ask the question, they'll come up with something to say."[#49]
- The female owner of a WBE-, DBE-, and SBE-certified firm stated, "Twice in our career, we have experienced being 'removed' from a winning team after the fact only because the client was cutting costs. The first time was on a project for the City of Virginia Beach and the second was for the City of Hampton. We were cut out after winning and after writing public engagement plans for these projects. We were not compensated for the bid prep, participating in the short list presentation, nor for public engagement plan and budget

development. In both cases, the city staff and prime contractor used our plans to do the work themselves, thus we (the DBE) were left out and received ZERO compensation after hours/days of time involved. Suggestion: City/Prime must verify why a DBE was removed from a team and budget constraints should not be the reason after the award has been made. For DBE/SWAM firms, contractors should have to pay for any time and materials used in the bid/proposal phase if they are subsequently removed from the team for no other reason than poor planning on behalf of the agency or Prime."[#WT3]

- The male owner of an SBE-certified firm described an email chain, "What is/was the proposed Small Business Subcontracting Plan as listed in the RFP? Since the proposal was awarded, we were informed by [the winning firm] that due to a significant budget cut there was no room in the contract for [our firm]. Since [our firm] was the only small business involved in the bid this effectively means there is no longer a small business subcontracting plan for this award. Is this how [your agency] has agreed to receive delivery for this contract?" The procurement officer replied, "When a vendor sends in a proposal at that time we ask for their SWaM Plan to be submitted. At the time of renewal, we ask for an updated SWaM Plan as well as how much money was spent in the last 12 months with the SWaM company they originally put on their SWaM Plan. If for any reason that has changed, we would proceed to further investigate the reason and if additional action needs to happen we would do so at that time." The business owner continues, "As you can tell from the above email. Small Business Subcontracting Plans are not worth the space they are written into because the prime can simply delete it during price negotiation and the SWaM status means nothing after the contract is awarded. The Government does not follow up on a small business plan nor do they enforce any of the requirements. This indirectly costs small business Bid and proposal time and money. The time and funds are lost regardless of whether we are on the winning or losing team. This motivates SWaM businesses like [ours] to concentrate on other parts of the government. If this was the only time it happened one could argue that this was an anomaly."[#WT15]
- The female owner of a WBE- and SBE-certified firm stated, "My small business has experienced multiple instances of being replaced on winning teams for Virginia state government contracts by the winning prime firms, whether being replaced with self-performance of our services or being replaced with a competing firm. There is nothing that I can find in Virginia state law that truly prevents this, even though I have been reassured by different state government representatives that this type of substitution shouldn't happen. In 2015, after experiencing this a few times already on Virginia state government contracts, I experienced the most egregious case to date for the design services for the General Assembly Building. Please find attached my detailed procurement complaint on this subject, as well as the response I received from the Governor's office. Having raised the issue as comprehensively as I could back in 2015, I had hoped that I would have, at least, raised sufficient awareness of this bad business behavior to prevent it from happening again. In fact, this sort of unjustified replacement happened to my firm at least one additional time, that I know of, on a Virginia state government contract, in 2018."[#WT22]

5. Double standards. Twelve interviewees discussed whether there were double standards for small, disadvantaged firms. [#17, #21, #24, #25, #26, #39, #47, #54, #55, #59, #60, #FG1] For example:

- The non-Hispanic white female owner of a WBE-certified construction company stated, "It always appears a good at the table. Until a conflict comes along. I have sat at the table and had five men sit right there and yell at me and be so disrespectful and I know I have to take it because if I say anything back then I'm being disrespectful. If I defend myself, I'm being disrespectful. I just have to sit there and take it. The sad part is not a single man will come to my defense."[#17]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "No, in fact, it's just the opposite. If somebody is out there trying to do the work and struggling or not familiar with the work, I'll see it go the other way. They'll cut them some slack and say, 'That's good enough.' I've not seen any kind of discrimination like that."[#21]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I believe that, when someone comes on board, if you can prove yourself and your work, that is what gains you that fair treatment. So, I think it's up to use, I call them, also, little guys, to show that we can deliver. And I believe that, once we show that we can deliver, the big guy is like, 'Okay, let's do this.' You know what I mean?"[#24]
- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "I think that it's great that there's more awareness of the disparity. It's a very delicate way that we need to work it out because I don't think it's helpful to do a lot of the accusing, as much as we need to educate more than accuse. I would say that is the one thing that I would add that we need to, those of us who are minority and who are women, that we just need to come into it with an attitude of educating. I always told my son growing up and I always tell my employees and the people in the office, 'We always give the other the benefit of the doubt.' Don't assume the worst. It's so easy to assume that worst, especially because of things that are happening and that we have seen happen. Give the other person the benefit of the doubt. Maybe they are just really, truly ignorant and maybe truly they have just never even thought about some of these things. I think it is important that we come to this discussion, come to the table, with that attitude of we can all learn from each other, and ultimately we all want to do well."[#25]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "I had an issue, this happened at CNU. And I had an issue there to do with a damage for an elevator door, and they quickly blamed us, that we damaged the elevator door. And it was a brand-new elevator door in a brand-new building. So, I'm quite sure it's very expensive to replace it or fix it. The truth of the matter is it wasn't our fault. But the way we had to fight and defend ourselves. And if it wasn't me being who I am and my type of personality. We would've easily been blamed for that."[#26]
- The Black American male owner of an uncertified MBE professional services firm stated, "I think that there is, just my experience in the industry, there is a wariness or there's, how can I say it, extra scrutiny that minority and women-owned businesses face. Every firm makes mistakes. Every firm has their challenges, but I think when they make a mistake or they have challenges, those things tend to get magnified and they become a defining factor

of doing business with this particular firm. Whereas others, it would be, 'Okay. Hey, you guys missed a deadline and don't do it again,' But if a minority or woman-owned firm misses a deadline, then it's, 'Hey, see, this is the problem we have with these types of firms.' So that type of scrutiny, I think, exists and it's something that most firms face going in. They have to be twice as good as other firms just to stay at the table, and that's reality."[#39]

- The Black American male owner of an uncertified MBE professional services firm stated, "Absolutely. Minority firms, it's already inherent a minority firm has to work harder, but I believe they endure way more criticism if something does go wrong. I don't think the ability to correct any issues on the fly is the same. I think it has to be a hyper-sensitive situation all the time, more of a fear that you're going to lose the contract and not get any more worker than, 'Hey, we're going to partner and we're going to get through this and work together and grow.'"[#55]
- The non-Hispanic white male owner of an SBE-certified construction firm stated, "Well, my experience on that job [as an SBE firm to an MBE firm], is that they didn't have to meet deadlines. They really did not have the expertise to do the project that we did. And I'm not holding that against them. They're taking advantage of what they were offered. But yeah, I would say yes."[#59]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Like I said, if you're a smaller firm, you have to... Especially if you're a minority. Women and minorities, you have to be twice as good. They're going to hire you in spite of that, not because of it. You have to be twice as good. For me, I've seen some businesses that have lower qualifications than we do that are owned by white men, that will get hired. We'll compete and if they don't know us personally... I mean, we've gotten past a lot of that now that we're more established, but it still happens. There's that subconscious, 'Hey, they've got to be better.' And again, it's not just women. It happens to minorities. I've seen it."[#60]
- The Black American male representative of a business development organization stated, "In some cases, from my perspective, I have to be better than the best. I have to prove myself that I'm number one and not only have to prove myself I have to show that I belong here at the table."[#FG1]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor were often mentioned by interviewees as barriers to success in both public and private sector work. Some firms attributed this to discrimination by race or gender, while others thought it was a factor of the size of the firm. [#1, #24, #29, #44, #47, #54, #55] Examples of such comments include the following:

- The Black American male owner of an MBE-certified professional services firm stated, "Because what happens sometimes, a prime will get a job, and he will then sub it out to a minority or a non-minority. The minority, he may only give \$50 an hour, and then he'll say, 'Well, because the company's small, it's not as big as...' He'll give some kind of reasoning. But then the white counterpart, he will get \$60 an hour. And there would be no reasoning for getting \$60 an hour. And so, the only way you could make that even is if there was a grading system for all small businesses and all subcontractors. So, you would just A sized business, a B sized business, C sized business. Yeah. The discrimination is even though you're giving the

10% quota, but you may not be getting the same fair share as if they didn't have that 10% quota over them. If they will give it out to a white company, that white company could do the same job as the black company, but the black company will get less an hourly rate than the white company."[#1]

- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "Construction industry is huge, so you don't need a degree to be in construction. But I've heard of a lot of times when people get hired to do contract work, and don't get paid by some companies, because they think they can get away with it. And then, some of these companies get told, 'We'll call Immigration on you,' or, 'We're not going to pay you because you're not legal.' Yes, this stuff happens. I was born in Puerto Rico, for one. So, anybody who tries to do that to me... But I've heard from people that are from Puerto Rico, who've been told they're going to call ICE on them."[#24]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I did have one contractor I was doing [work] for, they're out of business now, understandably, and I'd always check that I can put the lien on the houses when we did the new construction it. And the last three houses I did for him, the only way I got paid the bank paid me. Because they couldn't sell the house until they cleared my lien. Well, in the real world when you're a small business. And it's like I tell my guys, 'Hey, we got all the work in the world. But if we're not getting paid for it there's no need to go do it.'"[#44]
- The Native American male owner of an uncertified MBE construction company stated, "I do feel like that small businesses have less pull, and do not have the resources to pursue payment like larger contractors. I think that we get walked on the little bit because of that."[#47]
- The Black American male owner of an uncertified MBE professional services firm stated, "When the work is done you should get paid, pointblank, period. Smaller businesses, woman-owned, I've experienced it once. I've seen it numerous occasions, especially more so on the women's side, people will hold money. The work is done, there's a punch list, however, they're going to pick it apart just to hold your money all the way till the end, just to hold you to that line all the way to the end while bigger firms continue to get paid."[#55]

7. Predatory business practices. Five business owners and managers commented about their experiences with predatory business practices. [#20, #35, #45, #60, #FG1] For example:

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "As far as the government sector, none of that exists. I'm pretty sure of that, 99.9. There may be something in there along the way. But the commercial sector is a whole different ball game. They play by different rules, and I can't answer yes or no, to any of those questions. I've seen it happen... not to me... but I've seen it happen in other places in the commercial world. But I haven't never seen it in the government sector."[#20]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "So if you mean like by harassing business reps or other businesses or something like that, that does happen. With the amount of competition that's out there and like small businesses getting a foothold. You do have some of the other businesses kind of on the attack mode as far as small businesses. And that kind of exists in all big companies. So, you

do have like predatory larger businesses out there. We've dealt with a couple of national companies that are aggressive like that" [#35]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I was in a situation bidding with both companies on that one van pool contract. And thankfully, the top person that I work with at [Company A] welcomed me and honored who I am in my business. Because the person I was really working [in the bid process] with got angry that I would bid with two different companies, like [Company B] and [Company A]. And I said, 'Well, the state of Virginia wants me to do the work. And they need competition.' And [Company B] asked me to join their team. And I've been trying to join their team for two years now, since I joined [A's] team. And DBE regulations say clearly that you can't tell a small business, small women and minority business or DBE that they can only team with one company. That limits our marketing potential. I said, 'And if you're not comfortable, then I need to speak to your boss, because these are federal regulations. You can't tell me that I can't team with as many companies as I want to.' So, that was an issue that thankfully, the top boss had my back. And she goes, 'I'm going to assign a new person to you. And we know, as a prime contractor, we have to support and nourish the smaller companies.' And again, she knew me well, okay? But what if somebody didn't know we well? What if I didn't have the nerve to actually speak up for myself? I mean, that's a problem." [#45]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think the predatory business practices come from the prime contractors. These large prime contractors that are sitting there saying, 'Yeah, we're going to get these SWaMs and we're going to take care to make sure that they have a certain amount of the share,' and then it doesn't happen." [#60]
- The Black American male representative of a business development organization stated, "When I retired some years ago, and got into corporate world corporate setting, I noticed a lot more than as far as unfair practices, I think just mention about there's laws and bylaws and things in place to protect people in question as far as being a minority business owners or people in general, having a level of unfair practice of discrimination. I think it's very valid. Yes, it is. I think it continues now." [#FG1]

8. Unfavorable work environments for minorities or women. Eight business owners and managers commented about their experiences working in unfavorable environments. [#5, #35, #39, #44, #45, #55, #57, #58] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Not in recent years, but certainly when I first started my career." [#5]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah. I mean, it does happen in all workplaces. Not within the company, but mostly from the customer, so it does happen." [#35]
- The Black American male owner of an uncertified MBE professional services firm stated, "Yeah. Over 35 years of working in industry, I've heard of companies complaining about being treated poorly and attributing that to their race or their gender. I think that most of the companies that I work with or projects that I've worked with have had an escalation

process where those grievances are addressed. I can't think of an instance where it hasn't been addressed properly or to the satisfaction of the individuals, but that exists. That exists in the public sector, that exists in the private sector and over 35 years, I've seen my fair share of it."[#39]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "You go on a job, especially the construction jobs and stuff like that, yeah unfortunately you do see that. There are a lot of butt holes right there. Foul language, just nasty stuff. The world needs to change, man. Everybody needs to wake up. But some things are not going to change overnight. That is an issue. That is an issue. People need to act professional. And then again that all comes back to training. Training, honor, dignity, respect. A lot of places you don't see that, and that is an issue"[#44]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "that's one reason I moved to Virginia from Georgia. Okay, make a note, because I was physically threatened more than once in Georgia while I was at work. And I was kind of physically challenged here in Virginia, but that was when I was working at a, not a non-Commonwealth of Virginia agency. But it was in transportation. But thankfully, I had good people as witnesses and backing me up. And so, but not with my business, okay? Not to my knowledge, yeah. You know, where I had to work super late at a contractor's office in Springfield, and ... I mean, people would try to intimidate me late at night. Like, if I didn't give them what they wanted like a report, because I have to follow a protocol and channels. And more than once, I'd have people in there, a guy, you know, 'I want that report, and I want it now. And do you know who pays your payment? And I'm like, "'Listen, you need to remove yourself from my presence. I'm calling my boss right now. You got a problem with me, you talk to my boss."[#45]
- The Black American male owner of an uncertified MBE professional services firm stated, "My business is construction, so every time I go in a Porta-John there's racially insensitive comments. There's insensitive comments towards women, implied or otherwise. It's out there more now because of the MeToo movement and the current movement that's going on with social justice. And the thing is, if I'm in a room with my 10 white partners or 10 white coworkers, and they're joking and jousting and saying jokes that are totally fine to them, but it's insensitive to me and I say something, everybody is looking back at me with 10 heads. I used to have an admin work for me, and people would come in the room and be like, 'Honey and baby,' and I'd be like, 'That's not her name. That's not her name.' Even with some of the women business owners that I have, people still don't treat them like a business owner."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "More so when I first started than now I think that there have been many flirtatious men and comments that wouldn't be acceptable that people just kind of don't know quite what to do with."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "There are, even if there are a lot of rules and regulations in terms of workplace ethics, those are there, but I think there are groups within the industry who are very wealthy and very of certain race. They have more money, more control of businesses, and

they're prejudiced against people of certain races and people of certain color, and especially against women. And yes, definitely that exists."[#58]

9. 'Good ol' boy network' or other closed networks. There were a number of comments about the existence of a 'good ol' boy' network or other closed networks. Thirty-eight firms shared their thoughts. [#5, #6, #8, #9, #11, #12, #13, #16, #17, #18, #19, #20, #21, #23, #24, #25, #26, #27, #29, #35, #39, #44, #45, #49, #52, #54, #55, #57, #58, #60, #AV, #FG1, #FG4] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "You know there will always be a good old boy network. That's unfortunate, and I said this early in our conversation, a lot of older family-owned companies are going out of business because they have no legacy to hand off their business to. That's where you'll start to see this good old boy go away."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I still believe that there's a good old boys system out there, and people get... I understand how it happens. People get comfortable with certain people, and I've benefited from that, but at the same time I think it eliminates exclusion... It doesn't completely eliminate it, but it at least brings that rate down."[#9]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "Politics are involved in everything, relationships are what makes a lot of that work for sure. But I don't think there's any favoritism, we're not the only one that holds the contract. There's another company that holds the contract as well, and they just kind of spread the work out between the two of us. So, they definitely seem to be pretty fair as far as all that goes."[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "The trouble with those things is, if you're not inside that bubble, you don't know that it's happening. So, wouldn't really be aware of it."[#13]
- The Black American male owner of an MBE-certified construction company stated, "I'll tell you what I've experienced, you can't do nothing about it, there's nothing you can do about it, but I've experienced it anyway, I've seen it way back in the day and it still exists now today. You take these big contractors, I have been trying to get in that man's [the owner of a large firm] door for, I guarantee you seven years, I bid probably more than 10 million dollars' worth of work with him. Not even a call back. I seen one of the project managers that works for them at a YMCA, the same YMCA that I go to, and he told me 'look, I'm going to tell you, just go knock on the door and just tell him'. And I've done that, still that guy will not give me no work. I've even low balled it some just for the thought of it, just low balled it, still did not get no work."[#16]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I have no problem working from the bottom up, but I feel like the government is still in its 'Good 'Ole Boys' days. No. I've just noticed that they have the good ole boy system so when I go into pre-bid meetings, I sit at the end of the table and I'm like a college person. I get my laptop out, my notebook, my highlighter. Nobody wants to sit around me. You've got the good ole boys. To me, I don't care. I ain't your friend. I'm going to take your jobs. I'm not

there to be friends, but I have been in that situation before when I first started and it's discouraging. Really discouraging. When you see these people come into these pre-bid meetings and you know they're doing work, or they're talking to a contracting officer, or they already know the architect. Why would I waste my time bidding against this guy when I feel inadequate? That's discouraging. That's a problem. I've seen that. Me, I don't care. They can be friends all they want. Still don't matter. I'm going to take your job. Be friends, shake hands, but you're really going to cry after I put my bid in, and that's what I have found is they've got the cliques. They've got the good ole boys. And I understand why if it's not broke, you want to try and fix it. Why do you want to jump ship when it works?"[#18]

- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "I think in terms of finding out about opportunities ahead of time before they hit the streets for bids, I think a little it does. I think when it gets to the procurement level, I mean, they have procurement procedures and laws. I think there's really... we can't hand somebody a contract because if they're a good old boy, I think that... Then again, I could very well be naive. I can't say though that has played a role in why we don't respond to state solicitations."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Yeah, that's always out there. They're an integral part in the government sector, but you do find it in the commercial sector. I'm sure of that."[#20]
- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "Certainly there are places that we have seen that it is alive and well, and it's frustrating. It's hard to break into certain lines of work. And unless you have a teaming partner that might be part of the good ol' boy network, it's not something you can always break into on your own. It's alive and well."[#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "Unfortunately, I believe that the men are the ones who run the show, for the most part. Yeah, thank God, there are women in a lot of the procurement offices and things like that, and in government."[#24]
- The Black American male owner of an uncertified MBE professional services firm stated, "Actually, that exists, and you just have to guard yourself against it and make sure that when opportunities are there to socialize and participate in activities where you can get to know your clients, get to know your co-workers, some of that is on you. The good old boy network is alive and well, but you've got to make sure that you recognize that if you decide you don't want to socialize with your clients or with your co-workers, someone else will. When you don't get the promotion or you don't get the contract, then you shouldn't be surprised if you're not doing the marketing and the networking necessary to form those relationships. A lot of the business is about relationships and the way you beat the good old boys' network is you try to build up relationships and you try to build up your network so that when the opportunity comes up, your name comes top of mind."[#39]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I think it exists everywhere. Federal, state, private, residential, yes. It does exist. It is there. It's just a real fact of life. It's just a real fact of life."[#44]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "And this is my problem is that, if you are an incumbent and you have a contract, then guess what? You have constant access to the people that are going to be putting in those bids in the future. But if you didn't get a contract, you have no right to just knock on the door at a state agency because of security right now."[#45]
- The Black American male owner of an uncertified MBE construction company stated, "It's still living very strong in our society. It is there. It's there. I can't say I've seen it directly happen to me. But I know it's out there in today's climate. We know it's there."[#49]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "Yeah, that happens a lot when we're at the auctions. They accept males, and when they see a female, some of them don't play nice."[#52]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Oh my God, yes. I mean, I see it. I was working with a company some years ago. I mean, it was just firsthand. Contractors doing work and they didn't do all that they were supposed to do, but because a certain person or a color of a person was managing the project, they got away with certain things. But then, it might've been me, or someone of my background, my color doing the same thing and trying to work with a contractor. We would get slap on the hand or a bad write up if the contractor did something that he wasn't supposed to do, or he didn't provide something he was supposed to provide."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "Hey, I'm sitting in a room with 10 white people. I've been working in this industry in Richmond over 10 years, and the room is never diverse. There are people that are owners, business owners, developers. Owners of construction companies are not diversifying upper management or their development teams or their project teams because they never change. I've been doing this for a long time, and the group is always the same. I told you my feelings about the job at Richard Bland. I just think that was a deal where somebody said, 'Hey, we don't know this guy. He's low bid, but we want to work with this guy, and you have to beat that.'"[#55]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "I think that this is how it works. If you know people inside, then you get it. If you don't know, and you keep applying, maybe you have great proposals, well that doesn't mean a lot it looks like. Definitely that's the group that I was referring to. It's not only just that having some preference to certain friends, but it is more of this racial part, I would say, where there is a support within certain community, and they have lot of businesses, and they would prefer people of certain race. Of certain preferences to get the business. And that's how they are able to get smaller business very quickly rolling and have very successful businesses. And people of certain race, they have smaller businesses, they remain smaller businesses and they don't even grow like us, and probably never grow. You don't know if this is the same way."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Oh, absolutely alive and well. I mean, that's what I'm saying. A lot of these big teaming discussions, things like that, it's alive and well. I actually hire a firm that is a Good Ol' Boy to help me get into these places. He's been doing it for 30 years, but that's part of the

game. And quite frankly, if he wasn't as connected, I wouldn't know some of the stuff that's going on. I have to actually employ a Good Ol' Boy to give me the information I need."[#60]

- A respondent from the availability survey stated, "[Contract awards are] tilted to the good old boy network. There are not enough skilled workers, and inspectors do not enforce the code. They don't check qualifications of contractors."[#AV]
- The Black American male representative of a business development organization stated, "But it's a good old boy network as well, and you can't it's tough to beat the good old boy network. Private sector is not a lot going on. And a lot of private sectors are born with the gods that they know, they have worked with them for the last 20 years. So, they're not open the door for anybody who's new to come in, because there's no incentive for them to do it either. To be frank about it. So, I'm talking mainly in construction because it is not a lot of it. So, what they have to feed the guys, that has been good to them for the last 15 to 20 years. So, to try to break into that market, it's almost impossible. Almost, I mean, you still got to be able to get out there and pound the pavement as much as you can, in the midst of this and leverage connections that you got, or you've had over the course of years."[#FG1]
- The Black American female representative of a business development organization stated, "It's very much a relationships game. It's very much a networking, when you see my name, do you know who that is? That happens a lot in the bidding process. And so, but on the other side of that, that's why whenever they have it... And it does, it takes a lot of time and energy to make those connections. When they're having these events, for you to keep coming out, for them to, you're preparing all this literature and your marketing materials and making your pictures and your presentations, but it's absolutely something that has to happen. So even before they started having these networking events, one of the things that I always recommended to people to do was to go on eVA, see who the buyer is, see who they gave the contracting last, reach out to the buyer, let them know you're interested. See if you can actually meet with the buyer, see if you can understand their preferences. It's like you have to go through this entire process, when really all you're saying is, 'I am a qualified vendor. You have a desire that you need completed. I can do it.' And it should be a whole lot more straight forward. But unfortunately, the bottom line is it's the networking, the relationships, it's required."[#FG4]
- The female owner of a WBE-certified professional services firm stated, "I think it's hard for startups up and coming businesses to be known, be heard and be seen, when you're competing against incumbents for certain opportunities, or even well-known small businesses within the area, it's hard to get your foot in the door. Not unless you have an established relationship, not unless you know who the buyer is intimately. When they're looking at the proposals they're seeing, 'Okay, well, we know this vendor, we know this vendor A, we know vendor B, but what about vendors C.' It puts you in a neutral state to where it kind of handicaps you until you start to win, until you start to be known or be seen within the community or within the network, I guess, with that buyer, so."[#FG4]
- The Black American female representative of a business development organization stated, "It's just a given. So there's so much. It's like when even now, everyone's talking about like Black Lives Matter and all these issues. There are so many things that are behind the scenes in every conversation, whether addressed or not, so I hate to say it, it just exists. So those who are currently in power, the current majority, and stats are still showing, it's still

currently, older Caucasian men. That's just what it is right now. So, to even ask the question of, are you giving me a fair shake? When still today, you're making your business deal on the golf course, at the country club, someplace separate, you might have an intent for it to be a friendly conversation about, 'Hey, I have this opportunity,' but that's what we're all talking about because even as we talk about these contracts, we're saying, 'Well, everybody has their preferred person.' Well, part of that preference is because you're so-and-so's cousin, you're so-and-so's niece, you're so-and-so's uncle, you're someone... There's a connection and that's missing. We don't generally have that network. As women, even if it weren't as an entrepreneur, if you look at the workplace, the fact that we generally make 78 cents on the dollar doing the exact same job as a man and in a system that was previously set up where you weren't supposed to discuss your salary, these are the type of systemic rules have been put in place to keep us all in check. So, the fact that I couldn't talk to you about the fact that we're doing the same job, why do you make \$10000 more than I do? And that's in the standard private sector. You have to know that translates just as well into entrepreneurship."[#FG4]

10. Resistance to using minority- or woman-owned businesses. Eighteen interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm. [#8, #16, #24, #29, #37, #38, #39, #47, #52, #53, #60, #AV, #FG1, #FG2, #FG4, #PT1, #PT2, #WT16] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't know if it's because I'm SWAM."[#8]
- The Black American male owner of an MBE-certified construction company stated, "I can tell you the people that I do private work for, they're from out of state. They don't have this issue with minorities. I only have one company locally that I do work for and he's retiring. I haven't worked for him in a year. But I was doing all this work, but I haven't had contact with anyone else around here because of that minority situation. It's just the good ol' boy network."[#16]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I think, resistance might be strong, but I think some companies, they know and understand that, in order for them to fulfill a contract, they have to hire minorities, or subcontract to minorities. So they do it because they understand that they have to. I don't know that many companies, their heart is really into it."[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Well we don't know if they refused it. I can tell you what, they needs to be more of a mandate that they must."[#26]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Yes because I'm micro. Just because I'm small, people don't give me the consideration they do a bigger business."[#29]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I've seen it the other way around. I've seen them looking for...minority or small business. Or setting aside work for the very purpose...matter of fact there was one company I was working for, who is humongous but will remain nameless, they were almost looking

for my company to get the contract, but they looked at me, and because they wanted to...they couldn't bid the job, or they wanted the job because it was for small business. So the government bends over backwards as far as I can tell, to accommodate small business."[#37]

- The non-Hispanic white male representative of a majority-owned construction company stated, "I think there is actually the opposite. Oftentimes... we are in alignment with our customers and we would prefer to work with those firms. In many cases, we pay a premium to do so."[#38]
- The Black American male owner of an uncertified MBE professional services firm stated, "If a company is qualified and they have the necessary resources, even though you reached your goal, it shouldn't matter that they're a minority or a woman owned business, the best company should receive the work. So I've heard discussions about how that has, in some people's mind, kept them from getting awards because the contractors or the agencies have reached their goal and they weren't looking to go anything beyond what was required. I don't know that the government is the one that's going to resist. They're usually the one that is establishing the requirement. It's holding the contractors accountable, as I mentioned earlier. The governments, I think, depending on what state you live in and who's in office, generally have it in their procurement rules the use of small or minority owned businesses. Some states are more aggressive than others, but my issue is about enforcement, monitoring and educating, so that's what I see there."[#39]
- The Native American male owner of an uncertified MBE construction company stated, "I have, just because sometimes, I think that it costs a smaller company more to do a job than it does a larger contractor. A lot, they see the number come in. They don't want to use the smaller contractors that you're describing, DBE, SWAM, minority owned, women owned businesses, just because of the price difference they're driven on."[#47]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "I was in communication with the customer, going back and forth, providing him the specifics on the vehicle, all the details. And we did a FaceTime, he was very, very interested, we did a FaceTime, and I could tell by the expression on his face something changed. I don't know if it was racial or what it was, but it just seemed like after that, all communication just stopped. But we did a FaceTime with the vehicle, started it up, did a walk around, showed the interior and everything and he was super excited, and then after that we didn't hear anything. But we were in constant communication for like two weeks ahead of that, and then done. I don't know, maybe it was something about the car, but... I don't know. It was just strange."[#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Here's an example. The barn that I'm doing. Now, originally another firm was going to do this project, but I was contacted by the owner, by this client, who said it wasn't working out with that firm. I know the owners of that firm, and I talked to them. It's a husband and wife ownership. The project manager was a woman who was mostly working with this guy. I said, 'Well, if there's a problem, I'm going to meet with them and see what the problem was from their point of view.' They felt like this guy, like there was a sexist attitude problem. They didn't feel like they could work with him. It had broken down. So I was weary about this, but being I was another man I thought, 'Well, maybe he'll be more comfortable working

with me. I'd like to try this job.' But I was weary about it, because maybe there's other problems too."[#53]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think sometimes there's resentment, but I don't think resistance. because it's additional paperwork."[#60]
- A respondent from the availability survey stated, "As a woman-owned business, I feel as though some clients, from both the residential and commercial sectors, don't like to deal with a woman. I feel like I'm discriminated against from both sides"[#AV]
- The male representative of a business development organization stated, "From a county perspective as it relates to public procurement, where all governed, the Virginia public procurement act. That's a sensitive question that I would say I would be on the fence about, because I have seen cases where that is, it would be an affirmative that yes, there are some hindrances to minority owned businesses. But legally, it should not be happening."[#FG1]
- The female representative of a business development organization stated, "I've had a couple of businesses, so people who have gone out on their own, so they've been running their own business for a number of years, doing the exact same work that they did in larger corporations. That exact same client base, so people would know the quality of that work. What they have found is, people are still hesitant to allow them to get a contract. A minority business that their clientele tends to be heavily minority clients, not because of lack of that lack of trying. When they were in larger corporation, more diverse corporation, with a corporate backing, they could close sales, close those deals all the time, but as an independent business that happens to be on minority business, those willing to take a little more risk on a smaller business happens to be other minority customers."[#FG2]
- The Black American female representative of a business development organization stated, "A lot of the suggestions given today are, are exceptional, the mandates and requirements, the set-asides but at the core of it, there is a general lack of respect and expectation from a woman entrepreneur, there just is. It's sad that I walk into a meeting and I am asked by advocates for me, do I have either a white counterpart who can represent me at the meeting so that I can look professional or do I have a white male counterpart? It's sad but these are real conversations that I have engaged in, in the past few months. When that's what we're dealing with and I'm talking to people who are advocates for the center, we have a long way to go so it's hard to answer to say what can be done. I hate it when we attempt to answer everything with legislation but when we don't have everyone who has the same, what we're seeing logically, sensible mentality, then sometimes legislation, mandates, requirements are what is required. I think there's been a lot of good ideas that have been shared and it's unfortunate that it has to go that route but that will be the easiest way. It's quotas and mandates and requirements and regulation, unfortunate but true."[#FG4]
- The Black American male owner of an MBE-certified construction company stated, "The Department of General Services told me one time, 'If we were to contract to you, we had to deal with all these other black contractors.'"[#PT1]
- The owner of a professional services company stated, "So my company does data analytics, project management and data strategy type work and we've gone through Virginia's project, IT project management training and we have submitted a number of potential

candidates to the vendor that is managing the VDOT outsource, I guess, contract. And I've spoken with a lot of minority owned businesses and expense has not been the greatest in terms of even getting our candidates to be considered for a lot of the openings. And when I have reached out to them in this break conspiracy, it has been a very... What's the word? It has not been a great experience in terms of getting them to be coming with how they're selecting candidates isn't it? We have candidates with several years' experience, I do understand some positions do require experience working with the agencies in the past, but that is not always the case. For certain positions, we're talking about a business analyst position, that should not be a requirement that the candidate has had to or have worked with the Commonwealth in the past in order to be presented forward."[#PT2]

- The Black American male owner of an MBE-certified goods and services firm stated, "Though I've had the support of my community, I know from first-hand experience that contracts and procurement opportunities are less available to me and businesses like mine. I have experienced blatant discrimination as an entrepreneur of color and that decreases my business's success, and ultimately, the success of our local economy. These obstacles are heightened because there's not enough encouragement from the state for other businesses and government agencies to procure with companies like mine even though we face enormous obstacles."[#WT16]

11. Fronts or fraud. Fourteen business owners and managers shared their experience with MBE/WBE/DBE/VBE/DOBEs fronts or frauds. [#8, #20, #21, #24, #28, #30, #33, #35, #47, #49, #56, #60, #WT5, #WT12] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't really know about that. I mean, I don't know how when you submit a qualifying teaming arrangement how it goes through that the other firm didn't subcontract out to the people, they said they were going to subcontract out to. That happens a lot. I've had friends who are in the same situation in different... it's not just in archeology, it was in environmental wetlands identifications and stuff like that. I've had... and they actually complained, and nothing ever happened with it. They just were looked at like they were... you know."[#8]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Yes, I've experienced that in the past, that they claim to be, but they're not... or they put up a president or an owner, that really doesn't know what they're doing. I know that one company... this was years ago now, before I'd been my own business... but there was a company that had a secretary own the business, and then they just paid her as a secretary. And they basically claimed she was woman-owned and minority, and they went and bid contracts and they won contracts. And they got hammered for it, but that was good. That's years ago, and I still think it's happening, but I can't be sure. I can't put a finger on anybody doing it now."[#20]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I believe there's still a long way to go for us. I also believe there's a lot of companies out there that are registered as woman-owned, but really, there's somebody else running the show."[#24]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "In today's socially and politically sensitive society that we live in, I find it unfortunate that one of my competitors over in the Hampton Roads area, brags he's black, he's the one that pretty much owns the business, he gets preferential treatment, because he laughs, because he put the company in his wife's name. And he brags that that gives him even a further leg up, because now he's female owned and racial minority, I believe, and yes, his bid can be higher than mine, but he gets preferential treatment. In my book that's not quite right."[#28]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Especially as far as being a woman-owned, I have the ownership from a female standpoint, but I'm not pursuing that at the moment because we're not woman-controlled. I know in the past; people have set up an artificial woman-owned business to take advantage of those programs."[#30]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "I have been to three contractor meetings [where they asked me to] do nothing and we will pay you. So, we would be bought out. So, I turned that down because I didn't want to work as a middleman. I have had that happen many times. They know they are going to win the contract, and they don't want a minority to interfere. They don't want you to come and learn anything. They want you to stay where you are. They say they will give you some money, you sign here, but we don't think you can do it right. So, I have had that happen to me. I turned it down. You know? Yeah, and I know it's illegal also. So, I came here with an expectation to live a good life in America and not go to jail, and I know you cannot get away with that. So, I rejected it. You can win once, twice, but the third time they will get you. So, I said, 'No. This is not something I'm going to do.' But I'm sure they found someone who agreed to do it. When you go and do that, how do you ever learn? How is your team going to learn? How do you grow?"[#33]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I'm not sure, but I mean, there's fraud everywhere. So, I guess with small businesses that might not be aware of how to defend themselves from fraud. Like I have a multi-system approach to preventing fraud. I actually verify the email addresses, verify the phone numbers because we do receive some sideline requests, have our officer sit out there in the middle of nowhere and it turns out to be a fake customer. We tend to avoid all those and we have a good service track out there and have not taken those assignments."[#35]
- The Black American male owner of an uncertified MBE construction company stated, "I know one thing that is surprising to most, Caucasian women can get a SWaM certification because they're women. But what happens quite often is they're Caucasian counterpart, their husband a lot of times they'll have a business and then he'll put the wife in business, and she has no clue what she's in business on. Just to have, got minority participation I don't know how they can catch that other than, Mr. Smith you are a general contractor. Mr. John Smith you're a general contractor. We have a Jane Smith here that has your same exact address as a SWaM. What's the relationship of you guys? Married? That type of thing. I don't know if it's illegal to do that, but the city of Richmond has realized that and recognized that. They do not recognize a white female as a minority."[#49]

- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "When I did VDOT work, yes. The woman-owned businesses were not legitimate businesses. No. They had a woman, but they were just pass [through] entities. They weren't performing a trade or anything. They were buying products and running them through their books to get the minority participation. Maybe the state of Virginia looks at that as a legitimate woman-owned business. If you're not self-performing something as a subcontractor as a woman-owned business, if all you're doing is a pass-through entity for books and then marking it up, I don't look at that personally, as a legitimate woman-owned business, or minority, or small business."[#56]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Not at the state level. I've seen it at the federal level, but not in Commonwealth of Virginia."[#60]
- The female owner of an MBE- and WBE-certified firm stated, "I have come across companies that are designated 'Woman-Owned' where in fact the spouses run the company and the woman is either not involved at all or involved in a capacity that is not the major leadership role in the company. There should be a vetting process for eliminating such activities which are not in the spirit of encouraging truly 'Woman-Owned' businesses, making it harder for truly woman- and minority-owned businesses to compete."[#WT5]
- The male owner of an SBE-certified goods and services company stated, "The biggest problem is not finding 'Woman-Owned' or 'Minority' businesses. The problem is that our biggest competitor within Virginia is a SWaM certified 'Woman-Owned' and 'Minority' business. It just so happens that 'minority-woman' is also on the Forbes List of Richest People on planet earth. Yeah, a 'Multi-Billionaire' is getting preferential treatment. That doesn't seem right."[#WT12]

12. False reporting of participation. Eight business owners and managers shared their experiences with the "Good Faith" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals. [#39, #49, #55, #60, #FG1, #FG4, #WT15] For example:

- The Black American male owner of an uncertified MBE professional services firm stated, "I will tell you that my experience with the public agencies in Virginia versus public agencies in Maryland and New York and Massachusetts, and it may have changed, or it may be changing, but a lot of the goals that were established in the public work in Virginia was viewed as a best-effort type of goal, not necessarily something that anyone had to achieve, but they had to document that they were giving a best effort. Other states and government agencies, they take those goals pretty serious. They're not just looking for you to document a best-case effort, they're looking for you to achieve the goal or exceed the goal. So, I would hope that the Commonwealth is moving in that direction or has moved in that direction because I've had experiences where others just, it was on paper, but it wasn't necessarily enforced. They absolutely do. It's just there's a requirement and then there's how you enforce that requirement and how you monitor that requirement and the consequences of not meeting that requirement. I found they are, in some cases, stricter in other states and other government agencies. So, like I said, my information might be a bit dated, but I've had

experiences where the goal was on paper, but, and it was articulated as a requirement, but there was really no enforcement and no consequences of not meeting the goal.”[#39]

- The Black American male owner of an uncertified MBE construction company stated, "Like when they said the city of Richmond you have to have X amount of percent of minority participation. So, if a prime contractor gets a million dollar contract, they're going to have a sheet in there that says, I'm going to provide 10% to minority participation. I'm going to provide 10% of minority participation. So, at the end of the day, the project is done, they invoiced and then the minority department sends the paper to them and say, 'Hey where's that 10% you said you was going to give us?' They're going to say, 'Well I...' They start back pedaling. I don't the city has been able to do anything to punish. I don't know about the State but if they're anything like the local city Richmond, they're expected to do all of these grand things. But it's like having a peace officer or a police officer and you don't give him a gun. You don't give him a baton. You don't give him anything and then you don't support him when he says, 'Hey I found this company doing wrong, here you go' and they say, 'Yeah, yeah, whatever' and they just keep on moving."[#49]
- The Black American male owner of an uncertified MBE professional services firm stated, "I use [Company A] as an example because they're the ones that I see out on that side of town most of the time. But I don't know how a small business guy says, 'Hey, I want to work with you, [Company A],' because I know [Company A] is going to require probably things that a small business guy can't give them at that point in time, without them feeling like they're going to fail. I'm from Georgia. I used to work for an all-black firm. I can remember the biggest thing about Atlanta was 35% minority participation, and they were very starch about that. A lot of business were able to grow because there was that mandate that you had to come up with minority participation. And it wasn't just your buddy hired a minority firm. These people had to actually do the work and have a fair shot at bidding. That was something. I don't know it was illegal, to my knowledge, but it was something that I don't personally see a lot of here. I see small business utilization plans, I see people's names go out on paper, but I don't actually see those names."[#55]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I try to warn people because SWaMs totally get taken advantage of. You get on these large bid packages and they're like, 'Oh yeah, we're going to get these resumes. We're going to use SWaMs,' and then the award happens and they're like, 'Who were you?'"[#60]
- The Black American male representative of a business development organization stated, "The good faith efforts don't mean nothing, but I'll try. And you can put somebody said, Well, I tried, I'm moving on now. And then there's no monitoring that goes along with that. And it's no penalty if you don't make it. So, it really has no teeth to it. No whatsoever."[#FG1]
- The Black American male representative of a business development organization stated, "Perhaps that is something that can be looked at as far as if there's a 25% 30%, whatever percent gold, then what are we doing in order to reach it? What's the penalty for not reaching it? And I'll go back again to what I said earlier, as far as it being marketed to advertise to talk about individuals need to know that what the what the requirement is, or what the what the goal is, and to work forward, and then what the penalty may be if you don't reach the goal? Lastly, I would also say that the general public needs to know."[#FG1]

- The female owner of a WBE-certified goods and services firm stated, "I have heard stories where companies will get listed in that goal, but they don't actually get the work once it got won. I think that even if it were kind of like the IRS does audits.... You'd give away a million dollars, you would think that the person writing that check at the end of it or even in the middle of it would go, 'All right, I need to see your sub.' Maybe you make that a deliverable, 'Hey, I need the contract you gave your small business contractors. I need a copy of it.' There's DBEs out there, they might say, 'We're going to give him 10% of the work' but then if they don't give them all of that, that's a number and the government is absolutely in a position to say, 'That's not what you said you were going to do. You won this with this plan, you need to execute that plan unless that subcontractor can't perform.' But you know, that's being a good partner. I don't think there's any enforcement now because I don't think there's a mandate that says, 'If you submit with them, then you have to use them.' I don't think there's a requirement to use a certain percentage. There's not a requirement to then use the partner that you said was going to do the work. And then, there's the loophole of, 'Well, I tried really hard.'"[#FG4]
- The male owner of an SBE-certified firm relayed a conversation had in response to a complaint he brought forth to a procurement officer, "What is/was the proposed Small Business Subcontracting Plan as listed in the RFP? Since the proposal was awarded, we were informed by [the winning firm] that due to a significant budget cut there was no room in the contract for [my firm]. Since [my firm] was the only small business involved in the bid this effectively means there is no longer a small business subcontracting plan for this award. Is this how [your agency] has agreed to receive delivery for this contract?" The procurement officer replied, "When a vendor sends in a proposal, at that time, we ask for their SWaM Plan to be submitted. At the time of renewal, we ask for an updated SWaM Plan as well as how much money was spent the last 12 months with the SWaM company they originally put on their SWaM Plan. If for any reason that has changed, we would proceed to further investigate the reason and if additional action needs to happen, we would do so at that time." The small business owner continues, "Small Business Subcontracting Plans are not worth the space they are written into because the prime can simply delete it during price negotiation and the SWaM status means nothing after the contract is awarded. The Government does not follow up on a small business plan nor do they enforce any of the requirements. This indirectly costs small business Bid and proposal time and money. The time and funds are lost regardless of whether we are on the winning or losing team. This motivates SWaM businesses like ours to concentrate on other parts of the government. If this was the only time it happened one could argue that this was an anomaly."[#WT15]

13. Other forms of discrimination against minorities or women. Nine interviewees discussed various factors that affect entrance and advancement in the industry. [#15, #28, #29, #36, #37, #57, #AV, #FG4, #WT17] For example:

- The Asian American male owner of an uncertified MBE professional services firm stated, "It's hard to say but I will say it works both ways, with our client base is very diverse so we have all ethnic group kinds, so I think that because we are minority firm, that's why this size, location, our clients we also have Latino, Asian, African American, so I think some of them because we're a minority too, so they feel comfortable to work with us. And I think most people find us also because we like our work. But I also believe there were a few

projects, the clients didn't like us because we're Asian and they probably think we are not okay with American culture or maybe... I don't really know but I have a sense that's maybe the reason."[#15]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I know our society isn't evolved that way and I know there are inequities in our system, but I don't think I should be penalized simply because I'm a dull white male."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "Unfortunately however the buyer's mindset is very big business oriented. So, if you put my bid against someone who is larger than me, they're going to go with the larger company because in their mind they think they can do a better job and they can get it cheaper from that company. It's just a mindset with the buyers. Sometimes they don't realize a smaller company, you'll get more personal attention and a better-quality work because a smaller company wants to make darn sure that their job is done right where the bigger company can afford to make a few mistakes. A smaller company can't."[#29]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Not all small businesses are as good at writing the proposal as they are in doing the work. So, I think small businesses can be discriminated against in a way, just because they believe all small businesses are just too small to do the work."[#36]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "What I've noticed mainly is age discrepancy. It seems like there's a glass ceiling for individuals over 50, 55 years old where we're still capable of doing work, but for whatever reason they're just not seen as reliable. That's where you really have to know what you're doing, but then you have other people who are very intimidated, or whether they just don't like people who are older than they are, or what. As far as consulting work goes, as an engineer, I get most of the engineering consulting work when I do an interview. I come in on an interview, then I don't get it. Isn't that crazy? And then when they find out how old I am, or my resume looks old...you know they're really interested through the interviews, and then nothing. For instance, we're doing work in Alaska and I see these two guys with gray hair come out of the job site, and I was kind of like 'oh.' Work gets done and they're kind of like 'are they going to get it done?' One of the things that I did have, I was subbing through a company and we were trying to knock out the contract between me and the prime, and he said 'what are you going to do? You may keel over and have a stroke or something.' He said that out loud. So, of course, once you get to a certain place people kind of have these expectations."[#37]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Being a female in this business comes with pros and cons. I wouldn't say it's a barrier. I think it has been helpful at times to be considered a minority. I think that the reality of construction still being primarily a man's world and the people empowered are mostly men and so they can relate to each other better than to relate to a female telling them how to construct something, try something different."[#57]
- A respondent from the availability survey stated, "It's difficult as a small business to get your foot in the door. Most people want to work with larger companies - they do not like

small business. They say they want to use locally owned businesses but when we get there, they have these huge multi-national corporations from out of state there and they get the jobs because they have lower taxes than we do in VA, which I find absolutely disgusting."[#AV]

- The female owner of a WBE-certified goods and services firm stated, "I was in the fourth class at the Air Force Academy to allow women and there were people, my classmates who were frustrated that I was there because their friend from home didn't get in because I took their seat. So, I think every time you legislate a mandate that says, 'You need to be fair.' There's someone who's going to say, 'That's not fair to the other side.' It would be great if we could legislate morality. It would be great if we could just tell people, 'You just got to do better, you really do.' I would love to see us be able to do this without it being forced on somebody because when you force them, you may not just be setting a quota, you may be setting a cap because they may not try to do any better. We need to figure out how to get these success stories out into the general public so that instead of setting a quota, we're making people sit back and go, 'Why am I not working with her?' I don't know how you'd do it but I'm going to throw back the lofty question with, 'How do we use positive reinforcement with the people that we want to impact their behavior?'"[#FG4]
- The male owner of a DBE-certified firm stated, "Our experience as it related to a DBE in the transportation engineering industry trying to do business in VA has been very poor. I could get into numerous details, examples and situations, however, suffice to say, it has been a brutal experience. We have been bullied, used and mistreated on numerous occasions, while spending a great deal of time providing information, making requests, marketing, etc. Frankly, we have decided that the only way to enter this market is to buy our way in. Either by expensive strategic hires or buying a firm. Neither option is a guarantee. The large Design-Build and P3 projects are a joke. I was on a conference today and I heard multiple times that 'DBE's that deliver coffee or other supplies are welcome'. I heard 'talk to our major sub-contractors' multiple times, if 'you are into traffic control or moving dirt around we might take a look at you'. Frankly, it's a joke. 99% of all the professional services will go towards the Prime contractors and Engineering firms. I truly believe the only reason these companies hold these events is because they are forced. If they were not forced, they would not even think about DBE or SWaM companies or how to incorporate them into their program."[#WT17]

J. Insights Regarding Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. On-the-job training programs;
3. Mentor/protégé relationships;
4. Joint venture relationships;

5. Assistance in using emerging technology;
6. Other small business start-up assistance;
7. Information on public agency contracting procedures and bidding opportunities;
8. Directories of potential prime contractors, subcontractors, and plan-holders;
9. Unbundling contracts;
10. Price or evaluation preferences for small businesses;
11. Small business set-asides;
12. Mandatory subcontracting minimums;
13. Small business subcontracting goals; and
14. Formal complaint/grievance procedures.

1. Awareness of programs. Twenty-seven business owners discussed various programs and race- and gender-neutral programs they have experienced. [#2, #3, #4, #5, #8, #15, #22, #24, #25, #27, #31, #35, #38, #40, #41, #43, #45, #52, #55, #57, #FG1, #FG2, #FG3, #FG4, #PT2] Five business owners were unaware of any available programs for small business assistance. For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I mean, I'm not really aware of any of that. We have not tapped into that. I mean, I know in our business sector, there's definitely trainings on contracts and state contracts, there's definitely training on the professional services manual and other things. So, from what we do, the resources that we need to find our way through appear to be there. We just have to go and find them. And we get notifications on certain trainings and things of that nature that are available to us as well. So again, you've got to know how to get online, find your way, sign up, and dive in and find your way through it."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "There's a few, yeah, that I've talked to people about. Yeah, some we do. We're usually on the federal level, we just go in with other firms, that kind of stuff."[#8]
- The Asian American male owner of an uncertified MBE professional services firm stated, "I really appreciate this program and what they are trying to do, and I don't know, maybe I didn't look up but if for example, if there's any opportunities for a firm like us, whether they can advertise or just broadcast. So, firm like us will be aware and there's opportunity for us to joining or applying for the government work and that would be helpful because I feel like for us, we just feel it could be pretty difficult. That's why we never try but maybe it's not, maybe as you said they are trying to use for minority firms so maybe if they can get the word out and let more people know what they are trying to do, it would be helpful."[#15]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "The only thing I know of that I knew all for women-owned businesses was that there was a tax break or something."[#22]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "It's called the Hispanic Chamber of Commerce of Costal Virginia. It used to be

called the Hispanic Chamber of Commerce, The Hemp and Rose Hispanic Chamber of Commerce. So, I understand, from having volunteered mostly with the Hispanic chamber, that the Hispanic chamber itself is a vehicle. It could be a good vehicle or a bridge to reach into the business communities to share information, and to help empower them with that information. But the local chamber of commerce is a volunteer organization. They have no funds to implement any kind of training, or mentoring program, or anything like that. And it's been like that since it was established. It's just folks volunteering their time. I go back to, after you volunteer for so long, you're exhausted, and volunteering doesn't pay the bills. But I also have had conversations with organization representatives who thought that, because they donated to the Virginia Hispanic Chamber of Commerce, they thought there was a trickle-down effect, and that some of that money was coming down to the local chambers. And that is not the case. It never has been. There was never any of that type of that affiliation. So, I think the chamber is a very viable option, not only for the Commonwealth, but for these companies. It's just that, when they reach out to the chamber, who's there to work with them?"[#24]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "It would be the kind of thing that you would think economic development agencies would support, companies like ours. I'll go to events and everything, but I've never had them put out my name as far as a potential to be interviewed by somebody that's coming into let's say the city of Suffolk or Virginia Beach or Norfolk or anything."[#25]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I've heard this from other people, is the workshops that they have in the trade shows where people will bring their business and they kind of do like a little table or sending them to introduce themselves and network. I think that's also good. It gives them more of a chance than the other big companies that have like millions of dollars to market. So, it gives them like a face to face approach with potential decision makers and allows to directly market which would cost thousands of dollars in mailers, millions of dollars in online advertisements. You know, just to do that simple hand a business card over."[#35]
- The non-Hispanic white male representative of a majority-owned construction company stated, "I am certain the SBA is active in helping and assisting there. I think the ability of certainly our government entities to require small business participation, has certainly helped."[#38]
- The non-Hispanic white female representative of an uncertified MBE professional services firm stated, "I know that I had started a small business a few years ago, and so I really haven't done anything to develop because honestly, I spend 60 hours a week at [my full time job], so I can't develop mine. But I did go to, I think it's called [a] Center there, they're very helpful for minority and woman owned businesses. They scheduled time and met with me. I only knew of a lot of these programs because of [my full time job], so really didn't really ever myself take advantage of those. But I know that locally in Prince William County and principally in Prince William county I get emails constantly for economic development. But it's sometime just time, you can't be everywhere. But they seem to have quite a few programs, especially recently with COVID, they were giving out some grants and things like that."[#40]

- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "I've just been downloading some things from the state NRS about helping with business. I think the Chamber of Commerce has something. But not that I know everything, but I've actually gone through so many of those programs. the American Express probably the best and that was a long time ago, but then they didn't do, at least I didn't get that much to understand marketing. Or maybe I thought I could get over with what they had. But now online, they have just as much as you would in going to a conference."[#41]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I understand there are loan issues. If I don't need the money, I can get the loan. If I do need the money, I can't qualify for the loan, Small Business Administration loan programs, the SBDC programs and things like that are supposed to deal with it."[#43]
- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I do want to put a plug in for Small Business Supplier Diversity, because when I teamed with that company two weeks ago in Texas, they needed my certification as a DBE. And I did my updated renewal paperwork before the deadline, like April 24th or 25th. But it hadn't been changed in the directory, like an INC instead of an LLC. And I didn't have an updated letter. So, I asked the director that morning, is there any way you could give me this updated information, because I need it today. And I know I'm asking you at the last minute. And can you believe, he changed it in the directory and had the top [person] sign that letter in that day. And to me, that they really came to my rescue that day. I was really thankful. I think that for me personally, Women's Transportation Seminar, WTS. I'm a member of that, and you pay by how much money you bring into your business. And they do highlight DBE and SWAM type companies. Now, they're changing their website, so I'm not on there right now, which I'm not happy about. But they were doing a good job up until then. And they have a lot of good webinars where they have women that have made it in industry. And you can go to webinars and hear. You know, people network and support each other. So, I think that's important to me, is WTS. And COMTO, which is C-O-M-T-O is a public transit like, I'm a member. I don't know what it stands for. Something of minority officials committee. Something like that. COMTO is based out of Alexandria, I think. But they are very serious about supporting minority companies, and I do get a lot from them, also. It's mainly helping minorities have a stronger voice. Giving us special training, giving us special guidance, hearing our success stories, telling us how to market new programs. So, a lot of that stuff is out there for me to take advantage of, but I'm still doing other types of trainings, so I haven't gotten there yet. But I really value my membership with them."[#45]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "I did attend a lot of sessions at the state local agencies like Longwood University, they have all these classes that teach you how to do business with the Commonwealth, they showed me how to navigate eVA and all of that. the programs that they offer here, the classes on how to navigate eVA, how to do business with the Commonwealth, are very, very helpful. And I mean in general, not just for women, it's available, they have one on one consultation. They constantly send out emails, even when COVID-19 hit, they constantly send out emails, hey, funding is going to be available, the application is opening up, it's going to be available here, do you need to get certification, we can help you, we can show you how, they're having sessions all the time, repeat sessions, so

even if you needed to recap and then go back and take it again, the information is there. The consultation is there. I've also signed up for, I think they were referred by Macha Bank, it's called JEDI, they're actually out of California, and even they, being out of state, offer these virtual classes on how to do business, and even though it's not directly with the Commonwealth of Virginia, you hear things, tips and tricks and things to do to be successful and how to win those opportunities."[#52]

- The Black American male owner of an uncertified MBE professional services firm stated, "I know SWaM, and I've been working with SCORE here in the past six months. Those are the only two that I'm aware of. And, again, SCORE has its challenges for what I actually need, is the right type of mentoring in certain departments, and they're hard to come by."[#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The Chamber of Commerce does have a lot of small business programs that I think are very helpful."[#57]
- The Asian American female representative of a business development organization stated, "If you go to the Virginia minority supply, that the city website, every region has a dozen of events every month. Pretty cool."[#FG1]
- The non-Hispanic white female representative of a business development organization stated, "We're always looking for opportunity, grant opportunities specific for those groups of folks, and sometimes you can find those, especially just women in business in helping them get started. With our business program, that's what we do. We have classes, we have mentors, we have loans that can be access, we have all kinds of resources for these folks. It's not just a one and done, they come to our classes, and then they can stay with us, and we follow through with them in different ways and ask questions and help them along. What we do, especially with those that just don't have access to resources, because banks don't often give you a loan for a new business, but we have USDA loan money, as well as some other monies that has been designated for loans. That's one way that we can help, and then we connect people all across southwest Virginia with each other, that might be helpful to each other, starting their business or growing their business or expanding their business and those kinds of things."[#FG2]
- A female respondent from a focus group for trade associations stated, "I do think there's a Virginia Values Veterans program that really gears itself more to a small business than larger manufacturers. I think that is helpful for companies looking to serve the veteran market, hire veterans, learn how to hire veterans."[#FG3]
- The Black American female representative of a business development organization stated, "Small Business Supplier Diversity; I think they do a really great job actually of making themselves available. I think they need more resources. So, one of the things that [our representative] does is that he does all kinds of one-on-ones to help people get set up with regards to they teach all these classes, how to do business with the state. A lot of stuff that I know now is from education and information that I've learned from him or from seminars that they've put on throughout the years. But I think there has to be more. So, right now, [our representative] posted, I guess a couple of weeks ago to say, 'Hey, I'm meeting virtually, here are my time slots.' They're gone. Those time slots are gone within the day, before the day's out, the time slots are over. And so, and they have one person covering a

large region. I think there needs to be some doubling of efforts of how many resources are provided for the area. Because a lot of things that I think of as problems, I actually know that they're providing solutions, but it's limited on, can you get in, can you get an appointment to get in and get the answers that you need and the assistance that you need?"[#FG4]

- The female owner of a WBE-certified goods and services firm stated, "The SBSD in our area has been phenomenal. They have done seminars on all kinds of different levels. I think they do a great job of not only looking at what the startup needs. So, they set me up with a mentor and it has really impacted my business. Maybe the biggest impact is just that when I meet with him and he asks me things and his follow-up questions always end up making me feel like a million dollars. You don't always get patted on the back when you're running the business. You're fighting with somebody to get paid or somebody called out or whatever, and you only see your failures or your trials and tribulations. When I meet with him... And it isn't made up. He's really asking things, 'Hey, it sounds like you've got this well under control.' It's kind of a reminder that it's okay to not get everything right every time, but they have programs that have really helped us at the different stages of our business. It was a roadmap to figure out what your strengths and weaknesses are, so you could go through and kind of grade your business. How are you doing? Now that you're set up, now let's help you get to the next level because sometimes you don't see what you're not focusing on because you're not focusing on it. But this one is like a textbook, 'Hey, let's look at all the different areas of your business you ought to be spending time in.' So that is helpful to let you focus on those areas, but it's also makes you feel better because you go, 'Oh, we're doing pretty well in all these or in some of these.' so I think that SBSD has been great for us. The Women's Business Center, same thing, the Women's Business Center and the VDOT are in the same building. So those two, between them have been, they've put on some great events. They're always trying to be innovative. They really listen. When you say, 'Hey, we want a network,' they find a general contractor to come in and talk to you and he takes names. So, I haven't gotten any work out of it, but I really felt like he was listening and that that work may be there... It's the long game. The contracting world is the long game. You can't expect it because you meet somebody on Tuesday, you're going to have something on paper in a week, but those seminars have really been helpful. I think the biggest positive for me is that they have gone throughout the life cycle of a business. It isn't just about how to get started."[#FG4]
- The female owner of a WBE-certified professional services firm stated, "The ODU Women's Business Center, I think, SCORE as well as PTAC can be improved to offer us better service. I know the SCORE is just lack of resources that are available and then maybe one or two individuals that provide assistance as well as PTAC. I know that there are some initiatives in place to improve upon what they've been providing in the past and hopefully, that'll work out. But I do think that at least within those three organizations, improved upon would be great asset to everyone for resources."[#FG4]
- A respondent from a public meeting stated, "I'm going to give a shout out to the small business development center of Alexandria. I'm happy to be in Fairfax County, but they're at work in Alexandria."[#PT2]

2. On-the-job training programs. Twenty-three business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries; firms who work in non-union construction firms or goods and services were most likely to support on-the-job training. For example: [#3, #5, #6, #7, #8, #11, #13, #15, #16, #19, #20, #21, #26, #27, #28, #29, #30, #32, #34, #35, #37, #44, #56] For example:

- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "That one's harder. In our business it's a little harder to introduce that because it's a professional service, so sometimes that's a little more challenging. I mean, they have to have education to get them to us, and then we do a lot of on the job training ourselves, hands on with the younger folks. I mean, we've hired a bunch of younger ones more recently, they're a little easier to train sometimes than some of us who have worked so long in the business, because we like to do things in a certain way. But as far as Lynchburg and as far as being a hot ticket item that every college graduate wants to come to and work in, that's a little more of a challenge. But no, on the job training, we pretty much are able to do that."[#3]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We do offer on the job training and we do offer classes, if they're available."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "All of our training is 99% on the job training. In our industry, the recession really hurt our industry. And a lot of people left the heavy civil construction industry during the recession. And so, it's been a struggle to build that back. And so therefore you have to start at the ground level and start this training in cycles. In our area there are no formal education opportunities for our type of work. It's not like going to an electrician school or a plumbing school or a welding school those resources are not available in the South generally to teach our tradesmen."[#6]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "When you get a job here, of course you get your two-week training. Because DMV is making it mandatory to have a school to get your CDL at, we applied to become a school and we were approved. The problem is, we do not have enough land to have them practice the driving. So, we were not able to do it. You have to have a certain amount of area, and we did not have it. It's really too expensive to rent the area."[#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Just on the job, like how to do the excavations, fill out the paperwork. We have... we pay for up to two college classes a semester or quarter, so we have that also."[#8]
- The non-Hispanic white male owner of an SBE-certified goods and services firm stated, "So it's kind of a long training process and that was something that as we've kind of grown and went from smaller work with me being hands on and actually wrapping most of the cars myself and then teaching some of the other guys how to wrap. Now we've got a little bit of a crew put together that that can handle it without me having to be all involved in it. But yeah, it can be difficult as far as the learning curve goes. Yeah. We train almost everybody we hire. It's very difficult to find anybody that has experience already."[#11]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "There's two types of training in our industry. There's state mandated training, and

those are requirements that everyone in the industry, and the two classifications that exist, which are unarmed or armed, has to complete. It's non-optional. And the other type of training... we run a school that provides that for officers that choose to take it there. And then of course the second type of training is what we call co-specific, which means that depends clearly on where you're being assigned. So that's done on the job training, I guess is the best way to label that."[#13]

- The Asian American male owner of an uncertified MBE professional services firm stated, "We used to have another employee, so both of the full-time employees joined us after they graduated from school. So, we are like studio, we train them from the... How do you say? How to practice the architecture, and we have an internal program to help them grow with the firm. So, because we are a small business, a small firm so they have the chance to be exposed to different aspect of the practice. So, we feel like this is a good way for their personal career."[#15]
- The Black American male owner of an MBE-certified construction company stated, "They're safety trained because we do a lot of the hurricanes in different states, which they have to be OSHA trained and all that."[#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "We just hired someone that was a schoolteacher and didn't want to go back in these times and decided to go more on the business side. So, she's completely new. So, she requires a lot of training. We do all that in-house."[#19]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "A lot of small businesses can't afford sending their people to schools and stuff like that. But we did from the beginning, if you wanted, we would basically send our people to training. I mean, not the school to training, but really to get the job done correctly from the beginning. If you came to work for us, we didn't require you to sign any statement saying you would stick around for five years or anything like that. We just made it easier thinking, 'Yeah, we'll help you get trained and give us your time and effort.' That's all we got, then you talk to the customer. It worked out fine for us."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We hire people at a low level and train them or let them learn, hopefully if they want to learn, and let them progress at the rate that they feel comfortable. And we've got a lot of people that have gone from just a common laborer's job to supervision. And I mean, it doesn't happen overnight, but it's just if a person is diligent and ambitious and wants to do that. That to me is one of the quickest ways to do it."[#21]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "We spent a lot of time pursuing that last year. The OJT program where you can hire people and if you hire them from the OJT program, they paid a portion of their salary for the first six months, or up to a certain amount. But first of all, speak[ing] to someone that could really give us information about it or execute the process was difficult. And then they don't tell you... So, you had to have worker's comp, you have to have been in business a certain amount of time and be able to prove it was your business a certain time. And then you had to, what was the other, oh and there were limited funds. So, when we got through it all, we were told, 'Well there's no more money for that program.' And it was July

of last year. They said, 'We've already ran out of money.' And so it's like they put you through all these hoops to say you must have this, this, this, this, this, and then finally they just said there's no more money. I think the program is more a flash than substance. There's a few around but it just seems that many of these programs are setup in an ad hoc fashion."[#26]

- The non-Hispanic white male owner of an uncertified SBE construction company stated, "I know they have various programs like the apprenticeship type things but right off the top of my head, no ma'am. I'm not real sure how to go about that. I hate to sound greedy, if there's some sort of financial incentive, just about anybody I bring in here kind of goes through our training program. It's really rare to find somebody that has any experience in liquid seamless flooring So, if there was some sort of incentive that told a 22 year old guy, 23, 30 years old, somebody that's still got physical butt to them and can do what we do, if there was an incentive that said, 'Okay, I'm going to start you at \$15 an hour because the State's going to kick in three for this training period', I'm just throwing out figures, just throwing out an example, then yes, that would be beneficial. But if it comes with the pool of people to draw upon, is where I just run into a roadblock."[#28]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "If I could offer on the job training to people that would certainly be helpful. They could at the very least learn certain tasks that I need them to do."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "I've heard of some of them. I've not really had the ease of use of any of those as far as anyone reaching out to say, 'We've got these candidates we'd like to put with you. We'll subsidize part of their pay rate, and then if you like them, you can hire them. If not, then we can send them back in a way.'"[#30]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "That's a bullet point of what we do. On the job training. It's a very layered industry. You have medical conditions. You have State licensing. You have funding sources. You have vehicles. You have parts to those vehicles and then how that person interacts with all the technology and stuff. There's so many different factors. We do on the job training."[#32]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "My mother is the career technical education teacher for our school system locally, and they have an apprenticeship program that career technical education across the state is now doing. And we've mentioned numerous times that we would love to have a trainee and that our possibility of hiring them after they're here and doing their apprenticeship when they're in high school is higher because we'd love to have someone come apprentice with us two or three days a week after school or one period each school block, and then come and work with us all summer. Or when they graduate and work with us, we'll send them to school. We would love to have something like that."[#34]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "The training? Pretty much we send all our security officers to a training school, and that's pretty much at cost. So, training is available, but it's part of the, I guess, business."[#35]

- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I did take a couple of apprentices, one of them didn't work out at all. Well, he worked out a little bit. The other one worked out very well, and he's now on his own. But if you have the time, and a kid has the desire to learn, then I have found it to be very profitable. And we have these...I don't really call it a program. But when you do that, the individual has to be teachable."[#37]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "When you're in the tradesman field, you got to have the technical educational knowledge. And that's how all these kids are getting certificates. They're doing all this stuff online and everything like that. But in a tradesman industry it has to be 50/50. They have to work the real-life experiences, work with the mechanics. That's why the apprenticeship programs are so important. Because you have to be able to work on this stuff while you're going to school. Because, for one thing, what you see in that book and what you see on that video that you're watching that they're working in laboratory conditions, that doesn't exist in the real world. The equipment doesn't look anything like what it does on those videos and the little slides they show you, or in the book reading about it. You have to work with real life experiences because trust me, what goes on in that book and on those videos does not exist out here in the real world. And it all comes back to monetary, money. A lot of homeowners still call the jimmy-jams jury-rig, they'll have this done and that done. Half the stuff is done 80% incorrectly anyway, and then when you get there just because you pull a disconnect doesn't mean that disconnect is actually working. You have to bypass it. None of the panels are worked right. In order to get your card and get your training they should have to work in the field. Which technically years ago when I got my license, you had to work in the field a minimum of 12 months before you were allowed to get your card anyway. I don't think it's that way anymore. They all go by the hours in the classroom and what the kids have done online, and then they're able to get their test."[#44]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "It does, but I think the high school is like an incubator and provides a first-round training. Not everybody that goes to a technical school, is going to like it either. But, to have an on-the-job training, somebody's probably going to come out and say they too, 'This isn't what I thought it was going to be,' and quit."[#56]

3. Mentor/protégé relationships. Fifteen business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms. [#5, #6, #16, #20, #24, #26, #29, #38, #39, #50, #52, #55, #58, #FG2, #WT5] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "That would be wonderful, a mentor/protege relationship from the state where someone could actually help you go after work so that diversifies the number of folks in that pool to go after work."[#5]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I'm a big believer in mentoring. [I have had] mentor my whole life."[#6]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think a big one like you just mentioned the mentor protege relationship is very, very important. There are a couple the SBA has I think one program and the VA has a program. I don't know of one in the state of Virginia. I think if they can talk to a small business as if somebody that's been there and that's, again, the business world we are right now those good-sized businesses that are getting bigger, and bigger, and bigger, and still growing are the ones that can really help the small business to get going. And I'll be more than happy to help anybody that comes to me and asks me for help. No questions asked."[#20]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "A mentor-protégé program would be phenomenal. I would sign up right away, because I want to learn, so I can teach. How to go after the kind of work that requires that certification. When someone is certified, someone should be contacting them, saying, 'How can I help you best use your new certification?'"[#24]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "Why not have some type of mentor protege program, where the prime contractor, he could sub to a smaller company, but the rates are the same. It could be a 70/30 split, or an 80/20 split. But the problem is when there is, because a lot of these major companies they sub out anyway. I get calls all the time for me to come do work for some of the major players around here. But they want us to work off of a 60/40 split. Where we do all the work, have all the liability, have to carry all the insurance. All they did was acquire the contract, and they sit back and get 40%. Well generally that's all the profit."[#26]
- The non-Hispanic white male representative of a majority-owned construction company stated, "I think certainly the mentoring aspect. Us and several others of our contract size try to hold mentoring programs or otherwise to help folks understand bonding, insurance, how to be successful, trying to provide education opportunities, be it on scheduling or contracts or otherwise."[#38]
- The Black American male owner of an uncertified MBE professional services firm stated, "I think they're useful, in general. I don't need a mentor. I've been in the business for 35 years and I've mentored a number of small businesses. I've mentored a number of disadvantaged business enterprises, so I am the mentee, so I probably don't need a mentor, but I think those programs are very useful and I would encourage as much resources that could be put forth as soon as possible."[#39]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "Make sure that they are getting the proper training and mentorship to where they're going to be successful. Like if somebody goes and starts a dealership, I just want to start a dealership, I took the two-day class, I got my certification, well here I am trying to do it. I don't know what I'm doing, I don't know how to do it, I just said I want to do it and I'm here. But one of the things that we did is we had a mentor. We had a guy that had been in business for 20 years, and so he as going to the auctions with us, showing us what to avoid, what to look for. We were getting the proper training and mentorship along the way, and I think that's how we are still here today, still doing what we're doing, because we did have that mentorship, that training. We attended chapter associations for the Virginia Independent Dealer Association, so we attended those monthly when they were having

them. So, we were surrounded by individuals that were in the business teaching us what to do, what not to do. I think if you're getting that support and training, then yeah, I think they should try to help fund them be successful with that. I got the training plan to help them make sure that they are getting the support that they need to be successful."[#52]

- The Black American male owner of an uncertified MBE professional services firm stated, "[We need] connections with honest and good contractors that are small businesses like myself that are actually out there in it to win it, to do the work. I don't think that I really grab a big chunk of the market that I need. And that, again, would coincide with doing more of a market analysis. I've retrieved a software LivePlan to help me with the business. As I was telling my wife the other night, I was on it for two hours, and I didn't know what the hell I was looking at. And I'm a pretty smart guy, but I was like statistics and all that, I was really struggling. So I was like, 'Man, it'd be nice to talk to somebody who can kind of put this into focus for me too.'"[#55]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Coaching and mentoring. Or some level of people you can come back after you've tried it and implemented those things for ongoing guidance."[#58]
- The non-Hispanic white female representative of a business development organization stated, "Networking is a big deal with us, putting alums with new businesses. Alums that have gone through our program, this is our seventh year, so we've got quite a few, we've got over 200 mentors that are professionals or have skillsets in all different kinds of arenas. We can connect those businesses with those resources. We're getting ready to launch a new platform on social media, on the internet so that folks can log in. We've already had some people from other states that have similar situations. It's going to be a great tool for them to log in and ask a question and get an answer from somebody from Kentucky that has the same situation that they do. We're going to launch that in November. Then we can also put training tools up there and feature different things. That's going to be a huge thing as far as networking for our folks."[#FG2]
- The female owner of an MBE- and WBE-certified firm stated, "Award an oversight/coaching contract to large businesses based on a bid process after the primary scope contract is awarded to the small business; have a credit system where the large businesses earn credits for oversight contract that will in turn help them win contracts in the future. This double bid system offers an open process for all small businesses to compete fairly."[#WT5]

4. Joint venture relationships. Eight business owners and managers commented on the potential value joint venture relationships have for small and disadvantaged businesses or noted barriers that prevented successful experiences with joint ventures. [#4, #8, #53, #58, #FG1, #FG3, #PT1] For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I mean, we've done that before. We've gone in with three or four small businesses and gone for something and they still chose the large business. We've done that maybe two or three times, and there really is a bias for hiring... it's the one-shop stop. They only have to hire one company, and that company can do everything from the engineering to the

environmental to the archeology to whatever they need. So, they don't have to worry about a lot subcontractors and stuff like that."[#8]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I also do joint ventures with an interior designer, that had been in different states, the city of Baltimore, North Carolina, and some other places, Minnesota. So, we do things out of state as well. She and I have worked together off and on for about nine years now."[#53]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "I know that there are some projects meant for small businesses and for the minority businesses. So, the issues with minority businesses or small businesses is they are too small to handle certain projects, and I understand that from the government perspective. But it would be good to have a few smaller businesses of the same kind, or who have the technical ability, but individually they're not big enough to win any contract. So, if they come up ways with teaming up several small businesses of woman-owned, minority-based, and give them the projects. And you don't have any other player in that pool. So that way you are creating opportunities, not for one company but many companies all at the same time of this bidding challenge."[#58]
- The Black American male representative of a business development organization stated, "Another issue I've talked about before, is the state does not recognize joint ventures. And that really hurts a minority business or a small business, because there's no incentive for a large business, to partner or team or to joint venture with a minority of small business. It has no incentive at all, what the state does it put barriers in place to block it, they say, if you're gonna do a joint venture, you got to create a whole new entity, that whole new entity has to be certified by the state. And nobody's going to do that. So, versus having two villages working together, they will get one to be a subcontractor, and one to be the prime contractor. I think the state can encourage partnering, joint ventures, teaming agreements, versus putting obstacles in the way to block. And to me that's a major problem with the Commonwealth of Virginia."[#FG1]
- The male representative of a business development organization stated, "Joint ventures are an option. And joint ventures are being encouraged. More so, particularly here in the county. We see that a lot where if the small business is not able to compete as a best practice. Often it is teaming is recommended. And so, I do think that there might be an opportunity relative to that at the state level."[#FG1]
- A female respondent from a focus group for trade associations stated, "There is another program, I don't know the name of it, that allows some teaming opportunities. I think those are useful. I don't work with a lot of companies that do the teaming because I don't work with a lot of contractors, but I do think that those can be helpful."[#FG3]
- The Black American male owner of an MBE-certified construction company stated, "I noticed that no one has talked about joint visits to majority and minority owned firms. I'm a construction manager, general contractor, [and the] Commonwealth of Virginia does not recognize if you have a joint venture with a majority owned firm. And you are a part of that joint venture contract with the majority owned firm, they don't count that as [joint venture that counts as an MBE]. I think that's a barrier to minority CMs or general contractors on capacity because there's no incentive for that GC or that CM to put you on the team because

it has no back to them at all. And what it does, is it forces you to be subcontractor. And I've been doing this for 30 years and been fighting that barrier with the Department of General Services, been fighting with universities over the years. And they put up every roadblock to try to discourage it or stop it. I know in the DC market or other markets, it's encouraged, but Richmond and Department of Services discourages it and will give you every reason why you should not do it always doesn't make business sense, or if the illegal or just unethical."[#PT1]

5. Assistance in using emerging technology. Fifteen business owners and managers thought assistance in using emerging technology such as online registration with public agencies as a potential bidder are helpful for small and disadvantaged businesses. Most noted that online registration on sites such as eVA is considered essential to bid on public projects can be helpful for small and disadvantaged businesses. [#2, #6, #9, #17, #20, #26, #27, #29, #32, #45, #48, #53, #55, #60, #FG4] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "More and more, it used to be if you wanted to go after this project, you need to provide 12 copies of this proposal. And you print all day and you FedEx out. And you're \$300 and \$400 into this just in the printing. So electronic submittal is very easy for a small firm to do, so that's pulling away barriers."[#2]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "The more the better. If you don't a firm grasp of the resources available through the internet, then one is at a big disadvantage because everything is done through that now, through that platform. And I see more and more structure since COVID is the emergence of more and more opportunities online, such as what you and I are doing right now, where we would have to do this over the phone or in-person before. Now, bidding opportunities are more online. The resources references are all available online, bid forms, anything you need is available online. Plans, it used to be where I would have to make copies of plans for small minority-owned companies and distribute to them for quotes. Now, I can just send them a link and they can open it up on the computer."[#6]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I'm really from the old pen and pencil day, okay. I've worked my way through all the parts and pieces and I'm like, okay we've got a new technology, we got to learn this. There's always something new. It's learning the new process, learning the new process and it's just there's always going to be something new. We're always going to have to learn it and I'm okay with that."[#17]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think that's one of the best things that have come out in the last 10 years. The technology does rapidly get better, small businesses have to keep up with it. They have to really embrace it because that's the way of the future. And that's where they're going to be more successful with less cost. Education. Yeah, Education, if they don't know how to do it, find out how to do it. And again, I go back to, see how the larger businesses help the small business out."[#20]

- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "You know what, those things are only barriers because I don't have the back office. So, they are barriers but if I had the resources to have steady consistent help, they wouldn't be a barrier."[#26]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "[I need] more computer literature and stuff where I can search this website and see what's coming in my area and what's going to be coming in or what's going to be going on or something."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "For example when you go through eVA so when you go through that and you look for certain bids, jobs to bid on, and they have this 10 pages or requirements that you have to do this and you have to do that it just doesn't, it's not feasible for a company of my size to even attempt to do. So, I just ignore all those. It would be nice if they set aside certain smaller jobs, 10,000 or less, for just micro businesses only. That would be helpful. Finding the right people to contact has been the barrier. That's been the most difficult. You have eVA and you've got this mound of jobs and so forth. I mean it's fairly easy to you get going there and you have quick quotes and regular bids that you search for as far as my department. I do printing, I do office supplies. Everybody buys that. So again, like I said, it would be nice to be able to narrow that down to my region and be able to contact the people who live here directly."[#29]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "So in order to get onto... Virginia's eCommerce, there's just no template. There's no step-by-step, 'Do this, do this, do this.' It takes an awful lot of time to go through, get signed up. Once you do, it's okay. But I will say this. If small businesses reach out and utilize the resources that the State of Virginia offers... I had a ton of support from Fairfax County Socioeconomic Development Authority were there. Helping us get to the resources to help us navigate which systems we needed to be in. That's business anyway. It's a lot of setup, and hard work in the beginning. But I think that Fairfax County really was, with their Small Business Administration, really helpful."[#32]
- The non-Hispanic white male representative of an SBE-certified construction firm stated, "We're online with almost all that kind of stuff now, except that they won't let us send a bid in online. We still deliver them by hand. But all the correspondence is mostly online, leading up to a bid."[#48]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Usually public work is advertised, and a request for proposal is put out or something. I guess if there was maybe more of a direct, if there's a listing, that there's a more direct advertisement, or notification that this project is available, so that they know to go for it. Because larger firms, they'll have a marketing person or somebody like that, and it's their job to hunt down all these things. But a small firm like me just doesn't, there's no way they'd have the time to search for advertisements and stuff, and all these different public entities what their projects are. I could spend all day doing that, and I would never get any work done."[#53]

- The Black American male owner of an uncertified MBE professional services firm stated, "Obviously on Eagle there's a lot of quick quotes and things like that that come through the Eagle website. So, for my business when I came in my business, I was seeking government state work contracts. And my experiences with them are they come out on the Eagle, which is a great website. But I feel like the competition is definitely fierce on the Eagle, not scared of it, but it's definitely fierce because that's where a lot of small contractors go. I didn't see a lot of micro bids on the CFG micro bids. It'd be nice to have more of those for those type people because we were out there. That was one thing that I was like, 'A micro bid maybe come up every blue moon.'"[#55]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I do like the consolidation of the notifications from eVA. I do find that eVA in and of itself has been somewhat... Okay, so we moved our offices. I have updated eVA, I can't tell you how many times. And for some reason, somewhere in that system they keep copying over an old address. Well, all of the screens that I have access to, we've changed it. I had to change it a couple times, but it finally stuck. I kid you not. Three weeks ago, we get an email from DGS or from somebody with eVA that says, 'Hey, we sent you an invoice for an eVA fee and it bounced back,' from our old address, 'So if you don't respond within a week, we're going to remove your access in the system.' What happens is, it's another system on the back end of eVA that they use and it was like, 'I don't know...' Me my office manager called and they got it straight, but it freaked us out, 'Wait a minute, we can't get kicked out of eVA.' But it was something on their end."[#60]
- The female owner of a WBE-certified goods and services firm stated, "The last thing I want to do is make life that much harder for anybody who's out there, maybe what they could do is, again, I might come back to construction. I don't know what the NAICS code is for construction but if there's a security piece in it, then 561621, there could be another associated codes so that then I get tagged again in eVA. All right. I have to remind myself, 'I need to go list the construction NAICS code as one for me to get notified on so that I can go see who's bidding on it, so that I can tell them I want to be a sub for them.' So, I'm never going to find those opportunities if I wait for my NAICS code to click but again, you run out of time and you forget to do it and then when it's gone out of your mind, it's gone until another one of these where someone goes, 'Oh, well, here's a good idea.' But that's another thing they could do is, 'This is a big \$10 million project, here are all the NAICS codes,' and that might let eVA, which is already an established platform push that out to me so now I know that ought to take some interest. It's some work for somebody to go in and pull all those codes. If we don't, then we're missing an opportunity to connect the dots. So no, I don't really want them to say, 'All right, I'll have somebody put in the access control doors and then I'll split out and have somebody else to the cameras and then I'll have somebody else sell them the cards so that I can then maybe sell them the cards' because that's just going to lead to a mess."[#FG4]

6. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Five owners agreed that start-up assistance is helpful. [#39, #41, #46, #51, #58] For example:

- The Black American male owner of an uncertified MBE professional services firm stated, "I think training is one area where the Commonwealth could probably, if they're doing it, raise the visibility of those training resources. I think that's one area that I think once you get through this pandemic would be beneficial. The financing we talked about, the certification process, streamlining that process, making it easier and not so cumbersome, how we talked about. Having a social media or a web presence where opportunities are apparent and can be applied forward and there's a response to those opportunities, I think we pretty much have it. Those are my issues."[#39]
- The Black American female owner of an uncertified MBE and WBE goods and services company stated, "When I started, I didn't realize that I forgot some of things I needed. For instance, I don't have a web page yet. I don't have merchants. And I tried to sell some and I think because they could not find me online, that's why they didn't do business with me. But I need those basic ones and a barcode. Getting started. Because I put my start up. Okay. You'll need a barcode. Like I said, according to the information that I've seen, you can buy a barcode and it's not legitimate or it may not last. So you got to share it with someone else. And so they need to know about barcodes. But it's got to be on these product. According to everybody I talk to."[#41]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Maybe if there's an assistant to small business startups. Maybe an agency or online or resources that will tell you about all this research that you guys are doing, what has worked in other businesses, what has not, ideas, and maybe a resource that will talk to you about that SWAM, or agencies like that, or stuff like that. It might help. For me, it's when we were first starting out, if I had had the opportunity to maybe sit down with somebody, I know that it's hard to do that, especially starting out with all the companies and stuff, but someone that can give you an idea of these resources and talk to you, "Hey, let me look up the business that you're trying to go into and let me see what information we have here in the Commonwealth to help you out, to get you started. Maybe, hey, if you're going to go into auto sales, we have companies that can help you with insurance. We have companies that can help you with finances. Generic stuff. Not very specific, because that would be nearly impossible to do in every position. Or maybe not even have to sit down with somebody, maybe something you can do over the phone with it. You guys could send out a packet of information that there's something like in the automotive industry, as a category... that's automotive related. Insurances, resources, automotive, auto dealers, systems, stuff like that can... Not just in automotive, but maybe in any other industry if you're trying to go into construction, trying to go in the hair salon or anything, I'm sure there's unexpected expenses, stuff that you don't think about before going into that business. So if there was a resource that you could be like, 'Hey, once you're in this category, these are all the things you think about from other companies- ' Well email would probably be... knowing 2020, almost everyone has a computer and I think email would probably be... Email or virtual learning videos. I don't know if there's resources like that that will talk to you, things to think about, just general stuff."[#46]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I know that it would be cool to have maybe a clearinghouse or one place to get all the information from, easily. It's actually easier than it used to be. I mean, I think the state updated their licensing website, which made it a little bit easier. So some things have been done since I started out. Other than that, any questions I've had, I've had them answered pretty quickly. Yeah, I think Virginia's pretty good, and North Carolina is, too. I mean, I haven't had issues with either one of them. If you go into it blind and you haven't done it before, some of that, maybe it's kind of tough."[#51]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Whether there is some sort of program, and maybe there is a program, and we don't even know, where it will give some sort of... Not just an overview, but kind of a training in the first place, where you get training from the government for the startups. And then also a way to be able to go back and ask questions. For example, what we should do in these certain situations such as, okay, we don't have... In our case, for example, we don't have the minority owned business certification. What are the process? What are the things? When I get a lot of calls from a lot of other places, mostly from Florida, and companies there they charge a lot more money for manage simple things. They say they offer a lot of things, and most of the times it is exaggerating the fact that okay, we can get you contracts, we can get you... So a lot of those... It doesn't make sense when you pay several thousand dollars up front and end up with nothing. So this is a... And then they'll still make you do all the paperwork. So instead of having such companies taking advantage of us, why don't government set up a way to not only just to train, but also for more of a guidance and a way to go back to and say, 'Okay, I got this paperwork. What else I need to be able to get this certification? And after the certification, what I should do? How should I be? Okay, I've written my proposal. Is there anyone who can read my proposal?'"[#58]

7. Information on public agency contracting procedures and bidding opportunities.

Thirteen business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information, and thought the information is helpful for small and disadvantaged businesses. [#5, #18, #19, #24, #27, #44, #47, #57, #58, #FG1, #FG2] For example:

- The non-Hispanic white female owner of a WBE-certified construction firm stated, "I'll call the procurement officer, and I'm like, 'What's the finish?' And they're like, 'What do you mean?' I'm like, 'Well, is it aura bronze? Is it brush nickel because aura bronze is three times as much as brush nickel.' I need to know what the hardware finish is on these orders. You've got to order them up front. This is stuff they haven't even thought about."[#18]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "So it would be really nice, if I get stuck, that I can pick up the phone or send an email, and say, 'Hey, I'm trying to do this. What do you suggest?' It would be really nice to have somebody like that, that I don't have to pay for."[#24]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "A little more training on how to bid and how to set up the bid on a job like that.

More news information on when the job coming and what's going to be the requirements to get in on it or whatnot."[#27]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Training. Communication training. For one, to show me... I would like some kind of class on showing me how to sign up, get registered with the state where we could do some of the state work, state jobs, and stuff like that. And keep getting on the list. I know they've got, there's a page you go to where you can bid on the state jobs and qualify for that. And actually, since we are a minority-owned business, a woman small-owned business, to where we could qualify to do a lot of the state jobs and stuff like that."[#44]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't think I understand the system well enough. I think that's perhaps where I don't quite know all the networks that one needs to go through."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Before you apply there should be a mechanism where we want to evaluate our understanding for this proposal. So, there is a proposal, is there any, some officer who can... someone who is most knowledgeable about this bidding process and how it works, and look at the proposal and say that 'Okay, there are some certain weaknesses in your proposal.' Why do we have to take chances with losing a bid and learning, and not even learning... They give you feedback sometimes. Not really helpful... I mean, it's very subjective. If there is a consulting branch of the government where we can go to and say that this is our proposal. This is our bid; this is what we have prepared. Also help us with improve in terms of visibility and being visible in all of these different ways to evaluate. How will you evaluate what I can give to you?"[#58]
- The Black American male representative of a business development organization stated, "It should also be in the in the atmosphere for individuals to know that the Commonwealth have the expectation of doing business with minority businesses. If the public knows that, then there can be a pressure applied and questions put forth from the public as well, if it's only coming directly from the agency, as the agency goes and talks with procurement offices around this thing it's a one-way piece of communication to those individuals. But there are literally thousands of employees across the state public should know that the common desire that dollars be spent with minority businesses, so that project can be put back to it."[#FG1]
- The non-Hispanic white female representative of a business development organization stated, "One thing that I would say about our experience with people who are doing business with the Commonwealth is, what I've heard a couple of other people say, there's just a lot of lack of information. I think that, the SBSD and the SBDC, we all work pretty well together to get that information out. But I think there's a gap in where we're putting the information, and sometimes I think we don't know where it should really go. How are we really talking to our local small businesses? I hate to keep coming back to it, [but] some of the results of COVID, because of the local grant process, we have learned about so many businesses in our community that we did not know existed. We have caterers and lots of folks who would be the kinds of businesses who might benefit from contracting with the Commonwealth."[#FG2]

- The female representative of a business development organization stated, "I think it's, again, access to the information to make it seamless. If we can get the information to the businesses that when I was in private sector, I did state contracting for our business. Once you do a proposal, you've got your proposal. It's just a matter of... It's just like, oh, you're not doing 15, you're doing one and making modifications based on the unique request, because you have the service need. I think the other barrier, especially for really small businesses who may not be able to complete or fulfill an RFP, is the idea of teaming to win a bid is just not the mentality, necessarily, unless you've had some exposure to that."[#FG2]
- The female representative of a business development organization stated, "I think a lot of times, it's all about getting the information to members where they are. I do think that virtual, believe it or not, has probably become a little bit better for members. As they've gotten more access to internet and things like that, just because, they can go to this webinar and they can either do it during their lunch hour when it's live or they can play it back in the evenings if they're not doing their other stuff. I do think trying to have those things readily available, and really making them easily accessible. Sometimes I feel like state websites, even local government websites aren't necessarily as intuitive, maybe to have what business owner thinks about where stuff should be, or... You know what I mean? Even for me, sometimes I'll go to a website, and I think, the reason I'm coming here is for X, and I think most people would come here for X, but it's not even on the front page of the website, you have to go to the menu and find something else, instead of a shortcut."[#FG2]

8. Directories of potential prime contractors, subcontractors, and plan-holders.

Eleven business owners and managers thought a hard copy or electronic directories of potential primes, subcontractors, and plan-holders would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through the Commonwealth's websites, while others did not know how to access that information. [#2, #8, #18, #20, #44, #47, #51, #54, #58, #60, #FG4] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "What eVA has done for us, for example, and it takes a few times to get it just right, to kind of get it to send you the right RFP. But once you figure that out, it enables us to find a lot more projects than we ever were able to find before. So, I think that's actually something to remove barriers as well."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Learning about potential primes has been an issue, I think. Well, just all the big companies have a small business... on their websites they have a place to register for small businesses and I've gone in and registered for every last one of them and I don't really know how really useful that is kind of thing. I don't think anyone has ever called me on any of the... for the big [projects] or anything like that. I'm not sure if they could do a list within the state of people who are approved by under each industry or something like that."[#8]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Yeah. In our position in time and in size, I think we met a lot of those primes and subcontractors, and we've become friends. I think we've developed relationships that already benefit both parties. So, I don't think there's a barrier there. It's just getting out and getting to know those people and finding out who's in your space and

they can share that, and 90% of them will help you get started. I mean, y'all fighting for a contract, but sometimes we'll team, sometimes we'll team against each other. It all becomes. Get to know your industry. Get to know the people in your industry. That's important."[#20]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "We go to our yearly distributor meetings and stuff like that where everybody gets to sit down to talk about the challenges and stuff. A lot of contractors know each other. We all talk about the challenges and stuff that we face. As far as any formal meetings, other than going through our distributor meetings and stuff where they bring everybody in and we all get to chat for a couple days and see the challenges that everybody's facing, there's really not a system set up for that. That would also be a great, great thing, too. Some kind of forum. What are they called? They're like forums, town halls meetings, whatever like that. Where small business owners could sit down and talk about the challenges and what they're seeing, and what kind of problems they're having. Right now, everybody we talk to, the number one problem out here right now is the supply chain. Materials are the hardest thing to get. Training, which naturally our distributors, we work with a couple warranty companies. Communications through them have been excellent. Because we really didn't get any of this information from the state. Most of it came through our contractors, I mean not contractors but distributors, and through the warranty companies on how to address the COVID issues, what precautions we needed to take, which safety levels you need to operate that. It would have been very helpful. I didn't see where the states, if they set it up, nobody knew about it. It all came from communication from the people we were already working with."[#44]
- The Native American male owner of an uncertified MBE construction company stated, "I think that a lot of these larger contractors, they think they see a lot of people, and it's hard to get in with them. Just to get in front of them, put my product in front of them I've sat in offices, sometimes eight hours at a time until somebody would see me to hear me out. But other than that, you can make phone calls, and send emails. Until you can get face time with these contractors, you're spinning your wheels."[#47]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "if there was a place where you could go and say, 'Look, I've got a contract. I need a surveyor, so I want to put a SWaM firm on surveying.' And you could just go on the [online] thing or the state's thing and say, 'Okay, surveying, SWaM,' and it would give you a list of firms with contacts, so you could build a relationship or call them and see what they do and see who they are. That would make it easy, like a one-stop-shop place."[#51]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "What would really help is to have a list of companies like mine, or small companies that larger companies like larger architectural firms, or local government, that they can choose... You know, go in and pick some of those lists of smaller... or to use as a consultant or someone that could either kick in and help with construction drawings, or kick in and help with some project management. Or to do some of the code and building code, and zoning research up front. If they could tap into the larger firms or the government public works department, could go to that list and see the experiences that these smaller firms had, and just give us a call. Give us a try to be a sub consultant to them. I think that would be

very helpful. I think if Virginia had a similar system for the smaller architect, the smaller project managers where their experience is listed next to their company name, and then those larger companies could pick and choose. But, the larger companies, if they had a mandate in their contract to use minorities or SWaM certified or EEE, it would help us to get more of the larger projects or be a part of the larger ones."[#54]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "There are several important contractors in... If we go to certain particular RFP and we look at the history who has been awarded, that's a way to know who are working with which businesses. So, it's kind of [shows that] certain vendors works for certain agency for long time, and they keep winning. And maybe there is one or two bigger players, and they keep winning. And that's a way to probably go and look at... talk to them. But then they would not be talking to us because the government is not required for them to get us into the loop. Why not the government have a portal where you have not only just the information of all the businesses, what type of businesses they are and who owns, maybe what certification they have, as a kind of directory. And then also have a platform there more for the social networking, social media kind of network and platform there. You get messages, you can send text messages to this client or phone calls offline. For example, if I had to go and join a certain group on LinkedIn, and if there is someone in that group who has some experience to share, or some training to share, some opportunity to share, or government wants to share something, so everybody gets. So, something more of the... Maybe you can use still the social media to communicate with them. That maybe probably also more effective. Yes, we have our websites. Who's going to come to our websites? There are too many websites. But if there is more of a very selective kind of a portal where every business gets to have their presence... And a way to have not only showing their presence, but also be able to communicate with you. So, I need that, I see there's another woman-owned business who are pretty good in business development and marketing, and that's their area and we don't have it, we can go there to them. And I don't know who those are right now. So, unless there is some sort of more structured platform like this, well designed platform where we would be able to communicate with each other, we would be able to team up, and then we will apply for certain proposals ourselves when we have such a platform. So, we cannot even know who other potential partners are."[#58]
- The Black American female representative of a business development organization stated, "So when larger companies, especially me with construction, get a contract, there is an option, at least with EVA, there is an option to be able to become a subcontractor. But I feel like there's a networking communication divide. So, someone can get the contract, subcontract it out to minority vendors to be a part of the project. But oftentimes, they don't have that relationship. So while you can post to the board and say, 'Hey, here I am, I'm qualified.' If there's no relationship, then more than likely they're going to go with whatever they were doing before. So, I think it would just be so amazing if there was some way to have some type of networking beyond just a post on the board that says, 'Hi, I'm [Tina]. I have this construction company and I'm over here.' And something that says, 'Hey, here's my history. You can vet me out. I am qualified for this. I just wasn't big enough to take this whole job.'"[#FG4]

9. Unbundling contracts. Five business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces. Many thought that it could be helpful for small and disadvantaged businesses, while others noted that it may increase the complexity of project management for the State. [#21, #30, #35, #FG4, #WT5] For example:

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Well, if you look at it both ways, I understand what they're doing and why they're doing it. It's easier to manage one big job than it is to manage three or four smaller ones. So, like I said, I understand the efficiency part of it and the way they're approaching it, but like I said, it leaves smaller contractors begging for work, so to speak."[#21]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "Possibly. But our work, it's a little difficult because you're delivering a project, whether it's a structure or a building for the state to break down. It would be an efficient way for the state to do what they need to do. As a taxpayer, I wouldn't be appreciative of that."[#30]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "If the Commonwealth can... For example, if they have a big assignment... I know one of the assignments, security-wise, is the security stations at the DMV, Department of Motor Vehicles, they request security operations there. Usually, when they hand them out, these assignments, these contracts, it's basically covering a wide range of locations, and you have to [travel] to pretty much meet the requirements. If they can break down those contracts into per-location bids, I think that would be much better for smaller [firms] that are out there. Removing the financial requirements and scaling down a big assignment to cater to small business."[#35]
- The female owner of a WBE-certified professional services firm stated, "Unbundled them and also maybe move into more of an auctioning environment. I know in a federal sector, they have the reverse auctions for certain supplies. I think a lot of what I would be able to provide would be beneficial in an auctioning environment and it will be a different platform, different notifications, different awareness for vendors that do provide those types of supplies and services. So, there's different things that they can do. I think that they should unbundle a lot of the requirements that they do solicit because it does restrict the competition and often goes to your same vendors that you normally see."[#FG4]
- The female owner of an MBE- and WBE-certified firm stated, "No effort to 'chunk up' large projects so that small businesses can compete and deliver."[#WT5]

10. Price or evaluation preferences for small businesses. Six business owners and managers thought price or evaluation preferences for small and local businesses are helpful. [#21, #27, #58, #60, #FG4] For example:

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I think any time that you have a system or a program that, and if you have an evaluation procedure, there will always be questions of how it's evaluated or who's evaluating and that type of thing. That's just almost human nature. It's just something that I think if you can leave the subjective approach out of it and just say this is who was the low bidder and we've

checked him out and he's qualified, and we think he can do the work. And we're going to give him an opportunity. I think that's the standard you need to look at."[#21]

- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "I mean if your own city government is not supporting you, to me that is just as wrong. It just is. I think if the Commonwealth could give them an incentive or tell them, I don't know what they would tell them, but they need to require that they purchase a certain amount within their own city limits."[#29]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "There should be a criteria to evaluate as well. It's not like just giving money to small businesses, but also looking at..."[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think the first thing is that the agency needs to step in with VITA. VITA, they have been able to sort of get away with murder for a lot of years. And they'll tell the agency, 'Well you know, we used to only have a few contract vehicles with a 20% contract fee. Now it's only 8.68%, like that's some win. It should be zero for SWaMs, it should be zero for micros.'"[#60]
- The female owner of a WBE-certified goods and services firm groups stated, "I think the biggest barrier for us to do work with the state and local is the actual legislation that's out there. So, you open a business and our economic development teams have been great. Our small business advocates in the cities have been great. They'll do a conference. Our women's business center has done some amazing events that say, 'Here's how to get started. Here's how to get rent to cert as a SWaM business. Here's how to get on eVA.' But in the end, when you go to bid on things, you meet with the buyer, you meet with the contracting officer, and they give you an opportunity. They're mandated by law to go with the lowest price. So, you do a bid review, and I think I lost a \$10,000 opportunity over \$40. So, the federal government has some different allowances for that. I think Hub Zone, they can give up to 5%. They can award a contract to a Hub Zone business, even if they're up to 5% more than the lowest price. So, there's an understanding that the businesses they're trying to lift up, may not be able to be quite as competitive. So, they give them a little bit of margin for error. And the procurement officer felt really bad. When I did the bid review, that was the reality of it. Now the good news is I did the bid review, and he was very open about this. So, when the next one came out, I had a better number. So, everything that I learned in the classes, I applaud all the efforts that have been there to say, 'This is how the game is played.' You have to get the bid reviews. You have to know what the going rates are for things. It has helped us. It 100% has helped us. But if I were to say, one of the barriers is that there's no allowance for, can the city of Norfolk give a 1% to a City of Norfolk company or to a Hampton Roads company? Is there any way to say, 'Let's give a little bit of room so that we can recognize the small business that's maybe in our state and keep the work and the money here?' I do think we've got room in our state and local economies to say, if it's a local business and I might get hurt by this because if all the different seven cities said, 'All right, we're going to give a 1% preference to somebody who's in our city.' Then that could hurt me in six of the seven areas that I service. But it's better than that work going to somewhere in Maryland. So, I'm selfishly going to say, I would love to see Hampton Roads say, we'll do this for Hampton roads, or even if we do it just in the state of Virginia, that 'we

give preference to Virginia businesses', but we've all seen the signs that say, when you buy from local business, you're not putting money in the stockholder's pockets. You're buying somebody's soccer [equipment], you're paying for somebody's dance class, you're supporting the local businesses and that money stays here. The economics of small business in Virginia is paying Virginia workers. It's buying gas at local gas stations. It's all of that money recycles throughout our economy, probably three or four times, as opposed to if it goes, if we just allow somebody from another state to go, 'All right, we're going to come down and take care of this, or we're going to sell a box sale because we can be the lowest price and all that money now, all that profit goes somewhere else.' So I do think that our state could look at the Procurement Act and think about whether or not there's some room for that, for there to be some local preference."[#FG4]

- The female owner of a WBE-certified professional services firm stated, "From what I've seen in other state and local communities, as far as our procurement offices, they'll give allowances for companies that are bidding, that are local, that are located within your state or local areas, but it's not like that in Virginia. It just seems as though it would be nice to have a, maybe starting an initiative or Buy Virginia Act, we have the Buy American Act. So maybe putting something in place that will give preference to small business owners or just businesses within Virginia. Texas and certain localities, they have it to where, hey, if you're a Texas resident, you're a business owner, you receive preference. We don't award to anyone else, not unless they are the lowest bidder for that requirement. And I think that's something similar that we can have in place in Virginia to give Virginia residents and business owners preference, and not just automatically look outside of the area to award to someone else."[#FG4]

11. Small business set-asides. Nineteen business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses. [#4, #20, #21, #26, #29, #35, #36, #39, #43, #49, #51, #53, #57, #58, #FG4, #PT2, #WT5, #WT9] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I think a lot of the small business contracts that they have available, they seem to be intended for not so small businesses, so businesses that employees, maybe 200-plus people versus just smaller up and coming businesses."[#4]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Tremendous. Yeah. I think that should go on and on. I think they should revise that a little bit upwards more and to give the younger guys in the 10 to \$20 million range. I mean that in 10 to \$20 million in revenue is not really that great, but you're just getting started there. So, we kick that [NAICS] code up to that \$15 million level to that \$25 that would really help those people because they can stay with it longer and developing themselves a little bit better. It's a critical space penetrate if you're in my industry that is, that \$10 to \$20 million is a good point."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I don't have any problem with that. I mean, I think it's a worthwhile program. There again, this is something that we've seen, and it hasn't really affected us. But I mean, we've seen cases where the minority set aside... where they end up and whoever gets the job and turns around and subcontracts it to people who are not minority contractors."[#21]

- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "They should be some inclusion and some set asides saying, okay we must level the playing field. We must have a certain percentage of minority-owned business, or disabled veteran-owned business. We must have a certain percent because you have companies who they've already had a leg up. They've been around for 40, 50 years. When minority businesses could barely exist without them come and burn it down or just totally marginalizing them. There needs to be a more aggressive process into finding minority and disabled veterans. There needs to be some inclusion, some set asides. There needs to be some mandate. Well let's just say you should do it by population. So, if African Americans are 30% of the population of Virginia, well then it should be 30% inclusion. I think that should remain place for the next 50 years. I think the reason why, is because we've been as a people, we have not been given a fair chance for over 400 years."[#26]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "When you go through that [eVA] and you look for certain bids, jobs to bid on, and they have this 10 pages or requirements that you have to do this and you have to do that it just doesn't, it's not feasible for a company of my size to even attempt to do. So, I just ignore all those. It would be nice if they set aside certain smaller jobs, 10,000 or less, for just micro businesses only. That would be helpful."[#29]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah, there should be more of them, because I guess the mentality right now is pretty much, if I can group all of the locations into one project, that's less of a headache for the Commonwealth. So, what they end up doing is they end with little or no small business set-asides. We only receive a couple of small business set-aside requests throughout the whole year, and it's not that much. It's usually unfavorable contracts. It's usually contracts that it's very short term or it's with costs to even service it. So, it would probably be unfavorable monetary-wise and unfavorable in the term of the contract as well."[#35]
- The Black American male owner of an uncertified MBE professional services firm stated, "I have from the standpoint of I had been the one that had provided those opportunities. My last project, we had a 10% goal for our program, and we ended up bringing actually 15% of the business to small business, minority-owned and women-owned businesses to the tune of \$221 million worth of business. So, I've been on the side of those that have managed the program. I haven't myself and I haven't pursued a contract or an opportunity as a member of that program, but I've been on the other side."[#39]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I have a lot of businesses come back and say, 'Well, Virginia businesses need to have, need to be created, given a set-asides, they need to have, rate higher.' And that's the world's worst policy. Because what happens is, we're living in a global market. If you have a good technology, or a good product or service, you're going to sell it outside of Virginia. Now, the policy that we have generally taken is if your state gives precedent to your state's small businesses over ours, like Washington D.C. does, then that Washington D.C. small business, and I have an Indian-owned SWaM, would qualify for SWaM if they were headquartered in Virginia, but they're headquartered in D.C. because D.C. gives preference to D.C. based businesses before anybody else, and grades them higher on a procurement, we will treat those businesses headquartered in D.C. the same way that our businesses are

treated. The point is encouraging not only Virginia, but other states to realize we are in a global marketplace and not a local marketplace. Our businesses have opportunities to grow and excel beyond the political boundaries of the Commonwealth of Virginia."[#43]

- The Black American male owner of an uncertified MBE construction company stated, "I would think if they could just the time you could set aside X amount of work for minorities, just minorities I know with the 8a program, they set aside X amount of business of 8a contractors, 8a work. If something like that can be set aside for SWaM because 8a is, from what I'm told, it's a two-to-three-year process to get 8a certified. Then it's very expensive, upwards of anywhere from, I've had people say they can do it for me for \$5,000 on up to \$10,000. There's no guarantee that you'll get the 8a. They even do all the paperwork for you. If there's a way that it could be work set aside for just the SWaM or the DBE vendor or contractor, I think that would be very beneficial to all, SWaM and DBE certificate holders."[#49]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I know that the set-asides help. They definitely... And you can just see how some companies developed. They'll get on a big team with a set-aside, and then they get to develop their organization. And then they get to a point where they can go after contracts on their own, as a prime. You know? And that's the intent of it all, I think, basically, is to... It's like a step up, I guess. You're on the first two rungs of the ladder, and you can keep climbing if you want."[#51]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I don't know how much is available for firms my size. There might be a program targeted for small things. I don't know. It may be that there's projects, like some public building needs one room renovated, a conference room needs to be upgraded, or one section, and it's something with the interiors and say, 'I could do that with my interior designer.' Or a very small addition needs to be put on for a new piece of equipment. Or something like that. Small project, and the paperwork would be smaller too, and somebody like me could handle it without any trouble."[#53]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think it would be helpful to have them hiring small businesses for the smaller projects. You don't have to have the big-time person to put an overhang at an entrance. It seems a waste of money to me. I think there ought to be some advantage to being in-state, because it's certainly going to save the state money from having all the travel expenses of bringing people from the outside."[#57]
- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "What I would recommend is for Virginia to start a program where... Give looking at companies like us who have a lot of potential, technical potential, and we want to develop tools, maybe opensource tools or maybe propriety tools, whatever tools. To give funding so that we can hire people and do the research and develop tools and then roll it over. So once you have a break, once we get a product out, that will put us into a certain position into the market. I know that there are some projects meant for small businesses and for the minority businesses. So, the issues with minority businesses or small businesses is they are too small to handle certain projects, and I understand that from the government perspective. But it would be good to have a few smaller businesses of the same kind, or who

have the technical ability, but individually they're not big enough to win any contract. So, if they come up ways with teaming up several small businesses of woman-owned, minority-based, and give them the projects. And you don't have any other player in that pool. So that way you are creating opportunities, not for one company but many companies all at the same time of this bidding challenge. Set aside is good, I think. Within that you are competing only with companies with the same certification. But then that itself, the proportion is smaller. So, what the problem is, why do we have to compete with each other? Why is the small businesses having to compete with each other? Why? And also, why do I have to compete with the larger firms? There should not be a way to just compete with each other, rather trying to uplift them. Give them opportunities. So, there should be some set aside for women-owned businesses. That's one thing. So that way you are getting something which is set aside. That means you don't have competition with, you've removed the competition from the other companies. Non-certified companies."[#58]

- The female owner of a WBE-certified goods and services firm stated, "I realize there's a lot of struggles and everybody has a budget, but I do think that the federal side where they'll have set asides, if it's up to a certain amount, they can do a set aside for a small business or the HubZone."[#FG4]
- The Black American female representative of a business development organization stated, "We all recognize are set-asides but there are work-arounds to the set-asides. The 'I tried mentality.' I think if their feet were held to the fire a little bit more to say, 'You know what? This is a set aside, this has to happen and if it doesn't happen, then you don't get to move forward unless there is... Goodnight. Unless there is a really documentable... There's only one person in the world who does this, this is the only person who can do this task and so I have to go with this person outside of that we're setting a goal', but it's not a requirement."[#FG4]
- The owner of a professional services company stated, "I believe vendors within Virginia should get first crack at it. But we are really hoping that opportunities will be set aside for companies like ours, especially as we are making sure we have the full range of capabilities to respond to these contracts."[#PT2]
- The female owner of an MBE- and WBE-certified firm stated, "[There are] no set aside opportunities for SWaM businesses in Information Technology."[#WT5]
- The male representative of a WBE-certified goods and services firm stated, "We find ourselves in the almost unique position (certainly 'rare' at a minimum) as a woman-owned SWaM that is not small. We would cherish the opportunity to participate in the Study as we have many times found ourselves not receiving any points in the current Governor's small business set aside executive order, and then losing out to National firms (who then proceed to sell themselves to another National firm). This has happened no less than twice to VDOT and VA National Guard contracts in which we always seem to come in second."[#WT9]

12. Mandatory subcontracting minimums. Seventeen business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary. [#6, #20, #21, #26, #27, #29, #30, #35, #38, #47, #49, #54, #55, #58, #FG4, #PT2, #WT10] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "For instance, the city of Virginia Beach has a goal that 50% of our subcontracts go to small minority-owned businesses. The problem there is, is it's really hard to achieve that goal because there's not enough small minority businesses to provide that service. Many times, I have to show that I cannot achieve that goal."[#6]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "It's the best thing in the world. You give a mandatory subcontracting minimum to a large business that is been a success of the Small Business Administration. That is good. You really should have a small business subcontractor you can on every unrestricted proposal that comes out and they do I think, I don't know of any that do not have that."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "That can be a problem. When I say that, in most of the cases that you're talking about, like the circumstances there, they're asking for a minority participation and the contracts. If we're bidding work as a general contractor, and it's got a DBE or minority requirement on it, the biggest problem we have in this end of the state is finding a minority contractor. They're just not here. In some cases, you're asking for 3% to 5% or something like that, if it's a large job, I mean, you're talking about a pretty good bit of money and if you can't find them, I mean, there's provisions that you document and show them how hard you tried and all this kind of stuff. But it just, there again, it's a cumbersome process to go through and put all that together."[#21]
- The Black American male owner of an MBE-, DBE-, and DVBE-certified construction company stated, "There shouldn't be a contract issued in the state of Virginia without it going through a SWaM office first. There should be a SWaM office that any contract over a certain amount, let's say, needs to go through the SWaM office first. Now, if the contract is over \$500,000 there needs to be a mandate for some type of inclusion. And that inclusion should be, actually I think disabled veteran should be at the top of the list as far as being the number one for inclusion. Because these are people who sacrificed and served their country. I don't think there's any greater sacrifice. I don't think that being born a woman or black should put you ahead of the line. I think people who, no matter what your skin color is, if you're a disabled veteran and if you volunteered for this nation and you have suffered injuries, lifelong injuries because of it then you should be given the first opportunity. After that though, there should definitely be more minority and women inclusion."[#26]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "The governor had dictated that the state agencies are supposed to buy a certain percentage from small and micro woman-owned businesses. I think it's 40%. That is just not being done, and I can tell you because I'm the only one in 50 miles. I'm in Franklin, Franklin is 50 miles from Richmond, Virginia Beach, Norfolk, Chesapeake, any big city. I am the only one. So, any state agency that is located in my rural area should be purchasing from me everything that they can and they're not. They're just getting it from the big boys I guess."[#29]
- The non-Hispanic white male representative of an uncertified WBE and SBE construction company stated, "It's been a bit of a challenge if there's not anyone. What we do with related to marine work on the water, we still perform it all. So, if there's a minority

participation required, it's a difficulty to find any minority participation within our work."[#30]

- The non-Hispanic white male owner of a majority-owned goods and services company stated, "Yeah, because, again, it's more of a favorite system. It's like, 'I just got this contract with the Commonwealth. I know you. You're a buddy of mine. I'm going to give you the subcontract.' If that is a requirement, the contractor should not subcontract every single contract to the same subcontractor. It should be a different one each time."[#35]
- The non-Hispanic white male representative of a majority-owned construction company stated, "What we would love to see there is... currently at least on the federal level, SBA requires all of those in order to get credit, have to be first tier subcontracts. That certainly gets challenging, especially on larger or more complex projects, where you may not have the same pool of capable small and minority firms. We would love to see that expand to second or third tier."[#38]
- The Native American male owner of an uncertified MBE construction company stated, "I think that it would help me out. If they made that across the board, I think that it would open up other opportunities for myself as well as other small businesses that are subcontracted. It would make the larger contractors sub more work, and therefore it would put more opportunity out there, and it would of course generate work for my business, but as well as my competitors, which would make the competition less of a competition."[#47]
- The Black American male owner of an uncertified MBE construction company stated, "Say like myself, with the city of Richmond, I am a prime. My contract, I am a prime holder contract holder. I am required to provide X amount of percent of minority participation, even though I am the minority. For the first few years when they did that, I was like, 'I am the minority contractor and I self-perform.' What they told me is, 'You can't self-perform your minority participation.' 'But wait a minute, you have me listed as a minority SWaM contractor, that's the reason you gave me the contract. But then you tell me I got to do the same amount of minority participation as the majority company.' Their answer was, 'Yes, you do.' So, I was like, 'Okay.' There's real talk in my industry because it is, I don't want to say heavily monitored by security, but a lot of it is. For me to allow someone to come in to say, I manage the mayor's office. I go in the mayor's office on a regular basis. All the past mayors for the past 20 years, I've known personally. We built a relationship. We were friends, most of them. But I would walk in and I'd knock on the door just out of respect, but I walk in, go get my job done and come out. Well I can't hire a subcontractor to go do that because one, he hasn't gone through the security vet. Everybody in my company has to go through a security vetting process through the Sheriff's office. That makes it tough for me as a prime, a minority prime for my minority owned company that has a prime contract that has to perform the same."[#49]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Make it a mandate, a requirement that they use at least a certain percentage. 10%, 5%, 20% of their total contract towards a minority or smaller firm that makes them have to reach out to us."[#54]
- The Black American male owner of an uncertified MBE professional services firm stated, "That is a connection or a recommendation, and I use KBS as an example because they're

the ones that I see out on that side of town most of the time. But I don't know how a small business guy says, 'Hey, I want to work with you, KBS,' because I know KBS is going to require probably things that a small business guy can't give them at that point in time, without them feeling like they're going to fail. I'm from Georgia. I used to work for an all-black firm. I can remember the biggest thing about Atlanta was 35% minority participation, and they were very starch about that. A lot of business were able to grow because there was that mandate that you had to come up with minority participation. And it wasn't just your buddy hired a minority firm. These people had to actually do the work and have a fair shot at bidding. That was something. the difference I see in Atlanta and Richmond as far as minority participation and really staying after the contractors to actually become active in sticking with the minority participation goals."[#55]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "Well how about there could be some RFPs where if the bigger contracting firms who are not in the category of these minority businesses... If the government puts a condition on them that they should have a certain amount of subcontracting given to the minority-owned businesses, so that way minority-owned businesses or small businesses don't have to put a lot of money into all the other aspects of getting the contract and... It's a lot of money involved, and it's a lot of time, and we don't have it. But we have a lot of technical capability. So, let the big players play their role, let them be in the front, that's fine. But they should not be just taking the whole, I don't know, piece by themselves. They should be sharing with the small businesses like us. So that way we get... It's a win-win situation. They get a bigger piece, but we also get some part of it which we are not able to get ourselves because we don't have the resources to get that bigger project. So, it would be good to have some sort of collaboration among, and also requirements for those bigger companies to have some of these smaller firms working for them. It's an advantage. bigger company gets the contract, to have them to subcontract to at least certain percentage of the contract to a minority business. So that way you kind of guarantee that you are having a fair opportunity for small business or woman owned businesses. I think that would be helpful"[#58]
- The female owner of a WBE-certified goods and services firm stated, "A lot of the state ones that I've gone after and I have been on... Sometimes I'm a sub and sometimes I'm trying to prime it. You have to have a small business contracting plan of what percent are you giving to small businesses? What ones are you going to partner with? I realized there is a downside to everything, but I think that ought to be a mandate, not a plan because right now, you can write the, 'Here's the small business I'm working with.' There's no requirement for you to use them once you win this. If you really look at that, if you can't find small businesses, you just have to document that you really tried. You really tried. So, you can go to say, 'Hey, I downloaded the SWaM directory and I contacted these firms,' and in the end, they really don't have to do anything. The model they could look at, the state could look at would be DOT. So, DOT has every construction project and that's funded by DOT has to have 9.9% of that contract has to go to a DBE. So that is probably one of the hardest certifications I got and rightly so. They did a visit. They made sure you were a real business. You weren't just a magnet on the side of somebody's truck. So they came, took me six months to get it and I keep it up every year because it's the only one I know that when Horrigan or whoever wins something at the airport, they have to give 10% of that to a DBE,

and because I'm one of them, I'm going to get a call. I may not win it every time, but I'm going to get a call. I'm going to hear about it. Yeah, I think that the lip service of, 'Tell us what your small business plan is, and then tell us how you tried if you weren't successful,' that that could have a lot more teeth. I know that people are going to say, 'You can't always find them,' but then I disagree with that. DOT's figured that out."[#FG4]

- The owner of a professional services company stated, "It was kind of like, we'll give you a little bit so that it meets our quota, but we have no intention of really developing this relationship with you."[#PT2]
- The female owner of an uncertified WBE professional services firm stated, "Our firm primarily works in Maryland and would love to do work in Northern Virginia since we are so close but have found that the low MBE/DBE goals established by VDOT for procurement makes it impossible to get into the field. VDOT generally has a goal of 10%, whereas MDOT's goals are generally in the range of 22%-28% which allows for the participation of multiple small firms on contracts. Consideration should be given to whether firms decide from the beginning to work in another state due to Virginia's low goals or firms like ours that decide that they could never open office in Virginia because there was not enough opportunity. My previous employer was also an MBE/DBE firm, and they opened an office in Virginia but ended up having to give those employees Maryland work because the low goals in Virginia made it too difficult to get added onto teams. The current environment should be evaluated for barriers to entry that make small firms decide to stay away."[#WT10]

13. Small business subcontracting goals. Seven business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses. Most acknowledged that this is existing practice for many State projects. [#2, #20, #21, #27, #38, #42, #54] For example:

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "I've found that sometimes, it's very helpful. It helps firms like us. And other times, it's a barrier. We've actually had people from Virginia Community College system, for example, called and said, 'We'd like you to propose on this because we noticed you're a SWaM contractor,' and we did. And they said, 'The good news is, we'd have never even thought about calling you except you were listed here.' I was like, okay, that's working, right? And then on the others where we need to compose a team, I have actually had trouble finding some of the professionals that we really need to have on the team. So, I don't think it would be... I think the system is there. We just all have to work better to make it better, which is get more small firms understanding how this works so that we can get a bigger crowd of firms in that registry so that way, if we find a project that has a mandatory requirement, we can find enough team members to put on a team."[#2]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Like I said, I don't have any issues with stuff like that, as long as it's fair. As long as you don't come out and ask for 10% minority participation in this end of the state. It's not here. So, like I said, those are the kinds of things, and we work with minority contractors. I mean, there are a few here and we try to work with them the best we can."[#21]

- The non-Hispanic white male representative of a majority-owned construction company stated, "I would say certainly make small business participation plans an evaluation factor in award. We're required on many of our federal projects to provide a detailed plan on what we've done for outreach, how we plan to engage the SB DB community. What are commitments we're making with our proposal to the firms in those categories? How do we plan to meet the percentages that have been outlined?"[#38]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Mandate that a local work be subbed out to have local contractors on it. You got a lot of solar farms going up in the state of Virginia right now, and everybody building their solar farms don't live in Virginia. They're not boosting any income for the people that live in Virginia. Now, don't get me wrong, they might have a 1000 people that they pay to do labor, but they got 3000 people a year from out of state doing all the other work."[#42]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Those larger construction companies, in their contracts with the local government, they had to use either the minority or the smaller construction companies for certain trades. And that helped them, the smaller construction companies to get worked that they normally would get passed by over. I think if Virginia had a similar system for the smaller architect, the smaller project managers where their experience is listed next to their company name, and then those larger companies could pick and choose. But, the larger companies, if they had a mandate in their contract to use minorities or SWaM certified or EEE, it would help us to get more of the larger projects or be a part of the larger ones."[#54]

14. Formal complaint/grievance procedures. Eight business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures. [#6, #9, #13, #16, #17, #20, #52, #WT3] For example:

- The non-Hispanic white male representative of an uncertified VBE construction company stated, "Well, first thing I do is I try to air that grievance face-to-face or on the phone. That's generally when you develop relationships, those relationships will carry a lot of grievances through and be resolved. Now, there are avenues that you have to take if you can't get them resolved that way. And those are spelled out in the contracts you have in methods for remedies of grievances, whether it's filing a complaint within a certain timeframe. It's mainly has to be written and there's guidelines in all sub-contracts and contracts and purchase orders for remedy agreements."[#6]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I haven't had that directly yet. Well, yeah, no, I take that back. We did have. In terms of we had a grievance. And it was formal. You submitted your issue and then it was reviewed and they had a response, and then there was debate, and then ultimately a solution, so yeah."[#9]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Sure. What we do is an after, we analyze the scoring of RFPs after the award, whether we're successful or not, and just see how those numbers work out."[#13]

- The Black American male owner of an MBE-certified construction company stated, "We had to go through the contractor of the job. I was the sub, the primary contractor was out of Florida, where we do all of the hurricanes around the United States. So they kept saying, 'we're not going to worry about that \$2,500 because it's just going to go back and forth, back and forth.' Maybe it would after. It probably would have. Trust me, I went to a judge about it. The judge said, 'What we need to do, we need to get that company in the courtroom.' I said, 'Good luck on that, because I can tell you right now, they're not going to cross over that Florida, because Florida has its own rules. They have their own rules that they go by, that don't require Commonwealth stuff.'"[#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Yeah, I will tell you it's interesting. All the channels lead back to one place and so there's not really a checks and balance. If I've got a complaint... I have a complaint right now with the Board of Virginia, it goes to the attorney general. We looked at, okay what if we were to go... you'll love this, what if we were to go through the insurance people and complain through the [company] and the insurance people. That complaint goes to the attorney general's office. What if I were to make the complaint through the whistleblower? That complaint goes to the attorney general. Well, I'm already battling the damn attorney general so I can't take it... there is no checks and balance because he's already their person. go into these big businesses and be able to audit it and say what you're doing, you've got the check mark that you are doing things properly. They've got to have a checks and balances. These small businesses are getting crushed. I cannot be the first one."[#17]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Plead our case and come to find out the guy was lying through his teeth. He lost the protest, but it still cost us three months in work and in revenue on that contract. And that really hurt us pretty bad. This was 10 years ago, but it still sits in my car somebody didn't have an issues to do that. Of course, you've got the edge people, you have people with no scruples whatsoever in this industry too. And there's not a lotta of rotten egg out there, but you got to be careful and you got to watch what you're doing. And a lot of small businesses they get hoodwinked by a lot of people. And I hate to see that, it really drives me mad. Let me finish, the protests are a good thing to have in your pocket because on the other side, companies that win contracts that they don't qualify and they don't deserve it. And they're good that way. I don't know where to take that. It's good and it's bad. Both sides."[#20]
- The Black American female owner of an uncertified WBE and MBE-certified goods and services firm stated, "For me it just seems like some of that stuff [race or gender-based discrimination] is there, but it's hidden and it's been respectful. Times are changing now where everything is coming out, so with that being said, I guess yeah, just to offer some classes on how to handle that situation, where do you go if you run into those situations, who do you contact? I guess something like that would be helpful. Because times are changing now and it's like everything is coming out, so I think creating awareness about what do I do? Because if you don't know what to do, you can make the wrong decisions, some people react in violent ways. So just knowing hey, there's somebody I can call, or somebody I can contact to report this, and just letting you know what options are out there."[#52]

- The female owner of a WBE-, DBE-, and SBE-certified firm stated, "In conclusion, we have not reported these at the time they happened. We wanted to, however, we did not want to rock the boat and instead we made decisions to not take on work again from the contractors/primes, cities or state agencies who we felt violated fair and reasonable practices. Additionally, without lawyers, accountants or mentors it seemed like our time was better spent keeping up with the work we had and avoiding these bad practice organizations."[#WT3]

K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with SBSD's certification and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with SWaM programs;
2. Experience with the Federal Disadvantaged Business Enterprise (DBE) program; and
3. Recommendations about race- and gender-based programs.

1. Experience with SWaM programs. [#2, #8, #20, #21, #22, #36, #FG4]

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "...Well, the one we mentioned earlier where some of the larger colleges had those open houses where SWaM are invited to come meet them. I think that's a great program, just haven't participated in it."[#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I do some of the webinars that they do. They have a program I guess where they're helping people kind of do a fast-track MBA kind of thing with your business and I applied and was accepted and then we had some pretty big contracts and I decided not to do it because I had to be out of the office. In order to participate, I had to be out of the office one day a week and I just couldn't do that."[#8]
- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Around small business programs, is really good. It really helps out."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "No, I think it's worked out well and I think it's well managed and I think it's performing as it was intended to perform. I think it serves a purpose from the standpoint of giving these small businesses an opportunity to get involved in some of the bigger projects and work with these contractors that are looking to use the SWaM people."[#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "Like I said, I've never heard of SWaM. Right. We've been in business 15 years and I knew nothing about it. So really just putting it out there, making people aware of it. I guess how it applies to them, how it can help them. Just the education of it, where to get the education."[#22]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "I think some of them are getting very proud that they actually are getting closer, but many

places I go have not met their small business goals. So when you find a place that is actually meeting their goals, that's a great place for small business to try to approach because they're very cognizant. Something I guess if you even write a report, I would encourage any small business to pick up and know who their small business advocates are. Government personnel who are small business advocates or the government agency that they intend to work for. If they can find out who that small business advocate is, they can oftentimes find out where the small business work is, and at least have their names be known that there are small businesses with capabilities that can be brought to bear in their area. I think there's a bunch of websites out there that provide information. I didn't use them, and not because I didn't want to. It's just I didn't have the time and it just didn't work out well. I need to go back and do more because I think there are lots of programs out there. I was so busy trying to get a CAGE code and get all the tax identification numbers and all that stuff that you just get swamped with stuff to do. But there are a lot of groups out there, but I can't say that I actually used a bunch of them, and I probably should have used more."[#36]

- The Black American female representative of a business development organization stated, "I think that would be an amazing principle for there to be a follow-up because I think about a contract that someone I know was a part of and they were subbed in because they were DBE certified. But then in the end, they were underpaid. They still weren't treated equally for the work that was done. So I think it's a good idea for the state to potentially legislate their money. You can't legislate morality, but I can legislate my expectations in the dollars that I'm giving."[#FG4]

2. Experience with the Federal DBE program. [#20, #21, #39, #47, #49]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "Around small business programs, is really good. It really helps out. The only comment I got is that it's fantastic. I think that the work that the government's doing right now is great. Can they do more? Sure, anybody can do more. Can they do less? No, please don't do less."[#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "Apparently, that's a pretty rigorous ordeal to get qualified as a DBE under the federal guidelines. I've been told some stories that didn't exactly make sense, but like I said, that's what they were saying."[#21]
- The Black American male owner of an uncertified MBE professional services firm stated, "Well, when we first launched our business in retrospect, Loudoun County, has a small business administration office in Leesburg. They hosted several seminars for new starts and small businesses. This was all prior to the pandemic. We attended a number of those workshops and I thought those were beneficial and they gave us a list of resources. Through them, we found our accountant that we use for our tax preparation and they also gave us some contacts for our marketing website development. We haven't used those, but they did provide them as a resource. Then they also gave us some ideas on some local legal assistance that's available that specialize in small businesses. So I guess when I say that the Commonwealth, probably, if I look at Loudoun County as part of the Commonwealth and the SBA, we have taken advantage of some of those resources. We know where they are. They're here, right here in Leesburg."[#39]

- The Native American male owner of an uncertified MBE construction company stated, "Well, in fairness, in the beginning it was the paperwork. It was me understanding what they wanted, and what documents I needed to provide and all that good stuff. But once I got on the same page with them, and I was providing the documentation that they were requesting, then it looked like it turned into a thing where I wasn't a preferred customer. It almost seemed a bit corrupt, because there were other companies, and much, much larger companies than mine getting DBE certification. I was getting pushed to the side, and here I am, the contractor that, of course I'm going to feel this way, but I think that looking at it black and white on paper, my firm was certainly more qualified for the program than these other contractors were. These contractors are big contractors that do large, large, large projects with [an energy company], and the city of Richmond, and VDOT. These big contractors that are doing \$30 million worth of work, they're still able to get SLAM and DBE certification, and here I am fighting for a \$1 million contract and I can't get anything. In all fairness, I don't want to beat up on the people at the SB the SB, the small business diversity program supplier. Anyway, SBD whatever it is, the people that I'm trying to get my DBE certification from. I think that they've got to be understaffed, because their processing time is out of this world. I mean, it takes literally, when I say that I've been working on this since I went into business, I'm being very honest with you that I have been working to get my minority status for four years now. They request information, I get it back to them as fast as I can, and six months goes by and I haven't heard anything. Then I contact them and they're like, 'Oh yeah, we were supposed to do this. Can you give us this, this and this?' Come on." [#47]
- The Black American male owner of an uncertified MBE construction company stated, "Where I think I would really like to see a lot of change is in the DBE side of it. The DBE and I don't know if you're referring to 8a. There needs to be an easier process for that because they just require so many more documents. I'm really glad to have gotten my DBE but if you get a DBE, SWaM automatically falls underneath it. The DBE requires so many more documents to become DBE. If they could relax a little bit on the financial documents, more financial side documents. If you're a DBE, you're a DBE. In the back of my mind I'm thinking of something I'm going to say in just a minute. But if you're truly a DBE, you're truly a DBE." [#49]

3. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to the Commonwealth and the HEIs about how to improve their certification programs. [#20, #21, #24, #27, #29, #31, #33, #34, #38, #39, #43, #43, #44, #50, #51, #54, #56, #58, #60, #FG1, #FG2, #FG4, #PT1, #WT19, #WT22] For example:

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "The VA is really good at doing that, and certifying those veteran-owned businesses. Certifications are very important, and I think the programs that the government has to require... Not require. Which word I'm looking for? It's to mandate a specific percentage of contracts that are for certain people. I think that's very, very important to a small business, wherever you're starting. They'll raise ethnicity, gender, all that story going forward, and it's a really good program to get going. You got to be joined at the hip with a small business. They didn't help with that long enough, I don't think, to make that worthwhile. There's got to be an overhaul of that, or something's got to be done to get

those small businesses off the ground. When they can run on their own at 15 million, I think it could do well. But you got the guys struggling at \$5 million revenue. It's tough. It's tough. But especially in my industry... Now I'm not talking construction or anything like that, or large inventory businesses, but the industry that I know well... that's the threshold. You've got to get them above that \$5 million mark in revenue. Because that's where he gets all his back-office stuff together, at about 5 million in revenue. He's got his rates, and he's got his G&A overhead down to a science, and he knows what that's going to be from year-to-year."[#20]

- The non-Hispanic white male representative of a WBE-certified construction firm stated, "The fact that we talked about the issues of accounting, bonding, bookkeeping, the list of certified DBEs. There's a lot of firms that deal with it. Like I said, from a small business standpoint, it would look like to me it would be an opportunity that somebody could use somebody like that. This business we're in, it's difficult for anybody to get started. I know from a minority standpoint, like I said, if I had to make a recommendation, I'd recommend that they'd try to follow some other business. This is not... Well, I shouldn't say that. I've been fortunate, but this can be a brutal business."[#21]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I would like to be more in the Latino community and be SWaM certified, so that we help them get some opportunities. So at least come in as a subcontractor, because that's the other thing. People get certified, but what do they do after they finish the training... Do they get certification? I don't know. How successful are people at actually getting and gaining contracts? I don't know. Once you understand the why, the rest is gravy. If you understand how... Why you want to do it is important, but how it's done, the process, if you get feedback and you get support, and then eventually you can be on your own and you can also share with people what you've learned, share that experience, it's a domino effect. But if you feel like you don't have enough knowledge to proceed, you're just going to get stuck. You're going to stay stuck. 'It's too hard. No, I'm not going to follow that.' You're going to continue to struggle, where, if you get into the system and you take advantage of it, and you tap into it, you could get out of that struggle, and be successful. But it's almost like there's roadblocks, and the roadblocks are the lack of knowledge. 'Where do I go from here?' The stuff could be in the system, but it's all in English. It's in Spanish, but a lot of people have to work. They don't have time to be stumbling, and stumbling through the internet, looking for information to get their company going."[#24]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Sending me to more of the DBE meetings or SWaMs or whenever they got something coming up just to aware me or send me notice that I can go and study and get enlightened on what's going on."[#27]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "We need more programs for the micro businesses in my opinion. There's just no programs out there for us. They have none at all. So it would be nice to develop some for maybe obtaining insurance for your business or for capital, for just improvements to your building. I mean my roof right now is going to cave in on me. I need to get a new roof and unless you pay, when they're done with the job unless you pay for it in full you can't get a new roof. So I have leaks."[#29]

- The Hispanic-American male owner of an uncertified MBE construction company stated, "Maybe send some news, like emails to companies or mostly maybe more emails about that part."[#31]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "You need to have things set aside for small business. No, you set it aside for small business... Okay, let me give you a good example. Me and two of my designated guys, we bid on a contract that the government wanted to take down in an area where they wanted. We lost but we were very low. So let's pretend we win that contract. Some of the things we need is to make credit assistance available. We want the state to be able to create those abilities for minority contractors who do not have the financial means to have access to capital. This is important, because we give them the ability. We should be able to access 25,000-50,000. Okay, what are you going to use this money for and what are the reasons? I'm going to hire helpers. I'm going to do this and this for a contract. If they audit you and you did not use the money for that contract, then you either pay a fine or jail time. They should be doing things like that. So we are praying that they will take this into consideration and help us. I applied for a small income loan through this company, including \$5,000. And I told them to bring in two full-time employees and they offered me 5K. Then provide training. where they officially mandate or require every successful company that has been making so much profit to agree to sponsor or work with minority companies. Meaning in this case, each successful contractor will have to take two or three, or five subcontractors and work with them so they don't have to struggle to have access. They need to qualify. You pay them, you work with them, and offer them compensation. Because one of the problems that minority business owners are having is they over price and underprice."[#33]
- The non-Hispanic white female representative of a majority-owned goods and services company stated, "Maybe just having grants that small businesses can qualify for that are specific, not just in general well, here's your money do something with it, but maybe having specific requirements for it. I could see that as beneficial not just for us, because that would be beneficial for us sure, but for other people too. Being specific telling them, 'Okay, well, you can have this if this is what you're going to do with it.' Or maybe have different categories. Okay well, this is what you'd like to do, okay well, this grant applies to you, apply for it. And then when they get it, have a checklist. I love checklists. I'm a list person. I like ticking off my progress on things. So just putting a little check mark next to it saying, okay, yeah, this is what I want to do."[#34]
- The non-Hispanic white male representative of a majority-owned construction company stated, "I don't see a large focus from the State on how we encourage and support growth of SBE DBE type contractors. Certainly, we would be willing to participate or assist in that in any number of ways, be it mentorship, or education, or however we could. I just, I think you've got a lot of firms in the State who would be very interested in doing that, a lot of your larger firms. I just don't think we've been asked."[#38]
- The Black American male owner of an uncertified MBE professional services firm stated, "I think that one of the things that we don't spend enough time on and I'm not as familiar with what they do in Virginia, I just know that they do some things in California and other states, is spending some time putting some resources at the HBCUs and stressing the business ownership at a Historically Black Colleges and Universities and putting some resources

towards entrepreneurial type programs so that when these kids come out of school, they're not coming out of school looking for a job, they're coming out of school looking to create a business. So if you start with that mentality, that mentality is going to go throughout your career."[#39]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I think there is a way that the Virginia Information Technology Agency, or the Virginia Department of Transportation, or the Virginia Department of Environmental Quality, or the health agencies in the technology sector or other delivery programs, professional delivery services, can sit there and create innovation centers. The Federal Government has done this to a degree, through more creative procurement programs and offerings, that encourage the solicitation of new ideas and allows for a risk component, is the best way I know how to put it, is you're going to be rewarded as an agency, for hiring a certain number of businesses that truly meet this criteria. And here is a testing program that the state follows to kind of vet these innovative sources. The Federal Government actually does a fairly decent job in going after innovation. They create contracts that allow for partnering opportunities, or they come back, the agency comes back and says, 'This is the business case I have to solve.' And they put a request for proposals out there, and then they sit and establish these"[#43]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "put in a proposal and these companies come in and they develop teams that are made of large and small companies to come up with their best solutions to meet the agency's needs and then the agency picks from one of those solutions. The procurement process in Virginia is now 'I don't give you the solution, I tell you exactly what I want you to do and how I want you to do it and that's what you give me a bid for.' We have them. We have the businesses. Their ability to enter into the Virginia market is almost impossible."[#43]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "For one, we don't know how to [take advantage of our certification]. That's why I said if they're going to do the small business stuff, we need to be able to have it where she could go to the forum, 'Hey this is what you do.' And I think some of that stuff is available. When I was reading all the stuff about the PPA, obviously we had our number and all that stuff like that. They knew what it was. I don't know what it is. I should have written it down or printed it. Education, accessibility, set up some kind of forum, some kind of site. A 1-800 number that they can call. A Q & Question site. 'Hey, how do I do this? This is what I'm seeing out here. Well, I would like to try to apply for this. What do I do?' Like a universal site, it doesn't just have to be for the HVAC industry, it could be for everybody. 'Hey, we're interested in doing this. How do we do this?' To where you could actually talk with a real person, or chat, or whatever virtual or communicate by email. Like a how-to section for everybody. How do we do this?"[#44]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I just think that you needed a help group that helps them find, like I said before, the grant process, what state grants, what federal grants. There needs to be somebody there to help, like go to this website, this is the Virginia website to help you as a small business find help right now, and instead of having to wade through all this stuff. I mean, it's just so hard

if you Google it, grants for small businesses in Virginia. You're not going to come up with somebody there. Where's the chat button? I mean, it's just really hard to identify grants. I have a master's degree. I know about grant writing and I'm like, why am I spending three hours looking for something? It's not streamlined. It's more for the bureaucrat that writes grants for the professional people that qualify all the time, just write it up again. It's not easy for somebody like a small business owned by a minority or a woman to just go somewhere. And they might not have the smarts. They might be a little farmer somewhere that doesn't even have access to a computer at the time, trying to save his business yet. Yes, you don't know how to do it. It's not easy."[#50]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "There could be some tax initiatives that would help, especially in your first few years of your business. And there may be, but I wouldn't know about it if there were, but I mean the tax break really hurt me the first year owning my business. And really, what I paid in taxes, I would have put into the business. And I think that's probably even more so if you're trying to build it, and I wasn't even really trying to build it bigger, just kind of get it established. So if you're into hiring people and trying to rent space and having to do things like that, and you still have the... You have write-offs, but the write-offs don't take care of it. Say General Motors wanted to build a plant in Richmond. The state would come in and say, 'Oh, we'll give you a tax relief for so many years, and then we'll help...' They're going to give them all this help. Okay? Well, a little bit of help for a small business. The Small Business Administration may have that, but my experience with them was mostly it's loans. There may be some grants for minority business, small business, but I know most of its kind of like business loans you're going to have to pay back. Just to have a tax break for a year. Maybe the first year you're on this rate, second year, and just for state taxes if the federal taxes ain't going to do it. State would be fine. Graduate it up until you have time to establish it. And I think there are records on how long it normally takes a business to actually get established. It's like a growth curve and then peak, and a decline or a level-off. So you could base it on something. Eventually, that would probably bring in more tax money, if you did that, because more small businesses would probably be able to make it through that start-up period."[#51]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I mean, maybe around some round table meetings where the minorities can sit at the table with the prime and just get a good rapport with each other so that they can see who they are. See exactly what they do and know their experience. There have been some round table meetings like that. I've attended some but they were so large. You find yourself sitting in an auditorium, and a few of the primes are up front, but it's not personal. You know what I'm saying? It doesn't give a true understanding of what the small business can do to you. if they could just give the small businesses a platform. There is a list that eVA has. But I think that list is too general. Like they would have large architectural firms and then the smaller firms in the same room together sitting at a conference room table. And then larger other types of businesses, construction, and smaller contractors, minority contractors at a table. Larger engineering firms, and then the smaller engineering firms. Do a specific round table for the specific trade."[#54]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "It would be nice if small businesses had benefits. Right now,

as far as I can see, women-owned and minorities have the advantage over us small businesses. There's very few benefits for a small business."[#56]

- The Asian American male co-owner of an uncertified MBE and WBE professional services firm stated, "think probably start earlier in the career to establish the goal of establishing a business. So that means not only just workshops, but kind of more of a system of much deeper training, business training. And work with making a partnership right in the first place. So have a mentor. Assign us a mentor from industry. So the mentor would be pretty much helping you to... to walk us through to get to the place where we want to be. Because there is no mentorship that I see in this training. There's no training much of the training the way we want. Also there's no mentorship to receive. There's no adviser who can advise on certain things. Why not the government have a portal where you have not only just the information of all the businesses, what type of businesses they are and who owns, maybe what certification they have, as a kind of directory. And then also have a platform there more for the social networking, social media kind of network and platform there. You get messages, you can send text messages to this client or phone calls offline. For example, if I had to go and join a certain group on LinkedIn, and if there is someone in that group who has some experience to share, or some training to share, some opportunity to share, or the government wants to share something, so everybody gets. Maybe you can still use social media to communicate with them. That, maybe, also be more effective. Yes, we have our websites. Who's going to come to our websites? There are too many websites. But if there is more of a very selective kind of a portal where every business gets to have their presence... And a way to not only show their presence, but also be able to communicate with you. So I need that, I see there's another woman owned business who are pretty good in business development and marketing, and that's their area and we don't have it, we can go there to them. Another aspect is that you will have a channel to talk that's very effective. One message goes and it goes to all the businesses, whoever is on the channel. So that's a more effective way than sending the letters. Lot of times we don't even look at what is this piece of mail-"[#58]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "One of the things that was very impactful to me that I think that if Virginia was able to do it, could just be such a game changer. I was lucky enough to get a scholarship to go to the Dartmouth Minority Business Program. It's a series of two classes. It's a weeklong. You get into a cohort, and throughout that week it's like an MBA on steroids for minority and women owned businesses, and it literally changed... It's actually three classes. It literally changed how we do business and made us so much more successful. It's out of Dartmouth. If there's one thing that I could wish for women and minority businesses that could really make a difference is if some people could, just some could... If there was a scholarship program, I think it's 10,000 for the week. You have to provide your own travel there, but you get to learn from the professors at Dartmouth that are just outstanding. That's partly the reason we changed the trajectory of our business and now we're more successful. If Virginia to something like that, that would be amazing. And don't get me wrong, I love UVA. UVA has tried to do it, but Dartmouth has done it If you haven't done it, and in fact, if you are looking for a scholarship, I can point you in the right direction. It's the Bank of America Scholarship that paid for me."[#60]

- The Black American male representative of a business development organization stated, "I think Commonwealth needs to be making certain that there's someone who's advocating, there someone who's educating and talking about the importance of the state dollars being spent with all different and in this conversation, I'm talking about with black businesses with state dollars being spent with minority businesses. I have not heard what I would think from a marketing advertised messaging standpoint. I haven't heard the states message of how important it is for the state dollars to be spent with the different communities that we have within the state. And I would think that would be a top-down message messaging. So that individuals in different areas of procurement would be looking for ways in which they could be doing more business with minority businesses." [#FG1]
- The Black American male representative of a business development organization stated, "The state agencies to me they're not focused on minority business, they're just not? How do we get them to focus? That's the issue. It's got to be an incentive for them to partner, or to do work with minority business. When you win a contract with them, even when you're counting, if you win, and low bid, well, good for the county, but not good for the minority businesses, that makes you miss something when your price is too low. I think remedial [programs] definitely needs to be in certain cases. But somebody's been 20-30 plus years, we don't need to go back to remedial, we need to know what's going to get it to the next level. I think if we continue to focus on remedial education, we'll never get to the next level of where we could potentially be. If you always stay in the first grade, you will never graduate. So remedial, it's got to be to the next level as well." [#FG1]
- The Asian American female representative of a business development organization stated, "When you hear remedial, we're talking to TED, remedial education, very basic. But companies have different levels. And that is something to deal with all the time. Like 60% are remedial needs, but there are 30 40% that are there already up there. Don't give them something that we thought that all they want is an opportunity for connection. And I think that's what the Commonwealth or any government mining providers should be aware of, to be very keen about their client's needs. Just because they think they need is not what the client's needs. So, the clients of the advanced enterprise level 30 years owning a business would need something different from somebody who's three to five years in business. So that is something maybe the Commonwealth has not thought of when running this education. And maybe that's not what they want, they don't want any education, they want to conduct an opportunity. And that's what we need to do to look up the things we do for small business." [#FG1]
- The non-Hispanic white female representative of a business development organization stated, "I think the Small Business Supplier Diversity could be bigger, and it could work with SBDCs more. I think that they don't just because they're overwhelmed. There are so few of them that do that work. I would say, I'd like to see stronger partnerships with us, with the Small Business Development Center. I think they'd all appreciate less territory that they have to cover. There are a lot of businesses out there. There's plenty of space for everybody in the marketplace, we just have to be better at talking to people about what's out there, I think." [#FG2]
- The female owner of a WBE-certified goods and services firm stated, "We've all got that want to compete. And again, I come back to, if they're only going to the two or three

businesses that they know and they've used before, maybe we can move the bar with our local and even state agencies to say, 'if a small business is registered with SWaM, they're a SWaM company and they've got this code, that they are on the mailing list, if an opportunity comes up, they get to bid.' I realize that means they may get 50 bids instead of three. But even if I decide not to bid on it, if I knew about it, I could then do a bid review and find out if I'm anywhere competitive. So, I do think there's... I don't think the numbers are going to be astronomical in terms of how many bids they have to review. And if it's LPTA, then they just put them in Excel form and go to the bottom. It wouldn't be that much harder for the buyer, but if I knew about them, I would then know to go do a bid review and find out who is the buyer, what was the opportunity? That would help me build those relationships a little bit more, because right now I don't know what I'm missing because I'm not getting the call... The training for the procurement officers and the buyers. Maybe, we can find a positive there. 'Hey, we want a success story. We're bringing these quotas but we want a success story out of every one of these.' Give them some kind of points towards whatever they're doing if they'll write up a success story, because I think that that's going to help those that are being impacted by that quota to go, 'Well, look, you can read about all these great companies, maybe it won't be that hard.' I think we need it. We need as much positive as we can."[#FG4]

- The Black American female representative of a business development organization stated, "There's a program in Chesterfield County. So, I'm in Richmond. The center's in Henrico. In Chesterfield County, they have a software system that they created and developed. It's called My Business Starts Here. So, it's an automated process where you log onto the system, you say exactly where you are in business and it tells you, 'Here are the next steps of what you need.' Then it connects you... So, it says, 'Oh, well you need this. Well, you need to go here. You need this? You need to go here,' and it connects you, wherever you are in business, it connects you to your next step. I think that it might be of assistance for organizations like the SBSB to have that type of directory, that type of information, but it takes a lot of man hours to create. But once created that's a tool... Even if it's just going through the bidding process like, 'You're trying to bid, here what these terms mean. Here's someone you need to speak to you. Are you looking for this buyer over here?' and to have real time information on who you can contact to connect to the next resource. It will be automated. So, I think that could be a really helpful tool to have. I have shown you what it looks like when you can have diversity and when you can bring that in and what it can bring to you and that has been amazing. The problem with that is that it's a very slow process so it's a domino effect but it takes a long time. I love the idea of saying, 'We should need quotas.' We also shouldn't have racism, but we do and so I think it's an interesting way because I love the award ideas so we do a shero award here. And so, we recognize women across platforms and it could be a PTA mom and the CEO of an international NGO, right. All together being celebrated because of their contribution to society. I think that's a great idea to bounce it off and somewhere we're doing each item, they'll come closer and closer to being one mentality."[#FG4]
- A respondent from a public meeting stated, "How do we get more companies to graduate, to become products? And then the second part is in the system, how do we get more minority companies to work for minority companies? If they have to hire or subcontract a lot of the folks, I guess that's what I'm seeing in the system that it needs to be looked at. How can we

get to that point? How can we put something in place to make sure that minority companies want to, but again, not all companies do, other companies that want to become primes because they control the assets, they control the money, they control the flow of where the money goes ... Once you become a prime you have greater control over where the dollars are actually sent."[#PT1]

- A comment from written testimony submitted to the study team stated, "A few years ago, it was questioned to what extent ALL state spending was being tracked by ALL demographic factors beyond just race and gender. While the DSBSD website now lists some data, a true picture of equity would involve not just DSBSD contracts, but all state spend. And, even secondary spend by the prime companies would/should be tracked. This is common practice in the (real) commercial world and the basis of tangible metrics for the efficacy of programs." [#WT19]
- A comment from written testimony submitted to the study team stated, "The adage of 'a government of, for, and by the people' takes on additional meaning when the agency involved exists to address diverse communities. Does it mirror the community it serves? It is unclear how many years have passed since full time staff has included any Latinos. It is unclear what job skills are listed as required (or even desired) in the job descriptions of agency staff in terms of language and background. Again, how does the agency mirror the population it serves?" [#WT19]
- The female owner of a WBE- and SBE-certified firm stated, "I maintain my position that if Virginia wants to take SWaM contracting seriously, it needs to put enforcement measures in place. The State of Maryland continues to offer an example of best practices for how to do this. In any case, correcting this unprofessional behavior on the part of the prime firms should not be left to the small businesses subs to do – we have limited resources across the board, and we do not particularly want to burn bridges with our prime firms. Please help business flow down to small businesses by giving the SWaM program some serious 'teeth'." [#WT22]

L. Other Insights and Recommendations

Other recommendations for the Commonwealth, HEIs, or other public agencies in Virginia to enhance the availability and participation of small businesses.

Interviewees shared other insights or recommendations. [#1, #2, #3, #4, #6, #7, #8, #9, #10, #12, #13, #14, #15, #16, #17, #18, #19, #20, #21, #22, #23, #24, #25, #29, #35, #36, #39, #43, #45, #50, #55, #56, #60, #AV, #FG1, #FG2, #FG4, #WT23] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "And I would say that's the first barrier. I don't know what the state could do about that, but that's the first barrier. If you're not getting... That's one barrier. But then the flip hand side, if the state says, 'Okay. We're going to try to set aside so many black firms, or we're going to open up the doors for black firms,' then be more vocal about 'This is how you go through the process.' If I just knew those steps that you just told me about, the networking, I would say more or some type of introduction to how to be successful with acquiring state contracts. If that's a one-day course or two day course. But it should not be only held at Richmond. It needs to come down to the local areas. And I will go even further with saying

have it as a Saturday class. Because I think it's a cop out when government agencies - local, state, federal - when people say, 'Well, it's at 10:00 in the day. If you are a business, you should be able to come at 10:00 in the day.' Well, there's two types of businesses. There's one type of business where you have a large capital, and that's what you're going to do full time, and you're just going to go out there. Then, there's another side of the business, which is me as African American - I couldn't afford to start a company without real deep capital at a young age because I was [in my mid 20s] at the time [I started] the construction company, [and] the engineering was more or less my mid-30s. So, if you don't have a lot of income, you can't really be full time in a business. You need capital. So, if you don't have the capital, then you have to work a job. So, if you work a job, and there's a class at 10:00 in Norfolk, and you live in Newport News, well, now I have to take off work. Now, of course I can take a vacation. And that's right, I could. And maybe that's what I should do. But if you really wanted to make it open and available, put it all on a Saturday. Because then, you're really saying, 'Look, we're trying to help everybody. We're not only helping the businesses that can afford to be in business.' And if you're African American, more likely you don't have the capital to afford to be in business. You're going to have to start as part time, and work your way from part time to full time." [#1]

- The non-Hispanic white male owner of an SBE-certified professional services firm stated, "No, I love working for the Commonwealth and want to do so at every chance I get. And also, I think I really believe in the small business model, and we want to help SWaM businesses and disadvantaged businesses in any way we can. So I think we've covered a lot of stuff, but I really appreciate all the time you've taken to try to get some of these... Because you've made me realize a few things that I did not... It had not occurred to me that these might be barriers, but I bet they are." [#2]
- The non-Hispanic white male representative of an SBE-certified professional services firm stated, "I mean, I think on the state side I don't see that I could offer anything major. I mean, on our end, it's just we've learned the process and we follow the rules. And it varies a little bit from agency to agency, and I mean, that's going to happen, just because of diversity and people. I do something one way, my business partner does something a different way, and we get to the same goal. And I think as far as helping other people know how to do that, I mean, they could maybe offer some workshops to support people in how to get through that process. But generally, if you've got the aptitude, you should just dive in and find your way through it, like anything." [#3]
- The Black American male owner of an MBE-certified professional services firm stated, "No, not really. Except just the availability and access should be easier, and more locations for people to get the help. Okay. More convenient locations and more awareness marketing, so you'll be aware of some of these opportunities." [#4]
- The non-Hispanic white male representative of an uncertified VBE construction company stated, "I don't think so. I really haven't thought about it much. I think the state and the municipalities do a very good job of providing opportunities for small, minority-owned businesses. And I think the programs generally are successful when they're used. Like I said, the only problem I have as a general contractor is having those resources available to do the work. I take a step back. I don't believe that the requirements are established fairly, and I believe if there was more interaction between the government agencies and the

contractors, we could come together with better solutions to improve and increase the participation in minority-owned businesses. What I'm saying is, when I see these panels, committees, [and] departments formed, they're never formed with a contractor on the board. You never get input. You just get onerous requirements that come out of these board meetings that, okay, 50% of your work has to be subcontracted [and] filled [with] minority or small business. How'd you get that number? There's never a dialogue with the actual people in the industry on how to solve it, it usually comes down from the top that we're going to make an edict that you have to do this. Well, that might not always be the right answer. The Minority Council [of] Virginia Beach is composed of, I believe, all minorities. And so to me, that's kind of [a] one-sided viewpoint coming from one direction. And to me, if you had on that council some contractors with a minority or non-minority, you would get [an] exchange of ideas and you would then create a team focused on success instead of one group of people mandating success, if you will. Man, if I want something to improve, I'm not going to sit in a room full of people [who] think like I do. I don't get different ideas and different viewpoints. And I think too often, these mandates come from - whether it's from the governor or from the mayor or whatever - they come down to us instead of us working together and coming up with solution[s]. You go to the DMB MBE website and you look at the small minority-owned businesses. It's just tons and tons of them. There's no shortage of those businesses, but there's a shortage of those who do contracting work or construction work. And so one size doesn't fit all." [#6]

- The non-Hispanic white female representative of a WBE-certified construction company stated, "My big thing is when someone goes to prison, they supposedly pay the price and they get a second chance on life. I do not see that. I think they should be allowed their second chance. If you're a convicted felon, you're labeled for life, even though they say you're not. I'm sorry, that's one of my big pet peeves." [#7]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "No. I mean, we don't... just because we're a small business, I do believe that there is a bias against using small businesses and I think that kind of makes a big difference." [#8]
- The non-Hispanic white male co-owner of an uncertified WBE construction company stated, "I'll be honest, I think their process, as far as establishing a company, maintaining a company, is pretty simple. It's pretty user friendly. I don't want to say there's nothing they could do better, because I don't think that's ever the case with anything, but at the same time they do a pretty good job of just keeping it very, it's just simple. It's a simple process. The information is readily available to maintain, and then when there's changes that occur, that stuff is disseminated, I feel, relatively quickly. And people are in the know. So I think information is distributed well. I think that you can get answers pretty quick, in a relative sense. And they help, they help you. They've got some cool programs in place that definitely help. Help people get established and get going." [#9]
- The non-Hispanic white male owner of an uncertified DVBE professional services firm stated, "So one of the things we always do is when you're trying something new and radical that has a high amount of risk, we try to test it small. And so what I mean by that is that you don't go trying to launch 100 people in[to] orbit if you're [starting] up a company to... a rocket company, right? Because that's going to fail. You start with simple rockets with no payloads attached and you watch them fail. And you learn how they fail and you learn as

you go. That process - if government organizations could pick that up and say, 'Hey, look, let's set aside ..., just like they do with the set aside program for small, disadvantaged businesses. 'Let's set aside ones that are purely performance-based. We'll start small, cap it at under a million dollar contracts [for] a year, or even under \$500,000, if we're talking ... state or local. And those companies don't have to meet any of the rules and regulations.' Like the goal is to have a one-to-three-person company be able to deliver on a contract and meet a standard. Like you say, 'Hey, at the end of this, I don't care how many hours you work. This is worth \$250,000 if you can get this system upgraded or running,' or whatever the particular task is, and they don't track the hours, they don't care how much you pay the employees. You got a quarter million dollars to get here. How long is it going to take you? Six months? Okay, well, give us a status update once a month and that's it. And see how it goes, see what innovation [occurs]. And then that's where you come in with tracking things. How were they able to hire resources? Were they able to hire people in remote areas that could do the work in a much more efficient amount of time? And were they able to set up their office in a disadvantaged area and maybe hire some local folks to do the manufacturing? Whatever the task was. Right? But basically just say, 'Hey, let's try this out small.' Because you know how well it's going to fail or how well would it work if you say, 'Hey, we're going to come in here and remove three quarters of the regulations for government contracting.' Everyone's going to go, 'No, not going to happen.' If you say, 'Hey, we're just trying this out, and we expect this to fail, but we want to see what works. And if anything out of it works ...' And I think that there would be a lot to be gained there because I really think that they need a feedback loop. You need to start doing things, try some things a little bit differently and see how it goes. Because that would allow me... I would love to try to get in on that. And I could see having something set up where we go into the inner city and we start teaching folks. And it wouldn't just be technology, because you can't just start on day one teaching technology when folks haven't even truly been shown how to manage a budget, how to have a savings account, why you would have a savings account. Basically, start teaching people that otherwise aren't getting the opportunity to have a path to success, something other than trying to play sports or stealing or selling drugs. Give them a path to success and give them a real skill. And then in return, 'Hey, come on over here and work for us and we're going to satisfy this contract for the state of Virginia or for the federal government or what have you.' But people like me aren't going to take that risk and try that if the burden [of] doing those contracts is as high as it is right now." [#10]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, yes. I mean, I think that the state... And I think this is recognized in law that the state has a responsibility to spend their money wisely and equitably, whatever that means. But I think it certainly includes making an effort to bring the smaller businesses and whatever into the mix because it's tax dollars." [#12]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We're going to expand our 42% to cover minority and woman- [inaudible 00:34:46] [owned] small SWAMs as well. There's no law, so they don't lose anything. All they're protecting are firms that have historically had greater challenges to success because they're minority-owned or woman-owned, and I can't see a negative to it. I would just call attention to non-small minority and woman-owned businesses not benefiting from their SWAM certifications currently." [#13]

- The Hispanic American male owner of an MBE-certified professional services firm stated, "[I] think the state of Virginia is just such a great state to do business. And I think all of the programs that we continue to put in place makes the barriers much lower for someone to be successful in business in Virginia. And I think it all comes to the entrepreneurial nature of the way our government in Virginia thinks. But honestly, with the federal spending being at an all-time high, we need to continue to go to contractors and not hire government employees, because the long-term cost of government employees far outweighs the short term cost of the contract. Even though it might cost a little more, these government employees all get retirements and benefits and all the other stuff that we'll continue to pay for 30 years after their service is over. Not that they don't deserve it, but let the contractors handle that. Let the 401K's and other things like that handle it. And in the long run, it's more cost effective for the government to do that than hiring government employees. My opinion." [#14]
- The Asian American male owner of an uncertified MBE professional services firm stated, "I think, actually I would say if they could consider firms... For example, it's the first time for a firm to work on public sector work or it's the first time for a firm to work on certain types of work. But, for example, if it's a school project, if our firm never did school projects before, it is very hard for us to get the job. But if they can consider [that] we did other types of projects and we did it well, they can consider us even [if] it's the first time we do this type [of work]. [If] they can, based on our other project type[s], allow us to do [it], then that [would] be helpful because it's always the first field project [that] is always the most difficult one to start with. But if the qualification only allows people who have worked with [the] government before or did certain project[s] before, then it will be really hard for a firm like us, the new firms to join this group, to get any projects from the government." [#15]
- The Black American male owner of an MBE-certified construction company stated, "As far as the Commonwealth go[es], I know DPR, [who] control[s] all of the regulations and stuff, is making it hard now for contractors to bid. Now it's even harder ..., because of COVID-19, to upgrade their standards. Same thing - I had a lawyer to incorporate my company, [and] that next year, when I went down to the city to get my city license, let me tell you - this is how it works. I went down to get my city license, [then] they called up and said 'Oh, do you know that your company is incorporated?' I said, 'Yes I know it's incorporated.' She said 'Well, do you know that you do not have a [DIN 00:46:07] in that corporation?' And she lost me before she got to telling me all that. I said, 'What? DIN? What are you talking about?' 'Well, you've got to have a DIN [your federal identification number]. In other words, you have to change your whole status and you have to go to DPR and upgrade your license to an incorporation license.' ... And it's so hard to get in there and get that done. I tried for a whole year and couldn't do it. So finally this year, this year past, I went down to the city and just told the city, I said, 'Look, I'm just going to change back to the way I was.' I called the IRS, I got the IRS to change my DIN number, went down to [the] city, [and] now I've got to go to this lawyer. I've already paid the lawyer and everything to get me out of the corporation, since I'm the only stockholder, get me out of the corporation before the end of this year coming so I won't have any problems. No. I know a lot of contractors around here that [are] in my same business and other businesses, and I know a lot of... I have friends that own businesses, everybody's having the same problems that I'm having right now because

of COVID. A lot of them have restaurants and stuff, which is putting them in a strain. They'll probably never recover, because now you can't have but so many people in the restaurant now." [#16]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "I honestly think we have a great program. I think our problem is, how do we hold the large businesses accountable? Because I think my question is, how many people would be successful or aren't in the program any longer because of the issues that they had on the projects? Does that make sense? I really wonder if we did a survey, if the questions were, were you treated fairly? Did things go ...? Or something like that. When we start doing that backtrack of the owner... where [are those] checks and balance[s] back there?... I know so many people that now tell me like, 'Girl, we will never work ...' There are general contractors that will never work for the city of Norfolk. Yes. I know that when they were doing the airport and things like that, they really did well on that part of it ... When I wanted to raise the bar for women in construction and things... people would call up and go, 'Who really runs the company?' The guys that would work with me would say, 'She really runs the company.' Because I really do understand this and I'm lucky enough that if I don't understand it, then I'll pick up the phone and call somebody or ask somebody. I think it's a wonderful thing. I'm very appreciative as a person who's lived [in] the Commonwealth my entire life, I'm very appreciative that we make this effort to make the playing field fair for everyone because that's extremely important." [#17]
- The non-Hispanic white female owner of a WBE-certified construction firm stated, "Yeah, I think that that would be a suggestion, maybe a threshold or something set aside specifically for contractors that wanted to get their foot in the door like me. Because you got to think, my code is contracting. While it's new construction, you're talking multi-million dollars starting [off]. That's why I'm glad, because it feels like the state knows there's a problem and at least they're wise enough to acknowledge there's a problem. Because you know what? I might not always have the solution, I might not always [have] the answer. But if I make a mistake, [I] admit it, because then you're aware of it and you learn from it and make it better. That is a good quality, and [if] the state's doing this and hiring y'all to do this study, they obviously want feedback to make them better. And I am so glad I can be a part of something, and I hope that we see the benefits and successes of it. I just think they need to [fill] that gap. They need to fulfill the gap of already established businesses. It's either you're going into a new business and they have all the resources for that, or you just jump to federal work and you bypass. But, what about those businesses that just want to do government work? There's nothing. That's what I want [for] my clientele. I already have all of that stuff. I just want to go after... And there's no agency, mentorship, nothing geared to already established businesses." [#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified goods and services firm stated, "And again, I can't stress enough that I feel very strongly, as do many of my business associates and people I know in my industry and out, they should not be going out of the state for procurement. There's no reason. If there's a qualified business here, regardless of whether they're going to save a few pennies, they should stay with a state-run business ... They're not supporting the small businesses they say they are. A recommendation would be to have more set aside in their procurement process and their solicitations for small... for women-owned and minority[-owned] businesses. Again, I'll say it again. Small business is

really not that small when you're looking at 500 employees or less. And if they were to limit the procurement to women and minorities, then that would certainly help us out. And staying within the Commonwealth and not going out of the state for their awards. I mean, they're hurting Virginia-based businesses, and turning us off from providing solicitations." [#19]

- The non-Hispanic white male representative of an SBE- and DVBE-certified professional services firm stated, "I think the only thing is, Virginia doesn't give enough of the information out to the public, as far as what they have. Or they may. Again, I may not be discovering it. Commercials on TV? I don't know. How about TV commercials? I don't think I've ever seen anything that's reporting to our business from the state of Virginia on television. I watch television a lot... well, not lots... but I watch it mostly at prime time. If the state of Virginia would put it out on TV during the news hours, or something like that, I think it would be very beneficial to the state to get the small businesses involved in their programs, and let them know about their programs. Again, I'm more federal government than anything else, but I would love to do work for Virginia, and I would love to support the state in any way I can. But I don't know the programs. I don't know how you could do it, but it's just not getting out there. I don't see it." [#20]
- The non-Hispanic white male representative of a WBE-certified construction firm stated, "I think it all boils down to, like I said before, just giving them a chance. I think there's plenty of people out here that are capable of doing the work and would like to do the work. They want a chance to prove [that they are capable] and I think by and large, these programs that they set up give them that opportunity, but there's a barrier you've brought up and that we've talked about. Whether it be financial, bonding, whatever, [these] are issues that still need to be addressed." [#21]
- The non-Hispanic white female representative of an uncertified MBE construction company stated, "We have these places, like streets and halls, that house the homeless kids, kids that have been banished from their homes or they are homeless for whatever reason... I really think [that] if they could get some sort of relationship with [inaudible 01:02:56] with the employment commission and you could take these kids who, for reasons beyond their control, are coming from nothing or been forced into nothing... I really think if we can get a partnership with all this, we can get some kind of... I don't want to profit off of it, but at the same time, if we could get some kind of... they offer the businesses something. If they would offer the businesses something, some kind of, 'Hey, we'll pay half his rate for the first year or we'll pay for his school.' The schooling at vo-tech [vocational-technical school] is like \$565 for a school year, which is not bad. Like I said, I just enrolled three into Norfolk vo-tech and then one of them chose to go to TCC. He's taking his electrical class at TCC, but we just pay for them all to go to school. We don't mind investing in them because they invest back. But if we could get some of these kids who just don't know that there is anything else they can do, kids who can't even dream of YouTube or computers or this or that because they don't even have internet or computers in their house. Kids who are 18, helping mom pay the bills and raise [their] younger siblings and whatnot. Unfortunately, I'm a true believer that desperation is what causes all of these kids to go in the wrong directions. But if they had somebody who came on... My boys treat each other like brothers. I can imagine if we had an 18, 19-year-old kid come in, they'd treat them like a son and we could train them and then we could send them on to bigger and better things. But I worry that they're being

taken advantage of because they don't speak English or because they don't have a green card - which yes, they should have one - but I feel like they're being taken advantage of because they don't have a choice. But if you give them a program, say, 'Hey, you can get a work visa. You can work for this company for a year while you're trying to get your green card, blah, blah, blah, but you're earning a paycheck with a social security number and you're paying minimal taxes. You can make a good life here, and you can move forward. You could move your family here or you could move back there, but give your family a better life.' Just programs out there that are meant to help people like that. Honestly, people like that are happy to work hard because they're not entitled. I definitely think there could be a lot more programs out there, especially for women and minorities. Educational programs - helping them start businesses, helping them financially and otherwise. There is a lot to learn when it comes to licenses and certifications and just navigating. I mean, I helped my girlfriend navigate just getting her first business license. She's a massage therapist and she worked for years for somebody else. She finally decided to go on her own. I helped her step by step, go through the business license application because I've done it and I'm familiar with it and whatnot. I just really think of the advertising. Really let people know, 'Whoa, there's a program that can help you start a business or there's a program that can help you get the money, get the funding, just get the start of another business or whatnot, or even just the training to see if you'd want to use something like that.' I really definitely think just more advertising. I know there's a lot out there, it's not advertised ... Everybody in the world knew about this PPE loan as soon as COVID hit because that's all anybody was talking about; it's all the media was talking about. All people on Facebook were talking about was, 'Woo, free money, free money.' How about doing the same thing for these other situations where especially the younger generation knows, 'Hey, there's this help. There's this, there's that.' And it's not hard. I really think we need some programs out there for the kids. We need some programs out there for anyone who just doesn't know which direction to go in and just help them out. Then once you help them out and you get them going, you can just give them a push and let them go. Definitely some advertising and some education would be good." [#22]

- The non-Hispanic white male representative of an uncertified MBE professional services firm stated, "I know that we have looked at the website before. I guess [when] trying to do business or being certified as a small business to do government [projects] with the Commonwealth, my impression had been [that] you pretty much have to be in road construction or doing something for the Department of Transportation, for VDOT. And we know that there's a lot more to the government and to the Commonwealth than that. And so, it may just be a misconception on our part, but that's certainly been one of those deterrents to us in really putting a lot of time or effort into trying to get into providing support for the government or the Commonwealth, even though we would love to and we enjoy being able to be a company home-based in Virginia." [#23]
- The Hispanic American female owner of an uncertified MBE and WBE professional services firm stated, "I know that there's a SWaM office that's just opened in Virginia Beach right now. So it's just nice to be able to have something local to give... And you offer the classes, and people don't show up. Are you reaching for them, are you looking for them in the right way, where they are? Are you going to their backyard, to find them, to bring them in?" [#24]

- The Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "[I] know that the Commonwealth... actually I was going to call yesterday about that new Minorities Commission that the Governor just implemented. That's good. I actually reached out to one of the councilmen who is on it - he's Ben from Williamsburg, Councilman. He saw that I was on the call and he reached out to me and said, 'Hey thanks for being on the call. What do you think?' I said, 'You know, let's not make this a commission of going there to complain and say, oh the government is not doing this or the government is not..., but let's allow more of the voices of the businesspeople who've been around and the new ones too. Let's make this a place also of positive and assistance, not just a place of advocacy for those problems, people who have issues.'" [#25]
- The non-Hispanic white female representative of a WBE- and SBE-certified goods and services firm stated, "The only thing I can stress is that the Commonwealth needs to get across to their buyers. And I say buyers because the leaders are not usually the buyers. They send that task down the chain to the secretary. Or a buyer for an organization. So I would only say to train them that micro needs... micro is not incompetent. Micro can do the job the big business can do, but they need to have the opportunity to do it. So I just would like to stress that they train their people to look small first, look local first, before they move onto the big companies that they have to ship their products in to." [#29]
- The non-Hispanic white male owner of a majority-owned goods and services company stated, "I mean everyone has that equal opportunity. So there's [inaudible 00:28:01] demand for women in the security sector because [inaudible 00:28:12] officer[s] dealing with women, there's, like, some issues. Like for example, if somebody's having a heart attack in a woman's restroom, a woman can go in there or if there's a domestic dispute or something... I think more of those trade shows, and there should be also maybe, like I said, for larger businesses to do business with smaller businesses, ... creditor or tax discounts. I guess maybe something like that." [#35]
- The non-Hispanic white male owner of an uncertified VBE professional services firm stated, "Well, especially now while we're going to do everything so virtual[ly], this COVID thing has revealed that people can do a lot more things virtual[ly]. I would get an industry day to vote and then everybody who's a registered small business owner, or just a registered... You know because... here in Virginia... they have this list and they should periodically do a virtual industry day where they can [promote] some of the opportunities that are coming out. It doesn't always have to be long and difficult. I would do it as periodically as they can, but provide those points of contact. You just want to come out here and give us the point of contact. Sometimes it's very generic. Look at the State of Virginia's website ... That's all good and well, but it would be nice to actually see a virtual industry day periodically, with small business folk. It's not all large... They should probably do one large as well, but certainly break it out with one that [is] small. Many of the search engines ... are expenses per year, and big companies, they can afford to buy those subscriptions to search opportunities like that. But small businesses, they can't really afford to maintain subscriptions for services that will feed them information. So they have to be much more skilled at going out and finding it [inaudible 00:52:07] where it wasn't tied to a subscription service. I guess it would be better for small businesses. I think any event requires... I think what we were paying for government [search engines] was like \$14,000 a year just for the subscription. Small businesses can't. They can't do that. That's the kind of money that it's just too big for a

more traditional small business. Any kind of help is great. Like me, I don't even know what else to ask, because when you're a small business you just don't know. You don't even know where to ask or who to go to. Sometimes you don't want to ask too many people either, because then they think you're not very knowledgeable, so they are not going to be in business with you. If you have to ask all these kinds of questions, you must not be a very good businessperson. Many of them, like I said earlier, are very technically proficient. Like a plumber or a carpenter. They're very good at what they do, but how to generate more business and stuff like that is a very difficult thing. So anything that can help that is a big deal." [#36]

- The Black American male owner of an uncertified MBE professional services firm stated, "So I don't think that, from my experience, there is a lot of that. When I was growing up, there used to be vocational schools in all the high schools, vocational training in all the high schools. So you could come out of school knowing how to be a welder, knowing how to be a carpenter, knowing how to be an electrician, and you couple that with business training. You could come out of school and open up your own carpentry shop. That's where you got to put some resources and stop training people to read history, which is fine, but at the end of the day, you need to have the skills to build a business. So if I can make a recommendation, as a reward for those of us who participated in taking time out of our day, it would seem to be a reasonable request that a copy of the study be sent to us and we not have to go look for it when it's made available to the public as a, I guess, a reward for our participation. So that would be a recommendation." [#39]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "All of the laws that have been created over the last two decades relating to open government and to transparency, and with every member in elected office, when they get a complaint from a constituent looking to find blame instead of understanding what's going on, those people in charge of procurement and technology, there are no right decisions that they can make. No matter what decision they make, it's the wrong decision. So what do you do when you're constantly being attacked? You take the most defensible position. In creating this transparent form of government, we have raised the... I don't know how old you are. I'm 63. We used to talk about the \$1,000 hammer. Well it's now a \$10,000 hammer. The hammer still costs \$12, but the compliance in buying the hammer costs \$9,988. The issue is... especially in the technology sector - we just got to the point about five years ago where we felt comfortable working with startups and helping them, and when I talked to you about that client that's paying me \$18,000 a year, that's probably, that's going to be a startup - when you get into these agencies, and remember that no matter what decision they make, there's an old statement in technology [that goes], 'You can't get fired for hiring IBM.' They're the best at technology. When you think of technology, you think of IBM. If they mess up, well, it's not my fault. If I go out and hire a company, which was one of my clients ... who's three-year-old startup [is] developing some fairly sophisticated security applications, far cheaper than a Deloitte would provide it for, or a CGI, or an IBM, they're looked at, and [the] state government - the buyer, the decision-maker - and the buyer looks at that company and they say, 'They're a startup. They don't have the experience. They've never done anything for anybody like me.' And they're ruled out before they had... And it has nothing to do with the technology or the innovation. The SWaM program can't change it. It requires an executive-level change coming down that says, 'This is how we create an

innovation sector - utilizing and growing Virginia businesses.' Now, you can't come back... I have a lot of businesses come back and say, 'Well, Virginia businesses need to have, need to be created, given set-asides, they need to have rate[s] higher.' And that's the world's worst policy ... So you're a small company of 20 people, [a] technology company that's two years old, that's got a good product, [and] is never going to be heard over another company that's been around for 30 years. And it happens to be 51% minority-owned. It could be woman-owned, could be minority-owned, could be Indian-owned. It's extremely difficult to overcome that hurdle. We have got to create the solution. [It] is in creating policy that allows the cultural, the attitudinal barrier, which is the culture of the agency, the culture of the department, to stick its neck out, if you will, to look at other [firms]. It needs to be encouraged internally in [the] government to go out and look at these types of businesses. And we need to create a procurement vehicle or multiple procurement vehicles for these types of businesses to be on, so that there is an entry point for them to sell to [the] government. Then you got to make sure that the guy or girl who is responsible for the buying decision doesn't get shot if the business doesn't succeed." [#43]

- The Hispanic American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I think that if the Commonwealth would give Governor's awards, or recognize the primes that are supporting the minorities and minority businesses and small businesses, and make that a huge event or a huge award, that that would be very helpful. Because primes have the money to invest in mentoring and helping out smaller companies. But they want recognition. And I think that's a relatively low-cost way for the governor to really support this. The first one is we women, we minorities, have to learn how to professionally take up for ourselves and not be, not let them close the door on us. And I think we need to be very proactive. And that's one thing, like this guy I was talking to when you called earlier, he's out of the [inaudible 00:58:45], and he's a minority. And I've trained him, and people call me all the time if they need a tough talk or guidance or technical assistance. And I'm like, you know, we are powerful people on this earth, and we can't allow anyone to take away our strength. But you can defend yourself in a professional, effective manner. And that's the type of training [needed], I think especially for younger minorities. And with COVID and everything turned upside down, we don't know what the world's going to bring us. So, people need that training But I also believe that white males, in particular, or white women, white people, whatever... And don't think I'm not white and have a southern accent. But I am Mexican. People don't realize it. They need training on why it's important to join hands. Not just because you're mandated, but also... highlight situations where people love working with me because I bring a whole different perspective." [#45]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "And we have, in the past three years, lost our butts growing apples because of China. China's influx of apples into our system and not paying the tariff. So we have to look at feeding ourselves and buying American products. So whatever we can do to promote Virginia apples, locally, statewide and nationally, I mean, we have 4,000 acres of apples and we're trying to figure out how we're not going to lose another million dollars this year growing them. I mean, it has been bad and to feel like people just don't care that China's bringing in apple products... They have a huge industry over there, and [they are] undercutting American growers. Just be aware that this is going on and look at what we can do to get our products into schools through the DOD, schools, prisons, whatever. Don't be

buying Washington State apples. And for our hospitals - I mean, I wasn't in the hospital, but I got a Washington State red delicious apple in the hospital and it looked beautiful on the outside and it was brown inside. I'm like, if these were Virginia apples, this wouldn't be happening. So it's just [that] Virginia products should be bought in Virginia institutions, and that's what we've been pushing. I've been pushing that for 20 years, but it's all, what's the cheapest? And I don't think China can import whole apples, but dried apples, applesauce, apple chews... And they don't have any standards over there. Supposedly it's organic. Yeah right, you believe that from China?" [#50]

- The Black American male owner of an uncertified MBE professional services firm stated, "I want to link with people who want to do good jobs like me. I certainly want to be on an equal playing field with a majority firm, but when I get on the equal playing field, I don't want them to say, 'Hey, he's just here because of the requirement.' I want them to be able to say, 'He got in because of a requirement, but, man, this guy is good. This guy knows his stuff.' And if it was something I didn't know, I'd like to have honest feedback between me and my partner or whoever. I know they did this with the ED-AG program and the mentor, they're supposed to walk you through, but to have some kind of honest feedback so that I can be better if there's areas where I'm falling short." [#55]
- The non-Hispanic white male representative of an uncertified WBE and SBE-certified construction company stated, "When I got my contractor's license with the Commonwealth, I had to take an eight-hour business class. Because 95% of construction companies failed [in the first two years]. They were trying to eliminate so many failures, which was admirable in the states. They recognized there was an issue, they tried to do it. It would be beneficial to people starting businesses to get a more general business class to understand payroll, taxes, bookkeeping, workers comp insurance... The things that, if you haven't worked in a company and been exposed to someone mentoring you, it's a lot to learn. I think if there would be some way to have like, an internship, or mentorship, that the Commonwealth could put together to help people start businesses. Particularly minorities and woman-owned [firms] that maybe understand their trade, but have had very... because they worked for someone else, they don't understand the business side." [#56]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "The one thing that I think, and I know that we've tried to champion, is that there [be] special funding for localities in order to be able to do cybersecurity. And it's so hard for them right now. I mean, like there's all of these new election requirements for cybersecurity, and not a dime from the Department of Elections to help them. Those are some of the challenges that they have to work through. But when they get that money, because we have the contract vehicle in place, because we've done the hard work, the purchase is easy. Other folks out there that are now just trying to... I saw this really cool technical solution for what's called a governance risk and compliance tool for tracking. They put a lot of time into it. Very small organization, but pretty cutting edge and they tried to get on the Computer Aid contract. That was very difficult because they didn't fit that... It was like a square peg into a round hole. Then they tried to go through a couple of other different channels. Finally they just gave up, and now they focus on the financial services market. Well, that is something that could have streamlined a lot of the compliance work in the Commonwealth of Virginia and actually made their lives easier. But because contracting was so difficult, they just said, 'You know what? We're not going to do it.'" [#60]

- A respondent from the availability survey stated, "I'm actually really happy with the governor's initiative to increase opportunities for small businesses and micro businesses. I'm impressed. While I appreciate the advantages to improve diversity, I still strongly believe firms should be selected for their qualifications. The government is putting small companies out of business. Large companies stay in business and small businesses can't get work. In the Hampton Roads area, state and government contract opportunities are limited to minorities. A lot of business might go to a larger company that then subcontracts to a minority-owned business. But minority-owned businesses are rarely the lead. We are a growing business. We are on eVA, but we don't do a lot of work with Virginia because the system is not fair. They will give allowance for minority- and woman-owned businesses, but not for small businesses. We pay taxes in Virginia [and should be given preference over companies based in other states]. The government should be more aware of whether people have a legal license." [#AV]
- [#FG1b] stated, "I've been doing work, like I said, for about 30 years in the Commonwealth and [in Richmond]. And I probably have known at least four to five disparity studies that've been done. And no results have come out of any of them or anybody other than the person that was doing that stuff. I sure hope this one has some teeth in it, and somebody will implement it and get something done. But it's being done in an election year. And nothing will be done until January. The governor is out of office... So it looks to me [like] it's the same. It's the same dog and pony show all over. That's what it looks like. I hope and pray to God [that] I'm wrong. I really do. Because been there, done that. Been there, done that. Been there, done that over and over again. And it has been the same result. Two, three years, somebody come[s] back, we will do [another] disparity study. What happened to the last one? No. So if I sound frustrated, I am." [#FG1]
- The Asian American female representative of a business development organization stated, "I, every 2 years or so, [am] invited to [participate in a] disparity study, [and] nothing [has] changed. Same questions. Frustration." [#FG1]
- The female representative of a business development organization stated, "[I] think the other thing too, is obviously for small business owners, whether they're starting up, or frankly, they're just... They're small, so their workforce is small. A lot of times, number one, they aren't aware of what resources are out there, or how to even begin to do business with the state. Number two, if they do, then how many hoops do they have to jump through? Because for a lot of small business owners, they're doing it all. They're the HR department, they are the sales department, they're wearing a lot of hats. Typically, sometimes just the capacity for that business owner can be a bit of a hindrance of trying to figure out which way to go. Usually, when they're finally ready to focus on doing business with the state or getting... usually, because now it has become super important, it has finally risen up the level[s] of the priority ladder, so to speak... I think that can be really difficult. Any kind of compliance and things like that that they have to do, added paperwork, for small business owners in particular, that can be difficult." [#FG2]
- The female owner of a WBE-certified professional services firm stated, "If there is a task force that is in place to address some of these issues and to be able to find resolutions and implement some of the ideas that women business owners or small business owners have for addressing some of the things that we're discussing today as far as with the mandates

and all the changes that come, it will be nice for them to have a good training program for the procurement professionals, both within the state, local, as well as the federal sectors. We see there's a lot of turnover within the industry. Then you have a lot of people that will come in. They may not know. They may be scared to make decisions, may not understand the critical aspects or critical thinking as far as the evaluation process and end up making the wrong decision. But I think that it can be a lot more enforcement there as far as the training program or supervisors that are in place to be able to help better prepare the up-and-coming talent within the procurement industry." [#FG4]

- A comment from written testimony submitted to the study team stated, "These disparities exist across all sectors, even in the tax code. For example, a 2017 study found that the country's tax code disenfranchises women-owned small businesses because, in part, it's geared towards industries that women typically do not operate in. There are also little tax incentives for smaller businesses of color, making it harder for them to compete with larger businesses that have resources to take advantage of tax loopholes." [#WT23]

APPENDIX E.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that the Commonwealth of Virginia (the Commonwealth) and higher education institutions (HEIs) awarded.¹ Appendix E expands on the information presented in Chapter 5 to describe:

- A. Overview of Approach;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Overview of Approach

BBC worked with Davis Research to conduct telephone and online surveys with businesses throughout the Commonwealth's *relevant geographic market area (RGMA)*, which BBC identified as the entire state of Virginia. Businesses that Davis Research surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of contracts and procurements that the Commonwealth and HEIs awarded between July 1, 2014 and June 30, 2019 (i.e., *the study period*). The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant Commonwealth and HEI prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local businesses that D&B listed as having their primary lines of business within those work specializations. As part of the survey effort, the study team attempted to contact 18,321 local businesses that perform work relevant to Commonwealth and HEI contracting and procurement and was able to successfully contact 3,696 of those businesses, 2,333 of which completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business operating in the RGMA. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses for Commonwealth and HEI work in an accurate, statistically valid manner. BBC did not design the research effort so the study team would contact every local business possibly

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

performing construction, professional services, and goods and other services work. Instead, BBC determined the types of work specializations most relevant to Commonwealth and HEI contracting and procurement in terms of the percentage of total dollars the organizations awarded during the study period and contacted businesses that D&B listed as having their primary lines of business within those work specializations for surveys.

Figure E-1 lists the 8-digit work specialization codes within construction, professional services, and goods and other services that were most related to the contract and procurement dollars that the Commonwealth and HEIs awarded during the study period and that BBC examined as part of the availability analysis. The study team grouped those specializations into distinct *subindustries*, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from local businesses working in industries relevant to Commonwealth and HEI contracts and procurements. As an example, the survey instrument that the study team used with construction businesses is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with businesses working in other industries in order to reflect terms more commonly used in those industries. (e.g., BBC substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services businesses.)

1. Survey structure. The availability survey included 13 sections, and Davis Research attempted to cover all sections with each business that was willing to complete a survey.

a. Identification of purpose. The surveys began by identifying the Commonwealth and HEIs as the survey sponsor and describing the purpose of the study. (e.g., “The Commonwealth is conducting a survey to develop a list of companies interested in providing goods and services to government agencies in Virginia.”)

b. Verification of correct business name. The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see area “Y” of the availability survey instrument).

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B’s work specialization codes were incorrect, they described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Concrete, asphalt, and related products (continued)	
15419908	Prefabricated building erection, industrial	32730000	Ready-mixed concrete
15419909	Renovation, remodeling and repairs: industrial buildings	50320101	Asphalt mixture
15420100	Commercial and office building contractors	50320503	Concrete building products
15420101	Commercial and office building, new construction	50329901	Aggregate
15420103	Commercial and office buildings, renovation and repair	50329908	Stone, crushed or broken
15429902	Design and erection, combined: non-residential		
15429903	Institutional building construction	Dam and marine construction	
17990100	Athletic and recreation facilities construction	16290110	Marine construction
Concrete work		Electrical equipment and supplies	
16110202	Concrete construction: roads, highways, sidewalks, etc.	38250000	Instruments to measure electricity
17410100	Foundation and retaining wall construction	50630000	Electrical apparatus and equipment
17410101	Foundation building	50650300	Electronic parts
17410102	Retaining wall construction	59990702	Motors, electric
17710200	Curb and sidewalk contractors		
17710202	Sidewalk contractor	Electrical work	
17719901	Concrete pumping	17310000	Electrical work
17719902	Concrete repair	17310403	Fire detection and burglar alarm systems specialization
17719904	Foundation and footing contractor		
17919902	Concrete reinforcement, placing of	Excavation, drilling, wrecking, and demolition	
17919907	Precast concrete structural framing or panels, placing of	16110203	Grading
17990702	Parking lot maintenance	17949901	Excavation and grading, building construction
		17950000	Wrecking and demolition work
		17990900	Building site preparation
Concrete, asphalt, and related products		Fencing, guardrails, barriers, and signs	
14420000	Construction sand and gravel	16110100	Highway signs and guardrails
29510201	Asphalt and asphaltic paving mixtures	16110101	Guardrail construction, highways
32719902	Blocks, concrete or cinder: standard	16110102	Highway and street sign installation
32720303	Concrete products, precast, nec	34449905	Guard rails, highway: sheet Metal
32730000	Ready-mixed concrete	34460107	Railings, bannisters, guards, etc: made from Metal pipe
50329908	Stone, crushed or broken	52119907	Fencing
Concrete, asphalt, and related products			
14230000	Crushed and broken granite		
29510201	Asphalt and asphaltic paving mixtures (not from refineries)		
32720000	Concrete products, nec		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (Continued)			
Heavy construction equipment rental		Plumbing and HVAC supplies (continued)	
50820102	Road construction and maintenance machinery	50740000	Plumbing and heating equipment and supplies (hydronics)
50820300	General construction machinery and equipment	50750000	Warm air heating and air conditioning
73530000	Heavy construction equipment rental	50750100	Air conditioning and ventilation equipment and supplies
Highway, street, and bridge construction		Rebar and reinforcing steel	
16110000	Highway and street construction	34490101	Bars, concrete reinforcing: fabricated steel
16110200	Surfacing and paving	50510216	Steel
16110204	Highway and street paving contractor	Roofing, siding, and flooring contractors	
16119901	General contractor, highway and street construction	17610100	Roofing and gutter work
16119902	Highway and street maintenance	17610102	Roof repair
16220000	Bridge, tunnel, and elevated highway construction	17719903	Flooring contractor
16229901	Bridge construction	Traffic control and safety	
17710300	Driveway, parking lot, and blacktop contractors	36690200	Transportation signaling devices
17710301	Blacktop (asphalt) work	36690201	Highway signals, electric
Insulation, drywall, masonry, and weatherproofing		36690203	Pedestrian traffic control equipment
17419901	Bricklaying	36690206	Traffic signals, electric
17419907	Stone masonry	73599912	Work zone traffic equipment (flags, cones, barrels, etc.)
17420000	Plastering, drywall, and insulation	73899921	Flagging service (traffic control)
17420100	Plaster and drywall work	42129905	Dump truck haulage
17420203	Insulation, buildings	42140000	Local trucking with storage
17430000	Terrazzo, tile, marble and mosaic work	Water, sewer, and utility lines	
Landscape services		16230203	Telephone and communication line construction
07829903	Landscape contractors	16230302	Sewer line construction
07830105	Tree trimming services for public utility lines	16230303	Water main construction
Painting, striping, and marking		16239906	Underground utilities contractor
17210200	Commercial painting	17310302	Fiber optic cable installation
17210303	Pavement marking contractor	17999906	Core drilling and cutting
Plumbing and HVAC		49390000	Combination utilities, nec
17110000	Plumbing, heating, air-conditioning	Windows and doors	
17110102	Boiler setting contractor	17930000	Glass and glazing work
Plumbing and HVAC supplies		50310300	Doors and windows
50399901	Air ducts, sheet Metal	52110200	Door and window products

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Other Services			
Advertising goods		Food products, wholesale and retail	
39939907	Signs, not made in custom sign painting shops	51419901	Food brokers
Automobiles		51480000	Fresh fruits and vegetables
35370000	Industrial trucks and tractors	51490800	Dried or canned foods
55110000	New and used car dealers	59630200	Food services, direct sales
Boats and boat repair		Furniture	
76990601	Boat repair	25210000	Wood office furniture
Cleaning and janitorial supplies		25210102	Chairs, office: padded, upholstered, or plain: wood
73499902	Cleaning service, industrial or commercial	25210202	Cabinets, office: wood
50870304	Janitors' supplies	25220000	Office furniture, except wood
59999908	Cleaning equipment and supplies	25220202	Panel systems and partitions, office: except wood
Communications equipment		25220400	Office desks and tables, except wood
36639911	Studio equipment, radio and television broadcasting	25429904	Shelving, office and store, except wood
38120306	Radar systems and equipment	50210100	Office and public building furniture
50640000	Electrical appliances, television and radio	50210106	Office furniture, nec
50650200	Communication equipment	50460104	Partitions
57319907	Radios, two-way, citizens band, weather, short-wave, etc.	57129904	Office furniture
59990601	Audio-visual equipment and supplies	Industrial chemicals	
59990602	Communication equipment	28999948	Water treating compounds
Electrical equipment		32740000	Lime
36250000	Relays and industrial controls	51690200	Industrial gases
Elevator goods and services		51691106	Salts, industrial
35340100	Elevators and equipment	51910102	Fertilizer and fertilizer materials
50840803	Elevators	Industrial equipment and machinery	
76992501	Elevators: inspection, service, and repair	35640105	Filters, air: furnaces, air conditioning equipment, etc.
Facilities management		50840518	Welding machinery and equipment
87440000	Facilities support services	50840805	Pumps and pumping equipment, nec
Farm equipment and supplies		50850000	Industrial supplies
50830300	Agricultural machinery and equipment	Office equipment	
59990803	Feed and farm supply	35790107	Mailing machines
		50440000	Office equipment
		50440200	Copying equipment
		50440207	Photocopy machines
		59991401	Business machines and equipment
		59991402	Photocopy machines

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Other Services (Continued)			
Office supplies		Security guard services	
51120000	Stationery and office supplies	73810105	Security guard service
51129907	Office supplies, nec	Security systems services	
51130000	Industrial and personal service paper	73820000	Security systems services
59439902	Office forms and supplies	73829903	Protective devices, security
Other goods		Sporting goods	
50460306	Restaurant equipment and supplies, nec	50910000	Sporting and recreation goods
59470100	Gifts and novelties	59410700	Team sports equipment
Parking services		Transit services	
75210101	Parking lots	41110100	Bus transportation
Petroleum and petroleum products		41110101	Bus line operations
28690400	Fuels	41110102	Commuter bus operation
51720203	Gasoline	41199906	Vanpool operation
51729902	Fuel oil	41310000	Intercity and rural bus transportation
Printing, copying, and mailing		41319901	Intercity bus line
27590000	Commercial printing, nec	41410000	Local bus charter service
73319904	Mailing service	41420000	Bus charter service, except local
Safety equipment		47299901	Carpool/vanpool arrangement
50630503	Fire alarm systems	Uniforms and apparel	
59999917	Police supply stores	56990102	Uniforms
Scientific and medical equipment		56990300	Sports apparel
38210000	Laboratory apparatus and furniture	72130204	Uniform supply
38260000	Analytical instruments	Vehicle parts and supplies	
38410000	Surgical and medical instruments	50140000	Tires and tubes
39440316	Science kits: microscopes, chemistry sets, etc.	50149901	Automobile tires and tubes
50470108	Surgical equipment and supplies	50149905	Truck tires and tubes
50470200	Dental equipment and supplies	Vehicle repair services	
50470308	Medical laboratory equipment	75490100	Automotive maintenance services
50490100	Scientific and engineering equipment and supplies	Waste and recycling	
50490101	Analytical instruments	49530100	Hazardous waste collection and disposal
50490102	Engineers' equipment and supplies, nec	49530200	Refuse collection and disposal services
50490103	Laboratory equipment, except medical or dental	49539904	Medical waste disposal

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services			
Advertising, marketing and public relations		Human resources and job training services	
73129901	Billboard advertising	73610100	Placement agencies
73199902	Media buying service	73630103	Temporary help service
78129901	Audio-visual program production	87420201	Compensation and benefits planning consultant
87439903	Public relations and publicity		
Architecture and design services		IT and data services	
07810201	Landscape architects	73710101	Computer software systems analysis and design, custom
07810203	Landscape planning services	73749902	Data processing service
87120000	Architectural services	73790100	Computer related maintenance services
87120101	Architectural engineering	87480401	Systems analysis or design
Business services and consulting		Market research	
87420505	Planning consultant	87320105	Market analysis or research
87429904	General management consultant		
Construction management		Other professional services	
87419902	Construction management	87349909	Soil analysis
87420402	Construction project management consultant		
Engineering		Remediation and cleaning	
87110000	Engineering services	49590302	Environmental cleanup services
87110402	Civil engineering	87449904	Environmental remediation
Environmental services		Surveying and mapmaking	
87310302	Environmental research	87130000	Surveying services
89990702	Geophysical consultant	87139902	Aerial digital imaging
Finance and accounting		Transportation and urban planning	
87210100	Auditing services	87420410	Transportation consultant
87210200	Accounting services, except auditing	87480204	Traffic consultant

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

f. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts, either as prime contractors or subcontractors (Questions B1 and B2).²

g. Interest in future work. The surveyor asked about businesses' interest in future work with government agencies in Virginia, either as prime contractors or subcontractors (Questions B3a and B3b).³

h. Geographic area. The surveyor asked whether businesses perform work in various geographical areas of Virginia (Questions C1 through C9).

i. Largest contracts. The study team asked businesses about the value of the largest contracts on which they had bid on or been awarded during the past five years. (Question D1).

j. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Question E3). The study team confirmed that information through several other data sources, including:

- The Department of Small Business & Supplier Diversity's (SBSD's) directory of Small, Women-owned, and Minority-owned (SWaM)-certified businesses;
- Commonwealth vendor data;
- Commonwealth review; and
- Information from D&B and other sources.

Note that businesses did not have to be SWaM-certified by SBSD to be considered as minority- or woman-owned businesses.

k. Business size. The surveyor asked about businesses' size in terms of their revenues and number of employees (Questions F1 through F3).

l. Potential barriers in the marketplace. The surveyor asked an open-ended question soliciting general insights about conditions in the local marketplace as well as interest in participating in a follow-up interview about marketplace conditions (Questions G1 and G2).

m. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

² Goods and services businesses were asked questions about subcontract work.

³ Goods and services businesses were asked questions about subcontract work.

D. Survey Execution

Davis Research conducted all availability surveys in 2020. The firm made multiple attempts at different times of the day and on different days of the week to reach each business and attempted to survey a company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

1. Businesses that the study team successfully contacted. Figure E-2 presents the disposition of the 18,321 businesses that the study team attempted to contact for availability surveys and how that number resulted in the 3,696 businesses that the study team was able to successfully contact.

Figure E-2.
Disposition of attempts
to survey businesses

Source:
BBC availability analysis.

	Number of Establishments
Beginning list	18,321
Less duplicate phone numbers	68
Less non-working phone numbers	2,357
Less wrong number/business	895
Unique business listings with working phone numbers	15,001
Less no answer	9,692
Less could not reach responsible staff member	1,587
Less language barrier	26
Establishments successfully contacted	3,696

a. Non-working or wrong phone numbers. Some of the listings that Davis Research attempted to contact were:

- Duplicate phone numbers (68 listings);
- Non-working phone numbers (2,357 listings); or
- Wrong numbers for the desired businesses (895 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

b. Working phone numbers. As shown in Figure E-2, there were 15,001 businesses with working phone numbers that Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- There was no response after multiple attempts at different times of the day and on different days of the week for 9,692 businesses.
- Davis Research could not reach an appropriate staff member after multiple attempts at different times of the day on different days of the week for 1,587 businesses.

- Davis Research could not conduct the availability survey due to language barriers for 26 businesses.

2. Businesses included in the availability database. Figure E-3 presents the disposition of the 3,696 businesses that Davis Research successfully contacted and how that number resulted in the 1,843 businesses that the study team included in the availability database and considered potentially available for Commonwealth and HEI work.

Figure E-3.
Disposition of successfully
contacted businesses

Source:
BBC availability analysis.

	Number of Establishments
Establishments successfully contacted	3,696
Less establishments not interested in discussing availability	1,216
Less unreturned fax/online surveys	147
Establishments that completed surveys	2,333
Less not a for-profit business	77
Less line of work outside of study scope	47
Less no interest in future work	311
Less multiple establishments	55
Establishments potentially available for organization work	1,843

a. Businesses not interested in discussing availability. Of the 3,696 businesses that the study team successfully contacted, 1,216 businesses were not interested in discussing their availability for Commonwealth and HEI work. In total, 2,333 successfully contacted businesses completed availability surveys.

b. Businesses available for Commonwealth/HEI work. BBC deemed only a portion of the businesses that completed availability surveys as available for the prime contracts and subcontracts that the Commonwealth and HEIs awarded during the study period. The study team excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded 77 businesses that indicated that it was not a for-profit business.
- BBC excluded 47 businesses that indicated that their main lines of business were outside of the study scope.
- BBC excluded 311 businesses that reported not being interested in either prime contract or subcontract opportunities with government agencies in the region.
- Fifty-five businesses represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions and consolidations, BBC compiled a database of 1,843 businesses that were considered potentially available for Commonwealth and HEI work.

c. Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If representatives from any of the locations reported bidding or working on a contract within a particular subindustry, BBC considered the business to have bid or worked on a contract in that subindustry.
- BBC combined the different roles of work (i.e., prime contractor or subcontractor) that locations of the same business reported into a single response corresponding to the appropriate subindustry. For example, if the representative from one location reported that the business works as a prime contractor and the representative from another location reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.⁴
- BBC considered the largest contract that representatives from any locations of the same business reported having bid or worked on as the business's relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC coded businesses as minority- or woman-owned if representatives from a majority of its establishments reported such status and validated by other sources.

E. Additional Considerations

BBC made several additional considerations related to measuring availability to ensure that availability estimates for Commonwealth and HEI work were accurate and appropriate.

1. Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of Commonwealth and HEI contracting dollars for which minority- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for participating organizations' work and should not be used in that way. Federal courts and other authorities have approved BBC's approach to measuring availability. In addition, federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability for organizations implementing business assistance programs.

2. Using a custom census approach to measuring availability. Federal guidance around measuring the availability of minority- and woman-owned businesses for an organization's contracts and procurements recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when estimating the availability of businesses for Commonwealth and HEI work is that those approaches undercount the existence

⁴ Goods and services businesses were not asked questions about subcontract work.

of minority- and woman-owned businesses and do not account for business characteristics that are crucial to estimating availability accurately.

The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple count. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in government work, which allowed BBC to take a more detailed approach to measuring availability. Courts considering implementations of minority- and woman-owned business programs have decided in favor of such approaches to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business located in the relevant geographic market area. In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to classify businesses more accurately in the availability database.

4. Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways.

a. Certification and business lists. BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from participating organizations. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses. The study team compared survey responses concerning business ownership with such information.

b. Contract data. BBC examined Commonwealth and HEI contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts that businesses bid on or performed with actual contract data.

c. Organization review. The Commonwealth and HEIs reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the Commonwealth of Virginia. This is not a sales call. We are developing a list of companies interested in providing construction-related services for government agencies—including public colleges and universities—in Virginia. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE SURVEYS WILL ADD TO EXISTING DATA THAT THE COMMONWEALTH HAS ON COMPANIES INTERESTED IN WORKING WITH GOVERNMENT AGENCIES]

A1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=RIGHT COMPANY – **SKIP TO A2**

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – **TERMINATE**

Y1. What is the name of this firm?

1=VERBATIM

Y2. Can you give me any information about [new firm name]?

1=Yes, same owner doing business under a different name – **SKIP TO A2**

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – **TERMINATE**

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes – **SKIP TO A3c**

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

97=(NONE)

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is your company a subsidiary or affiliate of another firm?

1=Independent – **SKIP TO B1**

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – **SKIP TO B1**

99=(REFUSED) – **SKIP TO B1**

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing construction-related work. During the past five years, has your company submitted a bid or received an award for any part of a contract—either in the public sector or the private sector—as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – **SKIP TO B3a**

98=(DON'T KNOW) – **SKIP TO B3a**

99=(REFUSED) – **SKIP TO B3a**

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98=(DON'T KNOW)

99=(REFUSED)

B3a. Please think about future construction-related work as you answer the following questions. Is your company *interested* in working with government agencies in Virginia, including public colleges or universities?

1= Yes

2= No - **SKIP to C1a**

98= (DON'T KNOW) - **SKIP to C1a**

99=(REFUSED) - **SKIP to C1a**

B3b. Is your company interested in working with government agencies in Virginia as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98= (DON'T KNOW)

99=(REFUSED)

Now I want to ask you about the geographic areas your company can do work in Virginia.

C1. Is your company able to do work in the Central region of Virginia, which includes Richmond and Charlottesville?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2. Is your company able to do work in the West Central region of Virginia, which includes Lynchburg and Roanoke?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3. Is your company able to do work in the Southern region of Virginia, which includes Danville and Martinsville?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4. Is your company able to do work in the Hampton Roads region, which includes Newport News, Virginia Beach, Norfolk, and other nearby cities and towns?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C5. Is your company able to do work in the Eastern region of Virginia, which includes Essex, Northumberland, and Lancaster counties, but NOT the Eastern shore?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C6. Is your company able to do work on the Eastern shore of Virginia, which includes Accomack and Northampton counties?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C7. Is your company able to do work in the Southwest region of Virginia, which includes Bristol and Galax?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C8. Is your company able to do work in the Northern region of Virginia, which includes Alexandria and Fairfax?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C9. Is your company able to do work in the Valley region of Virginia, which includes Harrisonburg, Staunton, and Winchester?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. What is the largest prime contract or subcontract that your company has either bid on or has been awarded during the past five years? This includes contracts not yet complete and contracts in either the public sector or private sector.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=\$100,000 or less	9=More than \$20 million to \$50 million
2=More than \$100,000 to \$250,000	10=More than \$50 million to \$100 million
3=More than \$250,000 to \$500,000	11= More than \$100 million to \$200 million
4=More than \$500,000 to \$1 million	12=\$200 million or greater
5=More than \$1 million to \$2 million	97=(NONE)
6=More than \$2 million to \$5 million	98=(DON'T KNOW)
7=More than \$5 million to \$10 million	99=(REFUSED)
8=More than \$10 million to \$20 million	

E1. My next questions are about the ownership of your business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by one or more women. By this definition, is *[firm name / new firm name]* a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by individual(s) who identify as Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian, or other racial/ethnic minority. By this definition, is *[firm name / new firm name]* a minority-owned business?

- 1=Yes
- 2=No – **SKIP TO F1**
- 98=(DON'T KNOW) – **SKIP TO F1**
- 99=(REFUSED) – **SKIP TO F1**

E3. Would you say that the minority group ownership of your company is Asian American, Black American, Subcontinent Asian American, Hispanic American, Native American, or Other minority?

1=Black American

2=Asian-Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet indicates that your company has about [number] employees working in your company across all locations. Is that an accurate estimate of your company's average employees from 2017 through 2019?

[NOTE TO INTERVIEWER - INCLUDES EMPLOYEES WHO WORK ACROSS ALL THEIR LOCATIONS]

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. About how many employees did you have working in your company across all locations, on average, from 2017 through 2019?

[RECORD NUMBER OF EMPLOYEES]

1=NUMERIC (1-999999999)

F3. What was the average annual gross revenue of your company, including all locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$1 Million	7=\$19.6 Million - \$24 Million
2=\$1.1 Million - \$3 Million	8=\$24.1 Million or more
3=\$3.1 Million - \$6 Million	98= (DON'T KNOW)
4=\$6.1 Million - \$10 Million	99= (REFUSED)
5=\$10.1 Million - \$15.5 Million	
6=\$15.6 Million - \$19.5 Million	

G1. Do you have any thoughts to share regarding general marketplace conditions in Virginia, starting or expanding a business in your industry, or obtaining work?

- 1=VERBATIM [PROBE FOR COMPLETE THOUGHTS]
97=(NOTHING/NONE/NO COMMENTS)
98=(DON'T KNOW)
99=(REFUSED)

G2. Would you be willing to participate in an interview to discuss marketplace conditions in Virginia?

- 1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

H1. Just a few last questions. What is your name?

- 1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact Jennifer Mayton, Chief of Staff, Virginia Department of Small Business and Supplier Diversity, at 804-593-2007, or at jennifer.mayton@sbsd.virginia.gov.

Figure F-1.
Table of Contents

Table	Characteristics						
	Agency	Time period	Contract area	Contract role	Contract size	Subcontractor Plan	Region
F-2	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	N/A
F-3	State agencies	07/01/14 - 06/30/16	All industries	Prime contracts and subcontracts	N/A	N/A	N/A
F-4	State agencies	07/01/16 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	N/A
F-5	State agencies	07/01/14 - 06/30/19	Construction	Prime contracts and subcontracts	N/A	N/A	N/A
F-6	State agencies	07/01/14 - 06/30/19	Professional services	Prime contracts and subcontracts	N/A	N/A	N/A
F-7	State agencies	07/01/14 - 06/30/19	Goods and other services	Prime contracts and subcontracts	N/A	N/A	N/A
F-8	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts	N/A	N/A	N/A
F-9	State agencies	07/01/14 - 06/30/19	All industries	Subcontracts	N/A	N/A	N/A
F-10	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts	Large	N/A	N/A
F-11	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts	Small	N/A	N/A
F-12	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	Yes	N/A
F-13	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	No	N/A
F-14	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	Northern
F-15	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	Central
F-16	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	Eastern
F-17	State agencies	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	Western/Southern
F-18	VASCUPP - Tier II	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	N/A
F-19	VASCUPP - TIER III	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	N/A	N/A

Figure F-2.
Time period: July 1, 2014-June 30, 2019
Agency: State agencies
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	31,959	\$9,764,318	\$9,764,318				
(2) Minority and woman-owned	7,196	\$1,312,910	\$1,312,910	13.4	32.8	-19.3	41.0
(3) Non-Hispanic white woman-owned	4,250	\$534,165	\$534,165	5.5	10.9	-5.5	50.1
(4) Minority-owned	2,946	\$778,745	\$778,745	8.0	21.9	-13.9	36.5
(5) Asian American-owned	277	\$104,301	\$109,434	1.1	6.6	-5.5	17.1
(6) Black American-owned	1,610	\$320,007	\$335,753	3.4	7.1	-3.6	48.7
(7) Hispanic American-owned	530	\$305,403	\$320,430	3.3	5.3	-2.1	61.5
(8) Native American-owned	111	\$12,512	\$13,128	0.1	2.9	-2.8	4.7
(9) Unknown minority-owned	418	\$36,521					
(10) Minority- and woman-owned (SWaM)	5,551	\$926,591	\$926,591	9.5			
(11) Non-Hispanic white woman-owned (SWaM)	3,617	\$458,977	\$458,977	4.7			
(12) Minority-owned (SWaM)	1,934	\$467,613	\$467,613	4.8			
(13) Asian American-owned (SWaM)	222	\$85,164	\$88,388	0.9			
(14) Black American-owned (SWaM)	865	\$145,480	\$150,988	1.5			
(15) Hispanic American-owned (SWaM)	488	\$207,398	\$215,251	2.2			
(16) Native American-owned (SWaM)	111	\$12,512	\$12,986	0.1			
(17) Unknown minority-owned (SWaM)	248	\$17,060					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.

Time period: July 1, 2014-June 30, 2016

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	13,808	\$4,971,488	\$4,971,488				
(2) Minority and woman-owned	3,140	\$655,982	\$655,982	13.2	35.2	-22.0	37.4
(3) Non-Hispanic white woman-owned	2,034	\$323,698	\$323,698	6.5	13.1	-6.6	49.8
(4) Minority-owned	1,106	\$332,284	\$332,284	6.7	22.2	-15.5	30.1
(5) Asian American-owned	107	\$61,155	\$64,278	1.3	6.7	-5.4	19.4
(6) Black American-owned	597	\$154,055	\$161,924	3.3	6.3	-3.0	51.8
(7) Hispanic American-owned	146	\$97,272	\$102,241	2.1	5.9	-3.8	34.9
(8) Native American-owned	60	\$3,655	\$3,841	0.1	3.3	-3.2	2.3
(9) Unknown minority-owned	196	\$16,147					
(10) Minority- and woman-owned (SWaM)	2,442	\$416,442	\$416,442	8.4			
(11) Non-Hispanic white woman-owned (SWaM)	1,749	\$279,081	\$279,081	5.6			
(12) Minority-owned (SWaM)	693	\$137,361	\$137,361	2.8			
(13) Asian American-owned (SWaM)	84	\$51,381	\$55,178	1.1			
(14) Black American-owned (SWaM)	327	\$30,329	\$32,571	0.7			
(15) Hispanic American-owned (SWaM)	127	\$42,544	\$45,688	0.9			
(16) Native American-owned (SWaM)	60	\$3,655	\$3,925	0.1			
(17) Unknown minority-owned (SWaM)	95	\$9,452					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Time period: July 1, 2017-June 30, 2019
Agency: State agencies
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	18,151	\$4,792,830	\$4,792,830				
(2) Minority and woman-owned	4,056	\$656,927	\$656,927	13.7	30.2	-16.5	45.3
(3) Non-Hispanic white woman-owned	2,216	\$210,467	\$210,467	4.4	8.7	-4.3	50.5
(4) Minority-owned	1,840	\$446,461	\$446,461	9.3	21.5	-12.2	43.3
(5) Asian American-owned	170	\$43,147	\$45,210	0.9	6.5	-5.5	14.6
(6) Black American-owned	1,013	\$165,951	\$173,887	3.6	7.9	-4.2	46.2
(7) Hispanic American-owned	384	\$208,130	\$218,083	4.6	4.8	-0.2	95.6
(8) Native American-owned	51	\$8,858	\$9,281	0.2	2.4	-2.2	7.9
(9) Unknown minority-owned	222	\$20,374					
(10) Minority- and woman-owned (SWaM)	3,109	\$510,148	\$510,148	10.6			
(11) Non-Hispanic white woman-owned (SWaM)	1,868	\$179,897	\$179,897	3.8			
(12) Minority-owned (SWaM)	1,241	\$330,252	\$330,252	6.9			
(13) Asian American-owned (SWaM)	138	\$33,783	\$34,579	0.7			
(14) Black American-owned (SWaM)	538	\$115,150	\$117,866	2.5			
(15) Hispanic American-owned (SWaM)	361	\$164,853	\$168,740	3.5			
(16) Native American-owned (SWaM)	51	\$8,858	\$9,067	0.2			
(17) Unknown minority-owned (SWaM)	153	\$7,608					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Time period: July 1, 2014-June 30, 2019
Agency: State agencies
Contract area: Construction
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	10,133	\$4,025,499	\$4,025,499				
(2) Minority and woman-owned	1,969	\$567,896	\$567,896	14.1	23.9	-9.8	59.0
(3) Non-Hispanic white woman-owned	1,074	\$279,261	\$279,261	6.9	5.8	1.2	120.4
(4) Minority-owned	895	\$288,636	\$288,636	7.2	18.1	-11.0	39.5
(5) Asian American-owned	23	\$10,278	\$11,103	0.3	5.5	-5.2	5.0
(6) Black American-owned	351	\$47,096	\$50,879	1.3	8.8	-7.5	14.4
(7) Hispanic American-owned	284	\$202,655	\$218,930	5.4	3.8	1.7	144.2
(8) Native American-owned	5	\$7,150	\$7,724	0.2	0.1	0.1	200+
(9) Unknown minority-owned	232	\$21,456					
(10) Minority- and woman-owned (SWaM)	1,661	\$436,299	\$436,299	10.8			
(11) Non-Hispanic white woman-owned (SWaM)	900	\$247,621	\$247,621	6.2			
(12) Minority-owned (SWaM)	761	\$188,677	\$188,677	4.7			
(13) Asian American-owned (SWaM)	20	\$9,236	\$9,972	0.2			
(14) Black American-owned (SWaM)	346	\$46,540	\$50,247	1.2			
(15) Hispanic American-owned (SWaM)	262	\$111,831	\$120,740	3.0			
(16) Native American-owned (SWaM)	5	\$7,150	\$7,719	0.2			
(17) Unknown minority-owned (SWaM)	128	\$13,921					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Time period: July 1, 2014-June 30, 2019
Agency: State agencies
Contract area: Professional services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	7,242	\$3,137,155	\$3,137,155				
(2) Minority and woman-owned	1,829	\$352,149	\$352,149	11.2	50.3	-39.0	22.3
(3) Non-Hispanic white woman-owned	444	\$63,443	\$63,443	2.0	17.4	-15.4	11.6
(4) Minority-owned	1,385	\$288,706	\$288,706	9.2	32.9	-23.7	28.0
(5) Asian American-owned	180	\$60,324	\$63,155	2.0	11.2	-9.2	18.0
(6) Black American-owned	841	\$127,910	\$133,913	4.3	8.5	-4.3	50.0
(7) Hispanic American-owned	163	\$82,167	\$86,023	2.7	5.4	-2.6	51.2
(8) Native American-owned	106	\$5,363	\$5,614	0.2	7.8	-7.6	2.3
(9) Unknown minority-owned	95	\$12,942					
(10) Minority- and woman-owned (SWaM)	995	\$272,050	\$272,050	8.7			
(11) Non-Hispanic white woman-owned (SWaM)	363	\$51,782	\$51,782	1.7			
(12) Minority-owned (SWaM)	632	\$220,268	\$220,268	7.0			
(13) Asian American-owned (SWaM)	153	\$48,197	\$48,473	1.5			
(14) Black American-owned (SWaM)	171	\$84,265	\$84,747	2.7			
(15) Hispanic American-owned (SWaM)	159	\$81,191	\$81,655	2.6			
(16) Native American-owned (SWaM)	106	\$5,363	\$5,393	0.2			
(17) Unknown minority-owned (SWaM)	43	\$1,253					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: Goods and other services

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	14,584	\$2,601,665	\$2,601,665				
(2) Minority and woman-owned	3,398	\$392,864	\$392,864	15.1	25.5	-10.4	59.3
(3) Non-Hispanic white woman-owned	2,732	\$191,461	\$191,461	7.4	11.1	-3.7	66.4
(4) Minority-owned	666	\$201,403	\$201,403	7.7	14.4	-6.6	53.9
(5) Asian American-owned	74	\$33,699	\$34,058	1.3	2.7	-1.4	49.2
(6) Black American-owned	418	\$145,000	\$146,545	5.6	2.6	3.0	200+
(7) Hispanic American-owned	83	\$20,580	\$20,799	0.8	7.8	-7.0	10.3
(8) Native American-owned	0	\$0	\$0	0.0	1.4	-1.4	0.0
(9) Unknown minority-owned	91	\$2,123					
(10) Minority- and woman-owned (SWaM)	2,895	\$218,242	\$218,242	8.4			
(11) Non-Hispanic white woman-owned (SWaM)	2,354	\$159,574	\$159,574	6.1			
(12) Minority-owned (SWaM)	541	\$58,668	\$58,668	2.3			
(13) Asian American-owned (SWaM)	49	\$27,731	\$28,652	1.1			
(14) Black American-owned (SWaM)	348	\$14,675	\$15,162	0.6			
(15) Hispanic American-owned (SWaM)	67	\$14,376	\$14,853	0.6			
(16) Native American-owned (SWaM)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SWaM)	77	\$1,886					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Time period: July 1, 2014-June 30, 2019
Agency: State agencies
Contract area: All industries
Contract role: Prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	31,203	\$9,638,642	\$9,638,642				
(2) Minority and woman-owned	7,074	\$1,286,699	\$1,286,699	13.3	32.8	-19.5	40.7
(3) Non-Hispanic white woman-owned	4,180	\$521,496	\$521,496	5.4	10.9	-5.5	49.6
(4) Minority-owned	2,894	\$765,203	\$765,203	7.9	21.9	-14.0	36.2
(5) Asian American-owned	265	\$99,188	\$104,024	1.1	6.6	-5.5	16.4
(6) Black American-owned	1,602	\$319,534	\$335,115	3.5	7.1	-3.6	49.0
(7) Hispanic American-owned	512	\$298,420	\$312,972	3.2	5.3	-2.1	61.1
(8) Native American-owned	106	\$12,482	\$13,091	0.1	2.9	-2.8	4.7
(9) Unknown minority-owned	409	\$35,579					
(10) Minority- and woman-owned (SWaM)	5,454	\$903,560	\$903,560	9.4			
(11) Non-Hispanic white woman-owned (SWaM)	3,563	\$447,950	\$447,950	4.6			
(12) Minority-owned (SWaM)	1,891	\$455,611	\$455,611	4.7			
(13) Asian American-owned (SWaM)	212	\$80,052	\$82,988	0.9			
(14) Black American-owned (SWaM)	859	\$145,216	\$150,542	1.6			
(15) Hispanic American-owned (SWaM)	475	\$201,742	\$209,141	2.2			
(16) Native American-owned (SWaM)	106	\$12,482	\$12,940	0.1			
(17) Unknown minority-owned (SWaM)	239	\$16,118					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Time period: July 1, 2014-June 30, 2019
Agency: State agencies
Contract area: All industries
Contract role: Subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	756	\$125,676	\$125,676				
(2) Minority and woman-owned	122	\$26,211	\$26,211	20.9	31.1	-10.2	67.1
(3) Non-Hispanic white woman-owned	70	\$12,669	\$12,669	10.1	12.4	-2.3	81.4
(4) Minority-owned	52	\$13,542	\$13,542	10.8	18.7	-7.9	57.7
(5) Asian American-owned	12	\$5,114	\$5,496	4.4	5.3	-1.0	82.1
(6) Black American-owned	8	\$473	\$509	0.4	4.6	-4.2	8.9
(7) Hispanic American-owned	18	\$6,982	\$7,505	6.0	7.5	-1.5	79.9
(8) Native American-owned	5	\$30	\$32	0.0	1.3	-1.3	1.9
(9) Unknown minority-owned	9	\$942					
(10) Minority- and woman-owned (SWaM)	97	\$23,030	\$23,030	18.3			
(11) Non-Hispanic white woman-owned (SWaM)	54	\$11,028	\$11,028	8.8			
(12) Minority-owned (SWaM)	43	\$12,003	\$12,003	9.6			
(13) Asian American-owned (SWaM)	10	\$5,112	\$5,547	4.4			
(14) Black American-owned (SWaM)	6	\$263	\$286	0.2			
(15) Hispanic American-owned (SWaM)	13	\$5,655	\$6,137	4.9			
(16) Native American-owned (SWaM)	5	\$30	\$33	0.0			
(17) Unknown minority-owned (SWaM)	9	\$942					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,553	\$7,469,275	\$7,469,275				
(2) Minority and woman-owned	203	\$865,475	\$865,475	11.6	33.1	-21.5	35.0
(3) Non-Hispanic white woman-owned	91	\$291,531	\$291,531	3.9	10.6	-6.7	36.7
(4) Minority-owned	112	\$573,943	\$573,943	7.7	22.5	-14.8	34.2
(5) Asian American-owned	32	\$76,811	\$78,150	1.0	6.6	-5.5	15.9
(6) Black American-owned	34	\$241,177	\$245,381	3.3	6.2	-3.0	52.6
(7) Hispanic American-owned	35	\$241,544	\$245,754	3.3	6.0	-2.7	55.2
(8) Native American-owned	6	\$4,579	\$4,659	0.1	3.7	-3.6	1.7
(9) Unknown minority-owned	5	\$9,832					
(10) Minority- and woman-owned (SWaM)	147	\$574,167	\$574,167	7.7			
(11) Non-Hispanic white woman-owned (SWaM)	75	\$259,699	\$259,699	3.5			
(12) Minority-owned (SWaM)	72	\$314,468	\$314,468	4.2			
(13) Asian American-owned (SWaM)	23	\$61,892	\$61,892	0.8			
(14) Black American-owned (SWaM)	18	\$98,665	\$98,665	1.3			
(15) Hispanic American-owned (SWaM)	25	\$149,332	\$149,332	2.0			
(16) Native American-owned (SWaM)	6	\$4,579	\$4,579	0.1			
(17) Unknown minority-owned (SWaM)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	29,650	\$2,169,367	\$2,169,367				
(2) Minority and woman-owned	6,871	\$421,224	\$421,224	19.4	31.8	-12.3	61.1
(3) Non-Hispanic white woman-owned	4,089	\$229,964	\$229,964	10.6	11.8	-1.2	89.9
(4) Minority-owned	2,782	\$191,260	\$191,260	8.8	20.0	-11.2	44.1
(5) Asian American-owned	233	\$22,376	\$25,857	1.2	6.6	-5.4	18.0
(6) Black American-owned	1,568	\$78,357	\$90,546	4.2	10.0	-5.9	41.6
(7) Hispanic American-owned	477	\$56,877	\$65,724	3.0	3.1	0.0	98.7
(8) Native American-owned	100	\$7,903	\$9,133	0.4	0.3	0.2	162.5
(9) Unknown minority-owned	404	\$25,747					
(10) Minority- and woman-owned (SWaM)	5,307	\$329,393	\$329,393	15.2			
(11) Non-Hispanic white woman-owned (SWaM)	3,488	\$188,251	\$188,251	8.7			
(12) Minority-owned (SWaM)	1,819	\$141,142	\$141,142	6.5			
(13) Asian American-owned (SWaM)	189	\$18,159	\$20,501	0.9			
(14) Black American-owned (SWaM)	841	\$46,551	\$52,552	2.4			
(15) Hispanic American-owned (SWaM)	450	\$52,411	\$59,167	2.7			
(16) Native American-owned (SWaM)	100	\$7,903	\$8,922	0.4			
(17) Unknown minority-owned (SWaM)	239	\$16,118					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Subcontracting Plan required

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,822	\$8,063,409	\$8,063,409				
(2) Minority and woman-owned	816	\$1,083,409	\$1,083,409	13.4	33.5	-20.1	40.1
(3) Non-Hispanic white woman-owned	442	\$422,699	\$422,699	5.2	11.0	-5.8	47.5
(4) Minority-owned	374	\$660,710	\$660,710	8.2	22.5	-14.3	36.4
(5) Asian American-owned	68	\$85,276	\$88,322	1.1	6.6	-5.5	16.7
(6) Black American-owned	118	\$265,118	\$274,588	3.4	6.8	-3.4	50.4
(7) Hispanic American-owned	133	\$282,498	\$292,588	3.6	5.8	-2.1	63.0
(8) Native American-owned	12	\$5,032	\$5,212	0.1	3.4	-3.4	1.9
(9) Unknown minority-owned	43	\$22,786					
(10) Minority- and woman-owned (SWaM)	653	\$767,132	\$767,132	9.5			
(11) Non-Hispanic white woman-owned (SWaM)	344	\$368,902	\$368,902	4.6			
(12) Minority-owned (SWaM)	309	\$398,230	\$398,230	4.9			
(13) Asian American-owned (SWaM)	55	\$70,868	\$72,617	0.9			
(14) Black American-owned (SWaM)	99	\$124,604	\$127,678	1.6			
(15) Hispanic American-owned (SWaM)	117	\$188,137	\$192,779	2.4			
(16) Native American-owned (SWaM)	12	\$5,032	\$5,156	0.1			
(17) Unknown minority-owned (SWaM)	26	\$9,589					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

No Subcontracting Plan required

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	27,137	\$1,700,909	\$1,700,909				
(2) Minority and woman-owned	6,380	\$229,501	\$229,501	13.5	29.2	-15.7	46.2
(3) Non-Hispanic white woman-owned	3,808	\$111,466	\$111,466	6.6	10.4	-3.9	62.9
(4) Minority-owned	2,572	\$118,035	\$118,035	6.9	18.8	-11.9	36.9
(5) Asian American-owned	209	\$19,025	\$21,531	1.3	6.6	-5.4	19.1
(6) Black American-owned	1,492	\$54,889	\$62,117	3.7	8.5	-4.8	43.0
(7) Hispanic American-owned	397	\$22,905	\$25,921	1.5	3.3	-1.8	45.7
(8) Native American-owned	99	\$7,480	\$8,465	0.5	0.4	0.1	140.4
(9) Unknown minority-owned	375	\$13,735					
(10) Minority- and woman-owned (SWaM)	4,898	\$159,458	\$159,458	9.4			
(11) Non-Hispanic white woman-owned (SWaM)	3,273	\$90,076	\$90,076	5.3			
(12) Minority-owned (SWaM)	1,625	\$69,383	\$69,383	4.1			
(13) Asian American-owned (SWaM)	167	\$14,296	\$16,021	0.9			
(14) Black American-owned (SWaM)	766	\$20,876	\$23,395	1.4			
(15) Hispanic American-owned (SWaM)	371	\$19,260	\$21,585	1.3			
(16) Native American-owned (SWaM)	99	\$7,480	\$8,383	0.5			
(17) Unknown minority-owned (SWaM)	222	\$7,471					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Northern Virginia

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,467	\$3,086,381	\$3,086,381				
(2) Minority and woman-owned	932	\$447,309	\$447,309	14.5	41.1	-26.6	35.2
(3) Non-Hispanic white woman-owned	505	\$180,260	\$180,260	5.8	16.9	-11.0	34.6
(4) Minority-owned	427	\$267,049	\$267,049	8.7	24.3	-15.6	35.7
(5) Asian American-owned	82	\$62,005	\$63,580	2.1	7.4	-5.3	27.9
(6) Black American-owned	161	\$36,899	\$37,836	1.2	5.1	-3.9	23.9
(7) Hispanic American-owned	109	\$157,462	\$161,461	5.2	6.7	-1.5	78.0
(8) Native American-owned	11	\$4,069	\$4,172	0.1	5.0	-4.9	2.7
(9) Unknown minority-owned	64	\$6,614					
(10) Minority- and woman-owned (SWaM)	666	\$325,112	\$325,112	10.5			
(11) Non-Hispanic white woman-owned (SWaM)	377	\$150,386	\$150,386	4.9			
(12) Minority-owned (SWaM)	289	\$174,725	\$174,725	5.7			
(13) Asian American-owned (SWaM)	62	\$52,104	\$52,963	1.7			
(14) Black American-owned (SWaM)	82	\$15,193	\$15,444	0.5			
(15) Hispanic American-owned (SWaM)	99	\$100,524	\$102,182	3.3			
(16) Native American-owned (SWaM)	11	\$4,069	\$4,136	0.1			
(17) Unknown minority-owned (SWaM)	35	\$2,835					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Time period: July 1, 2014-June 30, 2019

Central Virginia

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	18,968	\$7,975,294	\$7,975,294				
(2) Minority and woman-owned	4,158	\$984,160	\$984,160	12.3	32.8	-20.4	37.7
(3) Non-Hispanic white woman-owned	2,594	\$383,571	\$383,571	4.8	11.0	-6.2	43.8
(4) Minority-owned	1,564	\$600,589	\$600,589	7.5	21.8	-14.3	34.6
(5) Asian American-owned	167	\$71,710	\$74,410	0.9	6.6	-5.7	14.1
(6) Black American-owned	845	\$277,781	\$288,241	3.6	6.3	-2.7	57.1
(7) Hispanic American-owned	276	\$219,571	\$227,839	2.9	5.5	-2.6	52.3
(8) Native American-owned	91	\$9,733	\$10,100	0.1	3.4	-3.2	3.8
(9) Unknown minority-owned	185	\$21,794					
(10) Minority- and woman-owned (SWaM)	3,333	\$696,423	\$696,423	8.7			
(11) Non-Hispanic white woman-owned (SWaM)	2,213	\$335,784	\$335,784	4.2			
(12) Minority-owned (SWaM)	1,120	\$360,639	\$360,639	4.5			
(13) Asian American-owned (SWaM)	137	\$59,354	\$60,361	0.8			
(14) Black American-owned (SWaM)	549	\$121,557	\$123,620	1.6			
(15) Hispanic American-owned (SWaM)	245	\$163,977	\$166,760	2.1			
(16) Native American-owned (SWaM)	91	\$9,733	\$9,899	0.1			
(17) Unknown minority-owned (SWaM)	98	\$6,018					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Time period: July 1, 2014-June 30, 2019

Eastern Virginia

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,623	\$2,661,629	\$2,661,629				
(2) Minority and woman-owned	1,057	\$361,495	\$361,495	13.6	44.7	-31.2	30.4
(3) Non-Hispanic white woman-owned	596	\$187,947	\$187,947	7.1	18.7	-11.7	37.7
(4) Minority-owned	461	\$173,549	\$173,549	6.5	26.0	-19.5	25.1
(5) Asian American-owned	41	\$34,186	\$36,121	1.4	8.5	-7.1	16.0
(6) Black American-owned	256	\$42,331	\$44,728	1.7	5.2	-3.5	32.3
(7) Hispanic American-owned	49	\$85,826	\$90,684	3.4	6.6	-3.2	51.5
(8) Native American-owned	10	\$1,907	\$2,015	0.1	5.7	-5.6	1.3
(9) Unknown minority-owned	105	\$9,298					
(10) Minority- and woman-owned (SWaM)	873	\$317,864	\$317,864	11.9			
(11) Non-Hispanic white woman-owned (SWaM)	489	\$173,906	\$173,906	6.5			
(12) Minority-owned (SWaM)	384	\$143,958	\$143,958	5.4			
(13) Asian American-owned (SWaM)	36	\$30,674	\$32,201	1.2			
(14) Black American-owned (SWaM)	222	\$19,633	\$20,610	0.8			
(15) Hispanic American-owned (SWaM)	46	\$84,919	\$89,145	3.3			
(16) Native American-owned (SWaM)	10	\$1,907	\$2,002	0.1			
(17) Unknown minority-owned (SWaM)	70	\$6,825					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: July 1, 2014-June 30, 2019

Agency: State agencies

Contract area: All industries

Contract role: Prime contracts and subcontracts

Western/Southern Virginia

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	7,307	\$2,671,247	\$2,671,247				
(2) Minority and woman-owned	1,623	\$360,835	\$360,835	13.5	41.4	-27.9	32.6
(3) Non-Hispanic white woman-owned	966	\$197,418	\$197,418	7.4	17.0	-9.6	43.5
(4) Minority-owned	657	\$163,417	\$163,417	6.1	24.4	-18.3	25.1
(5) Asian American-owned	22	\$35,249	\$37,704	1.4	8.4	-7.0	16.8
(6) Black American-owned	426	\$34,236	\$36,620	1.4	4.6	-3.3	29.6
(7) Hispanic American-owned	109	\$81,323	\$86,986	3.3	6.0	-2.7	54.7
(8) Native American-owned	16	\$1,971	\$2,108	0.1	5.4	-5.3	1.5
(9) Unknown minority-owned	84	\$10,638					
(10) Minority- and woman-owned (SWaM)	1,151	\$305,004	\$305,004	11.4			
(11) Non-Hispanic white woman-owned (SWaM)	883	\$180,144	\$180,144	6.7			
(12) Minority-owned (SWaM)	268	\$124,860	\$124,860	4.7			
(13) Asian American-owned (SWaM)	14	\$31,655	\$32,433	1.2			
(14) Black American-owned (SWaM)	76	\$6,916	\$7,086	0.3			
(15) Hispanic American-owned (SWaM)	109	\$81,323	\$83,321	3.1			
(16) Native American-owned (SWaM)	16	\$1,971	\$2,019	0.1			
(17) Unknown minority-owned (SWaM)	53	\$2,994					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.
Time period: July 1, 2014-June 30, 2019
Agency: Tier II HEIs
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	8,683	\$1,573,670	\$1,573,670				
(2) Minority and woman-owned	1,115	\$175,177	\$175,177	11.1	30.5	-19.3	36.5
(3) Non-Hispanic white woman-owned	765	\$116,933	\$116,933	7.4	11.1	-3.7	66.9
(4) Minority-owned	350	\$58,244	\$58,244	3.7	19.4	-15.7	19.1
(5) Asian American-owned	52	\$35,212	\$39,899	2.5	7.0	-4.4	36.5
(6) Black American-owned	63	\$4,379	\$4,962	0.3	5.3	-5.0	6.0
(7) Hispanic American-owned	47	\$7,927	\$8,983	0.6	6.0	-5.5	9.5
(8) Native American-owned	24	\$3,883	\$4,400	0.3	1.1	-0.8	25.6
(9) Unknown minority-owned	164	\$6,842					
(10) Minority- and woman-owned (SWaM)	841	\$159,012	\$159,012	10.1			
(11) Non-Hispanic white woman-owned (SWaM)	636	\$109,066	\$109,066	6.9			
(12) Minority-owned (SWaM)	205	\$49,947	\$49,947	3.2			
(13) Asian American-owned (SWaM)	27	\$32,158	\$33,964	2.2			
(14) Black American-owned (SWaM)	49	\$3,930	\$4,150	0.3			
(15) Hispanic American-owned (SWaM)	41	\$7,426	\$7,843	0.5			
(16) Native American-owned (SWaM)	21	\$3,778	\$3,990	0.3			
(17) Unknown minority-owned (SWaM)	67	\$2,655					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaM businesses were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Time period: July 1, 2014-June 30, 2019
Agency: Tier III HEIs
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	48,445	\$4,553,329	\$4,553,329				
(2) Minority and woman-owned	5,503	\$363,808	\$363,808	8.0	29.4	-21.4	27.2
(3) Non-Hispanic white woman-owned	4,392	\$276,994	\$276,994	6.1	11.5	-5.4	52.8
(4) Minority-owned	1,111	\$86,813	\$86,813	1.9	17.9	-16.0	10.7
(5) Asian American-owned	152	\$13,348	\$15,617	0.3	6.4	-6.0	5.4
(6) Black American-owned	349	\$45,570	\$53,315	1.2	7.6	-6.5	15.3
(7) Hispanic American-owned	61	\$9,710	\$11,361	0.2	3.2	-3.0	7.7
(8) Native American-owned	145	\$5,573	\$6,521	0.1	0.6	-0.5	22.1
(9) Unknown minority-owned	404	\$12,611					
(10) Minority- and woman-owned (SWaM)	4,048	\$297,029	\$297,029	6.5			
(11) Non-Hispanic white woman-owned (SWaM)	3,378	\$226,180	\$226,180	5.0			
(12) Minority-owned (SWaM)	670	\$70,849	\$70,849	1.6			
(13) Asian American-owned (SWaM)	82	\$10,342	\$10,657	0.2			
(14) Black American-owned (SWaM)	304	\$44,026	\$45,368	1.0			
(15) Hispanic American-owned (SWaM)	52	\$8,823	\$9,092	0.2			
(16) Native American-owned (SWaM)	144	\$5,562	\$5,732	0.1			
(17) Unknown minority-owned (SWaM)	88	\$2,095					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned SWaMs were allocated to minority and SWaM subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the organization awarded.

Source: BBC Research & Consulting Disparity Analysis.