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Final Phase 1 Report, January 2017
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Phase 1 Summary Report

Keen Independent Research is conducting the 2017 Minnesota Joint Disparity Study for the following state and local governments (“participating entities”):

- State of Minnesota, including Minnesota Department of Transportation (MnDOT);
- Minnesota State Colleges and Universities (Minnesota State);
- Metropolitan Airports Commission;
- Metropolitan Council;
- Mosquito Control District;
- Hennepin County;
- City of Minneapolis; and
- City of Saint Paul, including its Housing & Redevelopment Authority.

The study team will prepare disparity study reports for each participating entity, including a separate report for MnDOT.

The study includes three phases. This Phase 1 report documents work completed in the first three months of the study and outlines plans for completion of Phase 2 (data collection and analysis) and Phase 3 (reports, presentations and public forums). The study will be complete by year-end 2017.

The Phase 1 report describes (a) Phase 1 accomplishments, (b) key issues identified, (c) changes to the detailed project plan and (d) legal issues for targeted business programs. Ten appendices provide supporting information.

A. Phase 1 Activities and Accomplishments

Part A of the report reviews:

1. The purpose of Phase 1;
2. Study team members and roles;
3. Activities completed as part of Phase 1;
4. Communications efforts;
5. The first public forum, held on August 31, 2016; and
6. Other input received from the public.

1. Purpose of Phase 1. Because of the number of governmental units participating in the joint study, and the breadth of activities for many of these organizations, Keen Independent Research (Keen Independent) included a Phase 1 project initiation and scoping component in the overall workplan. Phase 1 includes the eight specific tasks in Figure 1 shown on page 3. At the time of this report, each of these tasks is largely complete.
2. Identification of study team and roles. Keen Independent is the prime consultant for this project, assisted by local and national team members. Minnesota-based team members include:

- **Felton Financial Forensics.** Mark Felton, CPA, leads an accounting firm with extensive expertise conducting data collection and analysis.

- **KLD Consulting.** Kathie Doty, Principal directs a communications and public policy firm specializing in outreach and involvement for public agencies.

- **Fondungallah & Kigham LLC.** Michael Fondungallah, Esquire leads a law firm focused on local issues of immigration, employment and discrimination.

- **CJ Petersen & Associates, LLC.** Catherine Petersen, Principal, leads a market research and planning firm.

National team members include:

- **Holland & Knight.** Keith Wiener, a Holland & Knight Partner, serves as legal counsel for this study. He has conducted disparity studies and related legal assignments with Mr. Keen since the 1990s.

- **Customer Research International.** CRI will conduct availability telephone interviews as part of the disparity study. For the past decade, the firm has participated with Mr. Keen on disparity studies for many agencies.

- **BBC Research & Consulting.** BBC is a Denver-based sub-consultant with substantial disparity study experience working with Mr. Keen.

Five of the eight subconsultants are minority- or women-owned firms. Figure 1 summarizes the project roles for each team member.

3. Activities completed. Phase 1 activities included:

- Development of an External Stakeholder Group;
- Preparation of a draft communications plan, and initial execution of the plan;
- Holding initial meetings with participating entities and submission of information requests;
- Review of background documents;
- Holding follow-up meetings and submission of additional information requests;
- Review of complaint processes related to contracting and procurement;
- Development of a draft legal framework for the study; and
- Preparation of other plans and the Phase 1 report.
### Development of an External Stakeholder Group

The study team worked with participating entities to establish and hold an initial meeting with an External Stakeholder Group. This group offers:

- Perspectives on marketplace conditions, business needs and contracting practices;
- Insights on the targeted business programs and other programs;
- Help communicating the study to other individuals and groups;
- Suggestions concerning information sources and other study resources; and
- A sounding board as the study team develops preliminary results.

### Figure 1.
Project tasks by phase

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<tr>
<th>Phase and task</th>
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<td><strong>Phase 1</strong> Project initiation, planning and initial outreach</td>
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<td>Keen Independent, other team</td>
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<td>1.3 Initial public meeting and request for comments</td>
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<td>1.5 Background research into past studies, programs, regulations</td>
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<td>1.7 Project plan, communications and outreach plan, data collection plan and QA/QC plan</td>
<td>Keen, KLD, BBC, H&amp;K, Felton</td>
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<td>1.8 Start-up report</td>
<td>Keen, KLD, BBC, H&amp;K, Felton</td>
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<td>2.1 Phase 2 project management meetings, IOG and ESG meetings, and communications</td>
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<td>2.2 Contract data collection</td>
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<td>Keen Independent, H&amp;K, KLD, Fondungallah &amp; Kigham, CJ Petersen</td>
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<tr>
<td>2.9 Analysis of combined disparity study information</td>
<td>Keen Independent, all other team</td>
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<tr>
<td><strong>Phase 3</strong> Disparity study reports, presentations and public meetings</td>
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<td>3.1 Phase 3 project management meetings and communications</td>
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This group first met on July 25, with the second meeting on September 29 and a third meeting on November 4, 2016. Additional meetings will be held through 2017.

Holding initial and follow-up meetings with each participating entity and submission of information requests. The Keen Independent study team met with staff of each participating entity and prepared initial information requests.

To date, Keen Independent has held follow-up meetings (in-person or via phone) and submitted additional information requests to Admin, Minnesota State, MnDOT, Met Council, MAC and the City of Minneapolis. The study team has communicated with other participating entities as well. Entity representatives met four times as a Steering Committee from June through September 2016.

Review of background documents. Keen Independent obtained and reviewed procurement, program and other information from each participating entity in Phase 1.

Development of a draft legal framework for the study. Part D of this report summarizes the legal framework for the disparity study, and Appendix B examines relevant court decisions.

Preparation of other plans and the draft Phase 1 report. Keen Independent developed a

- Utilization Data Collection Plan (Appendix C);
- Availability Data Collection Plan (Appendix D);
- General Plan for Disparity Analyses for Participating Entities (Appendix F);
- Quality Assurance/Quality Control Plan (Appendix G); and
- Qualitative Information Collection Plan (Appendix J), which includes analysis of qualitative information collected to date.

Appendix A explains key terms. This appendix will continue to grow as draft report chapters are prepared. It will be included in expanded form in the draft final reports to each participating entity.

4. Communications plan. Keen Independent developed a communications and outreach plan in June 2016 to guide those efforts throughout the disparity study. The study team has been executing the plan since that time. It is summarized below.

- Communications with Joint Minnesota Disparity Study project management team. Keen Independent is working closely with the Minnesota Department of Administration (Admin) project management team, including frequent meetings. Keen Independent is submitting monthly written progress reports to the project management team, which will they share and discuss with the Steering Committee.

- Steering Committee meetings and other communications. Keen Independent is holding in-person or webinar meetings with the Steering Committee each month or every other month throughout the project (monthly during Phases 1 and 3).
■ **Communications within state agencies and local governments.** Keen Independent helped to prepare a fact sheet and website suitable for internal and external use.

■ **Other briefings to state agency and local government staff.** Keen Independent held kick-off meetings with each participating agency as part of Phase 1. We explained the objective of the disparity study and data that need to be collected.

Similar to the internal groups, Keen Independent has planned for involvement of external stakeholders through a combination of in-person interviews, briefings to external groups and regular meetings with the External Stakeholder Group. Efforts include:

■ Disparity study email address, telephone hotline, website and fact sheet (which is provided in Appendix I);

■ Introduction of the study through in-depth personal interviews; and

■ Public forums, including four to be scheduled after release of a draft report in late summer 2017.

5. **First public forum.** The participating entities held a public forum on August 31 to provide the opportunity for public input on the study and key issues to be examined in the research. Admin hosted the public forum and staff from many participating entities attended.

■ The public forum included two sessions (3 pm and 5 pm) at the Hennepin County Central Library in Minneapolis.

■ Admin and some of the other entities emailed meeting notices to potentially interested businesses.

■ More than 60 people attended one or both of the sessions and 22 made comments. One individual filled out a comment card. Keen Independent recorded the sessions and analyzed comments (see public forum section of Appendix J).

Keen Independent will participate in four public forums in different locations in the state after release of the draft disparity study reports for public comment (late summer or fall 2017).

6. **Other public input received.** As of mid-September 2016, Keen Independent and/or Admin received one phone call on the telephone hotline, six e-mails through the study email address and one mailed comment. The study team will continue to offer multiple avenues for public comment throughout the study.
B. Key Issues Identified in Phase 1

Key issues identified in Phase 1 are summarized below. They include:

1. Definition of the study period;
2. Level of involvement of the External Stakeholder Group;
3. Need for concrete actions that emerge from the disparity study;
4. Suspect quality of MBE/WBE ownership information from certain sources;
5. Interest in disaggregated results for businesses owned by women of color;
6. Process for identifying interviewees for in-depth interviews;
7. Challenges concerning multiple programs in the state;
8. Gaps in contract data;
9. Unequal marketplace conditions for certain other groups;
10. Purchases made from a national market;
11. Extent to which programs apply to participating entity contracts during the study period;
12. Application of state and local programs to federally-funded contracts (other than USDOT-funded contracts); and
13. Issues raised by AGC of Minnesota regarding the technical proposal and the availability in November 4, 2016 Comments document.

1. **Study period.** Several participating entities suggested defining the five-year study period as July 1, 2011 through June 30, 2016. Other entities agreed. (The study period had been calendar years 2011 through 2015.) The change allows analysis of more recent data and better alignment with the fiscal year definitions of many participating entities.

2. **Level of involvement with the External Stakeholder Group.** Keen Independent’s workscope called for meetings with the External Stakeholder Group (ESG) about every six months. At its first meeting, a number of members requested more involvement of the ESG, including more meetings. Keen Independent has increased the number of ESG meetings to accommodate this request.

3. **Need for concrete actions that emerge from the disparity study.** The External Stakeholder Group as well as participants in the first public forum urged the participating entities and study team to develop concrete actions to improve conditions for targeted businesses.

   This request for “concrete action” is incorporated into the study plan, but will ultimately be the responsibility of each participating entity.

4. **Suspect quality of MBE/WBE ownership information from certain sources.** The External Stakeholder Group expressed concerns about the accuracy of minority and women business ownership information from some sources in Minnesota. Keen Independent’s workplan includes substantial ownership data-checking, including phone calls with individual companies.
5. Interest in disaggregated results for businesses owned by women of color. Certain participating entities and participants in the first public forum indicated interest in disaggregated results for businesses owned by women of color.

Most of Keen Independent’s utilization, availability and disparity analyses will be performed for individual minority groups, combining, for example Native American male- and Native American female-owned firms. Further disaggregation by gender within a minority group is limited by the small number of businesses for certain minority groups. Also, disparity analyses disaggregated to this level do not appear necessary. Court decisions suggest that any disparities for white women-owned firms would be germane for any women-owned companies, including minority women (see Appendix B).

Based on the interest in businesses owned by minority women, Keen Independent will report utilization results for this group, as appropriate.

6. Process for identifying interviewees for in-depth interviews. The External Stakeholder Group, participating entities and people attending the first public forum expressed interested in learning about how interviewees will be selected for in-depth interviews.

The study team will interview about 90 businesses and trade associations. Many of these interviewees will be identified through the availability surveys (discussed in Appendix D). The study team will seek to interview a cross-section of businesses, reflecting:

- Different industries (construction, professional services, goods and other services);
- Minority, female and majority ownership, as well as veteran-owned businesses and firms owned by persons with disabilities;
- Large and small business size;
- Those with and without substantial contracts or subcontracts with participating entities;
- Regions of the state; and
- Certified and non-certified businesses.

Through the course of the qualitative information collection, Keen Independent will manage a “matrix” of potential interviewees based on these characteristics. As interviews are scheduled and completed with firms that fit certain characteristics, the study team will increase its efforts to schedule other types of firms for interviews. Appendix J provides a more detailed discussion of qualitative information collection techniques.

7. Challenges concerning multiple programs in the state. The External Stakeholder Group and public forum participants indicated the challenges for Minnesota businesses given the multitude of programs and program certifications across state and local governments. Keen Independent recognizes this issue and will consider it in future recommendations.

8. Gaps in contract data. Keen Independent has identified gaps in certain contract data, especially for subcontracts. The study team is working with each participating entity to develop and implement a subcontract data collection plan unique to that entity. When necessary, data collection can focus on the larger contracts that are more likely to have substantial subcontracting.
The schedule to collect these data will extend through January 2017, although Keen Independent urges participating entities to provide data as quickly as possible, and in multiple submissions.

Study team staff can assist in any hard copy data collection and data entry.

9. **Unequal marketplace conditions for certain other groups.** Members of the External Stakeholder Group identified unequal conditions for businesses owned by certain groups not currently included in state or local programs. At this time, participating entities have not expanded the study to encompass any additional groups. However, the study team will collect input throughout the study on whether such analyses might be warranted in the future.

10. **Purchases made from a national market.** Some types of purchases are made from national markets. To comply with direction from court decisions concerning proper definition and consideration of relevant geographic market areas for state and local government procurement, types of goods and services primarily made from national markets will not be included in the availability analyses. For example, if certain specialized equipment parts are purchased from national vendors that do not have a local presence, those work types will be excluded from the availability research (it would not be proper for Keen Independent to perform a national survey of these firms).

11. **Extent to which programs apply to participating entity contracts during the study period.** With the exception of Hennepin County, many of the participating entities’ procurements made during the study period were subject to race- or gender-conscious programs. The disparity analyses performed as part of this study will recognize this fact.

- Disparity analyses where race- and gender-conscious programs apply might indicate whether those programs are effective rather than indicate outcomes under race-neutral conditions.
- Analyses of outcomes when programs are not applied might be most instructive as to whether there is a level playing field for minority- and women-owned firms (see Appendix F). This increases the importance of analyzing the overall marketplace.

12. **Application of state and local programs to federally-funded contracts.** Although Keen Independent’s original workscope excludes analysis of federally-funded contracts, it appears prudent to expand the scope of the utilization analysis to encompass those contracts, with the exception of USDOT-funded contracts, for which the Federal DBE Program applies. Many of the participating entities operate state or local programs when awarding contracts using HUD, EPA or certain other federal funds (but non-USDOT funds).

13. **Issues raised by AGC of Minnesota regarding the technical proposal and the availability in November 4, 2016 Comments document.** In its November 4, 2016 Comments, AGC of Minnesota raise five points related to the technical proposal and four points regarding the proposed availability survey. Keen Independent delivered a separate memorandum, dated January 8, 2017, that responds to each point.
C. Changes to the Detailed Project Plan

Keen Independent’s proposal and contract for the 2017 Joint Disparity Study includes a detailed workscope, which is not repeated here.

Changes to the workscope prior to contract execution. Certain changes to the workscope were developed by Keen Independent and Admin prior to executing the contract, principally adding to the in-depth interviews and marketplace analyses to include businesses owned by persons with disabilities. The dates in the overall schedule were also refined prior to project initiation.

Changes and additions to the initial plan. The material changes to the scope of work identified in Phase 1 are:

- Changes to the start and end dates of the study period (discussed above);
- Inclusion of contracts using federal funds (except for USDOT-funded contracts); and
- Additional External Stakeholder Group meetings (discussed above).

The first change has no impact on cost or study schedule. The second and third changes are being accommodated without any increase in study budget or impact on the overall schedule for completion.

Keen Independent has made certain refinements to other tasks as part of Phase 1, as anticipated in the workscope. For example, the draft communications plan was developed through discussions with Admin. The Keen Independent study team has been executing its responsibilities in the communications plan since developing the plan in late June.

Summary of QA/QC plan. Keen Independent has internal measures and incorporates extensive external review to ensure quality utilization, availability and disparity analyses. Steps include Steering Committee and External Stakeholder Group review of methodology, raw data (such as race/ethnicity/gender ownership coding of utilized firms), and results of preliminary analyses.

The study team employs considerable quality control efforts in its qualitative information collection as well. Appendix G of the report provides the draft Quality Assurance/Quality Control Plan.

There will also be extensive external review of draft disparity study reports, including distribution for public comment, before Keen Independent prepares final reports.

Schedule. The overall project schedule has not changed based on Phase 1 results. Figure 2 on the following page presents the schedule and tasks for Phase 2 (schedule as of January 2017).
Further information. Keen Independent provides additional information in the following appendices:

A. Definition of Terms;
B. Detailed Legal Framework and Analysis;
C. Utilization Data Collection Plan;
D. Availability Data Collection Plan;
E. Summary of Participants Entity Programs;
F. General Plan for Disparity Analyses for Participating Entities;
G. Draft Quality Assurance/Quality Control Plan;
H. General Outline for a Disparity Study Report;
I. Copies of Communications Materials; and
J. Plan for Qualitative Information Collection (which includes results of the August 31, 2016 public forum).

Figure 2.
Phase 2 tasks and schedule

| Phase and task | June | July | Aug | Sept | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | June | July | Aug | Sept | Oct | Nov | Dec |
|----------------|------|------|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Phase 2 Data Collection, Research and Analysis |      |      |     |      |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 2.1 Phase 2 project meetings and communications | | | | | | | | | | | | | | | | | | |
| 2.2 Contract data collection | | | | | | | | | | | | | | | | | | |
| 2.3 Subindustry and location coding of contracts | | | | | | | | | | | | | | | | | | |
| 2.4 Relevant geographic market area and product markets | | | | | | | | | | | | | | | | | | |
| 2.5 Availability analysis | | | | | | | | | | | | | | | | | | |
| 2.6 Utilization and disparity analysis for agency contracts | | | | | | | | | | | | | | | | | | |
| 2.7 Quantitative analysis of local marketplace conditions | | | | | | | | | | | | | | | | | | |
| 2.8 Qualitative analysis of local marketplace conditions | | | | | | | | | | | | | | | | | | |
| 2.9 Analysis of combined disparity study information | | | | | | | | | | | | | | | | | | |
Figure 3 illustrates the plans for report preparation and distribution, presentations and additional public forums during the last six months of the study.

Figure 3.
Phase 3 tasks and schedule

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<th>June</th>
<th>July</th>
<th>Aug</th>
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<td>3.8 Post study needs</td>
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D. Summary of the Legal Issues for Targeted Business Programs

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

Appendix B discusses how courts have applied different standards when evaluating the legality of race-conscious programs, gender-based programs and other targeted business programs. The legal framework explained in considerable detail in Appendix B is briefly summarized below.

1. Minority Business Enterprise and Women Business Enterprise programs. Many state and local governments throughout the country adopted minority and women business programs for public contracting in the 1970s and 1980s. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to have MBE programs or any other programs benefitting a group based on race. Legal restrictions also apply to gender-conscious programs.
The **Croson decision**. The 1989 U.S. Supreme Court decision in City of *Richmond v. J.A. Croson Company* held there are only certain limited permissible reasons for a local government to have a race-conscious program, and set specific conditions for such programs:

1. A state or local government must establish and thoroughly examine evidence to determine whether there is a **compelling governmental interest** in remedying specific past identified discrimination or its present effects; and

2. A state or local government must also ensure that any program adopted is **narrowly tailored** to achieve the goal of remedying the identified discrimination.

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

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

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

**Intermediate scrutiny for gender-based programs.** Some federal courts of appeal have held programs for women-owned businesses to an intermediate scrutiny standard of legal review. This standard has similar components to strict scrutiny, but is more easily met.

2. **Other targeted business programs.** Even if a targeted business programs does not consider race or gender, it can still be subject to legal challenge. Such programs are much more easily defended by the enacting jurisdiction, however. The state or local government need only show that it has a “rational basis” for such a program.

**Small business programs.** State and local governments not meeting the standard for defensible MBE programs can still enact small business assistance programs as long as race or gender is not considered in the eligibility for the program or as a factor in the award of contracts.

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Programs based on economic disadvantage, physical disability or veteran status. As with small business programs, a state or local government can face legal challenges concerning programs for firms located in economically disadvantaged areas, businesses owned by persons with disabilities, and companies owned by veterans. If these programs do not take race or gender into consideration, they can be reasonably expected to only be subject to the rational basis test for defensibility.

3. Programs pertaining to federally-funded contracts. The State of Minnesota, metropolitan agencies and local governments in Minnesota also follow federal requirements to apply MBE/WBE or DBE programs for certain federally-funded contracts. Analysis of U.S. Department of Transportation-funded contracts, for which the Federal Disadvantaged Business Enterprise (DBE) Program typically applies, is not part of the 2017 Minnesota Joint Disparity Study.
APPENDIX A.
Definition of Terms (to be augmented in final report)

Appendix A provides explanations and definitions useful to understanding the 2017 Minnesota Joint Disparity Study. The following definitions are only relevant in the context of this report.

**A&E.** “A&E” refers to architecture and engineering (i.e., “A&E contracts”).

**Anecdotal evidence.** Anecdotal evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee’s or participant’s perspective.

**Availability analysis.** The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing and able to perform specific types of construction, professional services, goods and other services.

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms based on analysis of the specific type, location, size and timing of each contract and subcontract and the relative number of minority- and women-owned firms available for that work.

**Business.** A business is a for-profit enterprise, including all of its establishments (synonymous with “firm” and “company”).

**Business establishment.** A business establishment (or simply, “establishment”) is a place of business with an address and working phone number. One business can have many business establishments.

**Business listing.** A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a “listing” until the study team determines it to be an actual business establishment with a working phone number.

**Certified MBE or WBE.** A firm certified as a minority- or woman-owned business. Without the word “certified” in front of “MBE” or “WBE,” Keen Independent is referring to a minority- or woman-owned firm that might or might not be certified as such.


**Contract.** A contract is a legally binding agreement between the seller of goods or services and a buyer.
**Contract element.** A contract element is either a prime contract or subcontract that the study team included in its analyses.

**Consultant.** A consultant is a business performing professional services contracts.

**Contractor.** A contractor is a business performing construction contracts.

**Controlled.** Controlled means exercising management and executive authority for a business.

**Central CERT Certification Program (CERT)** The Central Certification (CERT) Program includes certification for minority-owned businesses (MBEs), women-owned businesses (WBEs) and small businesses (SBEs). Hennepin County, the City of Saint Paul and Ramsey County operate programs that rely on CERT certification. The City of Saint Paul is the lead certification agency for CERT.

**Disadvantaged Business Enterprise (DBE).** A “DBE” is a firm certified as such. A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26) can be certified as a DBE. Members of certain racial and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of social and economic disadvantage. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of $1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a non-minority male may also be certified as a DBE on a case-by-case basis if the enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

**Disparity.** A disparity is an inequality, difference, or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial or ethnic group and an outcome for non-minorities may constitute a disparity.

**Disparity analysis.** A disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a “disparity” between the utilization and availability of minority- and women-owned businesses is one tool used to examine whether there is evidence consistent with discrimination against such businesses.

**Disparity index.** A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity” or utilization “on par” with availability. Disparity index figures closer to 0 indicate larger
disparities between utilization and availability. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

**Dun & Bradstreet (D&B).** D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). Hoover’s is the D&B company that provides these lists. Obtaining a DUNS number and being listed by D&B is free to listed companies; it does not require companies to pay to be listed in its database.

**Economically Disadvantaged Area.** The Minnesota Department of Administration defines an Economically Disadvantaged Area as labor surplus areas, as designated by the federal government, and low income counties in Minnesota.

**Economically Disadvantaged Small Business (EDSB).** To be certified as an EDSB, the business must be located (or the owner must reside) in an Economically Disadvantaged Area in Minnesota.

**Employer firms.** Employer firms are firms with paid employees other than the business owner and family members.

**Enterprise.** An enterprise is an economic unit that is a for-profit business or business establishment, not-for-profit organization or public sector organization.

**Establishment.** See “business establishment.”

**Federal Aviation Administration.** The FAA is an agency of the United States Department of Transportation that regulates American civil aviation and provides funds for the construction and operation of airports.


**Federal Highway Administration (FHWA).** The FHWA is an agency of the United States Department of Transportation that works with state and local governments to construct, preserve, and improve the National Highway System, other roads eligible for federal aid, and certain roads on federal and tribal lands.

**Federal Transit Administration (FTA).** The FTA is an agency of the United States Department of Transportation that administers federal funding to support local public transportation systems including buses, subways, light rail and passenger ferry boats.

**Firm.** See “business.”

**Federally-funded contract.** A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with U.S. Department of Transportation, U.S. Environmental Protection Agency, U.S. Department of Housing and Urban Development or other federal financial assistance, including loans.
**Industry.** An industry is a broad classification for businesses providing related construction, goods or services.

**Local agency.** A local agency is a city, county, town or other local government.

**Majority-owned business.** A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of “minorities” below).

**MBE.** Minority-owned business enterprise. See minority-owned business.

**Minnesota Unified Certification Program (MNUCP).** MNUCP is the group of certifying agencies for DBE certification in the state (see definition of DBE in this appendix). This group includes the City of Minneapolis, Metropolitan Airports Commission, Metropolitan Council and Minnesota Department of Transportation.

**Minorities.** Minorities are individuals who belong to one or more of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians.
- Asian-Pacific Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong.
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

**Minority-owned business (MBE).** An MBE is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, “MBE-certified businesses” are those that have been certified by a government agency as a minority-owned company.

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

Owned. Owned indicates at least 51 percent ownership of a company. For example, a “minority-owned” business is at least 51 percent owned by one or more minorities.

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for an end user.

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the project owner.

Prime contractor. A prime contractor is a firm that performs a prime contract for an end user.

Project. A project refers to state or local agency construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are programs in which businesses owned by certain minority groups or women may participate but majority-owned firms typically may not. A DBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of “race-, ethnicity-, and gender-conscious measures.” For ease of communication, the study team has truncated the term to “race- and gender-conscious measures.”

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. A broader list of examples can be found in 49 CFR Section 26.51(b).

Note that the term is more accurately “race, ethnicity, and gender-neutral” measures. However, for ease of communication, the study team has shortened the term to “race- and gender-neutral measures.”

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most participating entity contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to race- and gender-conscious programs requires disparity analyses to focus on the “relevant geographic market area.”

Remedial measure. A remedial measure, sometimes shortened to “remedy,” is a program designed to address barriers to full participation of a targeted group.
**SBA 8(a).** SBA 8(a) is a U.S. Small business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

**Small Underutilized Business Program (SUBP).** The Small Underutilized Business Program (SUBP) ordinance is enforced by the Contract Compliance Division (CCD) of the Minneapolis Department of Civil Rights. The SUBP ordinance is intended to redress discrimination in the City’s marketplace and create opportunities for Minority-owned Business Enterprises (MBEs) and Women-owned Business Enterprises (WBEs).

**Service-Disabled Veteran-Owned Small Business (SDVOSB).** A firm certified as a service-disabled veteran-owned small business according to the criteria of the federal Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program.

**Small business.** A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. “Small business” does not necessarily mean that the business is certified as such.

**Small Business Enterprise (SBE).** A firm certified as a small business according to the size criteria of the certifying agency.

**Small Business Administration (SBA).** The SBA refers to the United States Small Business Administration, which is an independent agency of the United States government that assists small businesses.

**State- or locally-funded contract.** A state- or locally-funded contract is any contract or project that is entirely funded with State of Minnesota, local government or other non-federal funds.

**Statistically significant difference.** A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

**Subconsultant.** A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant’s contract for a customer such as MnDOT.

**Subcontract.** A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of the prime contractor's contract for a customer such as MnDOT.

**Subcontract goals program.** A program in which a public agency sets a percent goal for participation of DBEs, MBE/WBEs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.
**Subcontractor.** A subcontractor is a construction firm that performs services for a prime contractor as part of a larger project.

**Subrecipient.** A subrecipient is a local agency receiving financial assistance passed through another agency such as MnDOT.

**Supplier.** A supplier is a firm that sells supplies to a prime contractor as part of a larger project or sells supplies directly to an end user.

**Targeted Group/Economically Disadvantaged/Veteran Owned (TG/ED/VO) Small Business Procurement Program.** The Minnesota Department of Administration operates a TG/ED/VO Small Business Procurement Program. Once certified, Targeted Group, Economically Disadvantaged and Veteran-Owned vendors are added to the state’s vendor list, and are listed in the Directory of Certified Targeted Group, Economically Disadvantaged and Veteran-Owned Vendors. They receive certain price preferences when bidding on State of Minnesota procurements.

**Targeted Group Small Business (TGSB).** To be certified as a TGSB, the business must be at least 51 percent owned by a woman, racial minority or person with a substantial physical ability. The business must also be operated and controlled on a day-to-day as well as long-term basis by the qualifying owner.

**United States Environmental Protection Agency (EPA).** EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA has certain requirements regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-funded contracts for construction, equipment, services and supplies.

**United States Department of Housing and Urban Development (HUD).** HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project residents in those contracts.

**United States Department of Transportation (USDOT).** USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

**Utilization.** Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (for example, DBEs).

**Veteran-owned Small Business (VOSB).** The business must be at least 51 percent owned by a veteran or service-disabled veteran as determined by the Minnesota Department of Veterans Affairs. In addition, the business must be operated and controlled on a day-to-day as well as long-term basis by the qualifying owner (see definition of Service-Disabled Veteran-Owned Small Business in this appendix).
**WBE.** Woman-owned business enterprise. See women-owned business.

**Women-owned business (WBE).** A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a “WBE-certified businesses” is one certified as a woman-owned firm by a public agency.
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Legal Framework And Analysis
Prepared By Holland & Knight LLP
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APPENDIX B.
Legal Framework and Analysis

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program, which DBE Program recently was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act), and the implementation of the Federal DBE Program by local and state governments. The appendix provides a summary of the legal framework for the disparity study as applicable to: State of Minnesota; Minnesota Department of Transportation; Metropolitan Council of the Twin Cities; Minneapolis Saint Paul Metropolitan Airports Commission; Metropolitan Mosquito Control District, St. Paul, Minnesota; Minnesota State Colleges and Universities; City of St. Paul, Minnesota; City of Minneapolis, Minnesota; and Hennepin County, Minnesota (“Minnesota agencies”).

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied Croson and Adarand I to the present and that are applicable to this disparity study, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below recent Eighth Circuit Court of Appeals decisions that are instructive to the Minnesota agencies and the study, including the recent decisions in Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads, and Geyer Signal, Inc. v. Minnesota DOT. 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 Minnesota agencies and the study.

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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 federal courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

B. U.S. Supreme Court Cases


In Croson, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.17 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.

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7 Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187, (9th Cir. 2013).
12 Northern Contracting, Inc. v. Illinois DOT, 473 F.3d 715 (7th Cir. 2007).
13 228 F.3d 1147 (10th Cir. 2000) (“Adarand VII”).
The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.” The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors. The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

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

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

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

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

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18 488 U.S. at 500, 510.
19 488 U.S. at 480, 505.
20 488 U.S. at 507-510.
23 488 U.S. at 502.
24 488 U.S. at 502.
25 Id.
26 Id.
The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”

“Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”

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


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

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

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27 488 U.S. at 509.
28 Id.
29 488 U.S. at 492.
C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs

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

1. Strict scrutiny analysis

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

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

a. The Compelling Governmental Interest Requirement.

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

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

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

31 Id.

32 Id.

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

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

35 Sherbrooke Turf, 345 F.3d at 970, (citing Adarand VII, 228 F.3d at 1167 – 76); Western States Paving, 407 F.3d at 992-93; Geyer Signal, Inc., 2014 WL 1309092.
outside studies of statistical and anecdotal evidence (e.g., disparity studies). 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.

- **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.

- **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.

- **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.

- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program. Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender
discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.\textsuperscript{42}

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.\textsuperscript{43} If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.\textsuperscript{44} The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”\textsuperscript{45}

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.\textsuperscript{46} It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.\textsuperscript{47} In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”\textsuperscript{48}

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”\textsuperscript{49} “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.’”\textsuperscript{50} Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.\textsuperscript{51}

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.\textsuperscript{52} Once the governmental entity has shown acceptable proof of a compelling interest and remediating past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears

\textsuperscript{42} Id. at § 1101(b)(1).
\textsuperscript{44} *Adarand VII*, 228 F.3d at 1166; *Eng’s Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.
\textsuperscript{45} See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’s Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.
\textsuperscript{46} *Id.; Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.
\textsuperscript{48} *Croson*, 488 U.S. at 500; see e.g., *Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc.*, 2014 WL 1309092.
\textsuperscript{49} *Midwest Fence*, 2015 WL. 1396376 at *7 (N.D. Ill. 2015), appeal pending; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).
\textsuperscript{50} *Midwest Fence*, 2015 WL. 1396376 at *7, quoting *Concrete Works;* 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 500); see also, *Sherbrooke Turf*, 345 F.3d at 973.
\textsuperscript{51} *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *Midwest Fence*, 2015 WL. 1396376 at *7, appeal pending.
\textsuperscript{52} *Adarand Constructors, Inc. v. Pena* (“*Adarand III*”), 515 U.S. 200 at 235 (1995); See, e.g., *Majeske v. City of Chicago*, 218 F.3d at 820.
the ultimate burden of proving that the plan is unconstitutional. Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.

To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence. This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. Conjecture and unsupported criticisms of the government’s methodology are insufficient. The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.

In *Geyer Signal, Inc. v. Minnesota DOT*, the district court in Minnesota stated 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.'” The court pointed out in rejecting the plaintiff's disagreement with the use and interpretation of various statistical methods, that rebuttal requires presentation of affirmative evidence upon which the court could conclude that no discrimination exists in Minnesota’s public contracting. The court also found that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”

The courts have noted that “there is no 'precise mathematical formula to assess the quantum of evidence that rises to the Croson ‘strong basis in evidence’ benchmark.’” It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of

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54 Id.; *Adarand VII*, 228 F.3d at 1166.
56 Id. See e.g., *Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa. Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).
57 Id.; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.
58 *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.
60 Id.
61 Id.; *Advanced Constructors, Inc.*, 228 F.3d at 1166.
63 *H.B. Rowe Co.*, 615 F.3d at 241; see e.g., *Concrete Works*, 321 F.3d at 958.
such subcontractors by the governmental entity or its prime contractors. It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.

**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). “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.”

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

Other considerations regarding statistical evidence include:

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

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64 *Croson*, 488 U.S. 509, see e.g., H.B. Rowe, 615 F.3d at 241.
65 *H.B. Rowe*, 615 F.3d at 241, 1 *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see e.g., AGC, *San Diego v. Caltrans*, 713 F.3d at 1196.
66 *Croson*, 488 U.S. at 509; AGC, SDC v. Caltrans, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 1191; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *Geyer Signal, Inc.*, 2014 WL 1309092.
68 *Croson*, 488 U.S. at 509; see AGC, SDC v. Caltrans, 713 F.3d at 1195-1197; *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Cal., Inc. v. City and County of Denver* ("Concrete Works II"), 321 F.3d 950, 959 (10th Cir. 2003); *Drahlik II*, 214 F.3d at 734-736.
69 *Croson*, 488 U.S. at 509; AGC, SDC v. Caltrans, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.
70 *Western States Paving*, 407 F.3d at 1001.
72 *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 603 (3d Cir. 1996); see e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination … may vary.").
73 Id.
Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.  

Disparity index. An important component of statistical evidence is the “disparity index.” 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.”

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.

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

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;

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

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

76 See, e.g., Rico v. DeStefano, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); AGC, SDC v. Caltrans, 713 F.3d at 1191; H.B. Rowe Co., 615 F.3d 233, 243-244; Rahe, 545 F.3d at 1041; Eng’g Contractors Ass’n, 122 F.3d at 914, 923; Concrete Works I, 36 F.3d at 1524.

77 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.

78 See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1192, 1196-1198; Eng’g Contractors Ass’n, 122 F.3d at 924-25; Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991); O’Donnel Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992).

79 See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1192, 1196-1198; Eng’g Contractors Ass’n, 122 F.3d at 925-26; Concrete Works, 36 F.3d at 1520; Contractors Ass’n, 6 F.3d at 1003; Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991).

80 Concrete Works I, 36 F.3d at 1520.
Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and

Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.\textsuperscript{81}

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.\textsuperscript{82}

b. The Narrow Tailoring Requirement.

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.\textsuperscript{83}

The Eighth Circuit in Sherbrooke Turf specified the following elements of narrow tailoring as follows: “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”.\textsuperscript{84}

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated local and state

\textsuperscript{81} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; Northern Contracting, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), affirmed, 473 F.3d 715 (7th Cir. 2007); e.g., Concrete Works, 321 F.3d at 989; Adarand VII, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see Eng’s Contractors Ass’n, 122 F.3d at 924; Concrete Works, 36 F.3d at 1520; Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir. 1990); Dynalantic, 885 F.Supp.2d 237; Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

\textsuperscript{82} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; Concrete Works II, 321 F.3d at 989; Eng’s Contractors Ass’n, 122 F.3d at 924-26; Cone Corp., 908 F.2d at 915; Mountain West Holding, 2014 WL 668734, appeal pending; Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), aff’d 473 F.3d 715 (7th Cir. 2007).

\textsuperscript{83} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; Rathb, 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’s Contractors Ass’n, 122 F.3d at 927 (internal quotations and citations omitted) see also, Geyer Signal, Inc., 2014 WL 1309092.

\textsuperscript{84} Sherbrooke Turf, 345 F.3d at 971.
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.\(^{85}\)

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting’.”\(^{86}\)

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.”\(^{87}\) Courts, including the Eighth Circuit, 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.”\(^{88}\)

Similarly, the Sixth Circuit Court of Appeals in Associated Gen. Contractors v. Drabik (“Drabik II”), stated: “\textit{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.’”\(^{89}\)

The Supreme Court in Parents Involved in Community Schools v. Seattle School District\(^{90}\) 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

\(^{85}\) See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; Western States Paving, 407 F.3d at 998; Sherbrooke Turf, 345 F.3d at 971; Adarand VII, 228 F.3d at 1181; 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.

\(^{86}\) Sherbrooke Turf, Inc., 345 F.3d at 972, quoting \textit{Adarand Constrs., Inc.}, 515 U.S. at 237-38.

\(^{87}\) End’s Contractors Ass’n, 122 F.3d at 926 (internal citations omitted); \textit{see also Virdi v. DeKalb County School District}, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); \textit{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).


racial classifications—were rejected with little or no consideration.”91 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.92 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.93

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.”94

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;

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92 See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand V II*, 228 F.3d at 1179; *Eng’s Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.* , 941 F.2d at 923.

93 See *Croson*, 488 U.S. at 507; *Druhik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also *Eng’s Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fd. App. At 268.

94 *Croson*, 488 U.S. at 509-510.
■ 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.  

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.”

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. For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility; (2) good faith efforts provisions; (3) waiver provisions; (4) a rational basis for goals; (5) graduation provisions; (6) remedies only for groups for which there were findings of discrimination; (7) sunset provisions; and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.

As cited and discussed above, the significant recent case in this area regarding MBE/WBE/DBE programs in the Eighth Circuit is the decision in Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v.

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95 See e.g., Croson, 488 U.S. at 509-510; N. Contracting, 473 F.3d at 724; Adarand V. II, 228 F.3d 1179; Eng’g Contractors Ass’n, 122 F.3d at 927-29; 49 CFR § 26.51(b).
97 See, Sherbrooke Turf, 345 F.3d at 971-972; Eng’g Contractors Ass’n, 122 F.3d at 927.
98 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).
99 Sherbrooke Turf, 345 F.3d at 971-972; CAEP I, 6 F.3d at 1019; Cone Corp., 908 F.2d at 917.
100 CAEP I, 6 F.3d at 1009; AGC of Ca., 950 F.2d at 1417; Cone Corp., 908 F.2d at 917.
101 Id.; Sherbrooke Turf, 345 F.3d at 971-973.
102 Id.
103 AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; Western States Paving, 407 F.3d at 998; ; Sherbrooke Turf, 2001 WL 150284 (unpublished opinion), aff’d 345 F.3d 964 (8th Cir 2003); AGC of Ca., 950 F.2d at 1417.
104 Sherbrooke Turf, 345 F.3d at 971-972; Peightal, 26 F.3d at 1559.
105 Coral Constr., 941 F.2d at 925.
Nebraska Department of Roads,\textsuperscript{106} which is summarized in Section D below. It is instructive to review the Eighth Circuit analysis in \textit{Sherbrooke Turf}, including its findings, related to the Federal DBE Program and its implementation by the Minnesota DOT.

The Eighth Circuit noted “the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal.”\textsuperscript{107} In addition, the Eighth Circuit pointed out the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000 cannot qualify as economically disadvantaged.\textsuperscript{108} The Eighth Circuit also mentioned the limits in the DBE program, stating that “the DBE program contains built-in durational limits,” in that a “State may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years.”\textsuperscript{109}

The Eighth Circuit also found durational limits based on the fact “TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”\textsuperscript{110} The Eighth Circuit noted courts have found other measures for limiting program duration: such as required termination if goals have been met,\textsuperscript{111} decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.

The Eighth Circuit approved the goal-setting process for the Federal DBE Program.\textsuperscript{112} The Federal DBE regulations require that goals be based on one of several methods for measuring DBE availability.\textsuperscript{113} The Eighth Circuit found that the “DOT has tied the goals for DBE participation to the relevant labor markets,” insofar as the “regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination.”\textsuperscript{114}

The Eighth Circuit stated that goal setting may be inexact, but the process requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets.\textsuperscript{115} The Eighth Circuit noted the DBE regulations use built-in mechanisms to ensure that DBE goals are not set excessively high relative to DBE availability, including that DBE contract goals are not to be used if the overall goal has been met for two consecutive years by race-neutral means, and must be reduced if overall goals have been exceeded with race-conscious means for two consecutive years.\textsuperscript{116} The Eighth Circuit held these provisions to be narrowly tailored, noting they were implemented in

\textsuperscript{106} 345 F.3d 964 (8th Cir 2003).
\textsuperscript{107} \textit{Sherbrooke Turf, Inc.}, 345 F. 3d at 972.
\textsuperscript{108} Id. at 972, citing, 49 C.F.R. § 26.67(b).
\textsuperscript{109} Id. at 972, citing, 49 C.F.R. § 26.51(f)(3).
\textsuperscript{110} Id., quoting, Grutter, 123 S. Ct. at 2346.
\textsuperscript{111} \textit{Sherbrooke Turf, Inc.}, 345 F.3d at 972.
\textsuperscript{112} \textit{Sherbrooke Turf, Inc.}, 345 F.3d at 971-973; see \textit{W. States Paving Co.}, 407 F.3d at 994-995; \textit{Adarand Constrs. Inc.}, 228 F.3d at 1181-1182.
\textsuperscript{114} \textit{Sherbrooke Turf, Inc.}, at 972, 345 F, 3d citing, 49 C. F. R. § 26.45(c)-(d) (Steps 1 and 2); see also, Geyer Signal, Inc., 2014 WL 1309092.
\textsuperscript{115} Id. at 972, quoting, Crown, 488 U.S. at 507.
\textsuperscript{116} Id. at 972.
Minnesota and Nebraska based in part on local disparity studies that provide a basis to calculate the applicable goals.  

It also is instructive to point out the court’s rejection in *Geyer Signal, Inc. v. Minnesota DOT* of the challenges to the aspirational goals MnDOT set for DBE performance.  

The court found insufficient challenges raised by the plaintiffs based on the fact 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.  

Because these challenges identified only a different interpretation of the data and did not establish that MnDOT was unreasonable in relying on the outcome of disparity studies, the court held plaintiffs failed to demonstrate a material issue of fact related to MnDOT’s narrow tailoring as it relates to goal setting.  

The Eighth Circuit found that narrow tailoring also requires minimizing the burden of the MBE/WBE/DBE program on third parties. The Eighth Circuit noted Congress and U.S. DOT have taken steps to minimize the race based nature of the DBE program by directing its benefits at small businesses owned and controlled by the socially and economically disadvantaged.  

### 2. Intermediate scrutiny analysis  

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.  

The district court in *Geyer Signal, Inc. v. Minnesota DOT* recognized the intermediate scrutiny standard, stating that because the Federal DBE Program contains a gender conscious provision, it is a classification that would be subject to intermediate scrutiny.  

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

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

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

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is  

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117 Id. at 973-974.  
118 2014 WL 1309092.  
119 Id.  
120 Id.  
121 See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”); *Geyer Signal, Inc.*, 2014 WL 1309092.  
122 2014 W.L. 1309092 at footnote 4, citations omitted.  
123 Id. at 973-974.  
124 Id.
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.\textsuperscript{125}

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.\textsuperscript{126}

Certain courts have held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”\textsuperscript{127}

3. Rational basis scrutiny analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.\textsuperscript{128} 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.”\textsuperscript{129} It should be noted, however, the Minnesota Supreme Court has, at least in some circumstances, applied what it called a “higher standard” when applying rational basis review under the Minnesota Constitution.\textsuperscript{130} The Minnesota rational basis test has three requirements:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.\textsuperscript{131}

\textsuperscript{125} 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.

\textsuperscript{126} Coral Constr. Co., 941 F.2d at 931-932; See Eng’g Contractors Ass’n, 122 F.3d at 910.

\textsuperscript{127} 122 F.3d at 929 (internal citations omitted.)

\textsuperscript{128} Gluba ex rel. Gluba v. Bitzan & Obran Masonry, 735 N.W.2d 713, 719 (Minn. 2007); 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.”)

\textsuperscript{129} Kolton v. Cnty. of Anoka, 645 N.W.2d 403, 411 (Minn. 2002).

\textsuperscript{130} Scott v. Minneapolis Police Relief Ass’n, 615 N.W.2d 66, 74 (Minn. 2000) (noting that one test is the test articulated by federal courts and the other is “often characterized as the Minnesota rational basis test”).

The Minnesota Supreme Court has stated: “The key distinction between the federal and Minnesota tests is that under the Minnesota test ‘we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.’”132 The Minnesota intermediate appellate court has previously held, and the Minnesota Supreme Court affirmed, that Minnesota’s rational-basis test “applies when analyzing any case under the equal protection clause of the Minnesota Constitution.”133

More recently in Gluba, the Minnesota Supreme Court “declined to infer from the language or structure of the Minnesota rational-basis test that a higher standard than the federal standard applies to matters concerning the regulation of economic activity and the distribution of economic benefits.”134 In Gluba, the Minnesota Supreme Court, in determining whether a challenged provision in the Minnesota Workers’ Compensation Act violated the Equal Protection Clause of the Minnesota Constitution, “concluded that the analysis of the challenged provision under the second step of the Minnesota rational-basis test would focus on whether the legislature could reasonably have believed in any facts that would support the connection between the statutory classification and the purpose of the statute.”135

Thus, there is authority that when applying rational basis review to matters concerning the regulation of economic activity, the Minnesota Supreme Court may apply the federal standard of review. Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”136

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) in a procurement under the Federal Acquisition Regulations (“FAR”)137.

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.”138

133 Mitchell v. Steffen, 487 N.W.2d 896, 904 n.2 (Minn. App. 1992), aff’d, 504 N.W.2d 198 (Minn. 1993).
135 Id.
136 Chance Mgmt., Inc. v. S. Dakota, 97 F.3d 1107, 1114 (8th Cir. 1996); see also Lawrence v. Texas, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.”) (internal citations and quotations omitted); O’Connor, J., concurring); Gallagher v. City of Clayton, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).
137 2012 WI. 5939228 (Fed. Cl. 2012).
138 Id.
The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational. The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors . . .” Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals. 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 . . .”

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

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


- Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015). Dunnet Bay submitted a Petition for a Writ of Certiorari in January 2016 to the U.S. Supreme Court, which is pending. Docket No. 15-906 (See Section F below).

- Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), appeal pending in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section F below.)


It is instructive to note the recent decision in Rathe Development, Inc. v. U.S. Department of Defense and Small Business Administration, which was affirmed on other grounds, by the United States Court of Appeals, District of Columbia Circuit, on September 9, 2016.

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139 Id.
140 Id.
141 Id.
142 Id.
144 2016 WL 4719049.
Plaintiff *Rothe* Development, Inc. filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) challenging the constitutionality of the Section 8(a) Program on its face. The Constitutional challenge is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*. DynaLantic’s court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional.

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

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

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

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

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

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

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

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145 Id.
147 2016 WL 4719049 (September 9, 2016)
149 Id.
150 2016 WL 4719049 at **1-2.
151 Id.
D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Eighth Circuit Court of Appeals


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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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 benchmarks or levels of participation for the targeted minority 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.


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-Intervenors’ Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in
this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in
this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss,
or in the alternative for summary judgment, arguing that the DBE Program on its face and as
implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and
its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the
constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal
Defendants and the State defendants’ motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a
race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at
*10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1)
treats the construction industry as monolithic, leading to an overconcentration of DBE participation
in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3)
sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually
perform. Id. *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it
allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided
the increase in price is not unreasonable, without defining what increased costs are
“reasonable.” Id.

Constitutional claims. The Court states that the “heart of plaintiffs’ claims is that the DBE Program
and MnDOT’s implementation of it are unconstitutional because the impact of curing discrimination
in the construction industry is overconcentrated in particular sub-categories of work.” Id. at *11. The
Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they “simply
cannot perform the vast majority of the types of work required for federally-funded MnDOT
projects because they lack the financial resources and equipment necessary to conduct such work. Id.

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such
as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are
spread out over the entire contract. Id. Plaintiffs asserted that prime contractors are forced to
disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of
work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of
non-DBEs in MnDOT contracting have essentially no DBE competition. Id.

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any
DBE goals are only being met through a few areas of work on construction projects, which burden
non-DBEs in those sectors and do not alleviate any problems in other sectors. Id. at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. Id. Plaintiffs allege that the
DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where
DBE goals are met disproportionately in areas of work that require little overhead and capital. Id. at
11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires
prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs,
provided the increased cost is “reasonable” without defining a reasonable increase in cost. Id.
Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

**Strict scrutiny.** It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as-applied. *Id.* at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

**Facial challenge based on overconcentration.** The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

**Compelling governmental interest.** The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remedying 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.

**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. \textit{Id.} If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. \textit{Id.}

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. \textit{Id.} Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. \textit{Id.} Also, the Court, states that recipients may obtain waivers of the DBE Program’s provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. \textit{Id.}

The Court also rejects plaintiffs’ claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into “group-specific goals”, but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. \textit{Id.} at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. \textit{Id.} at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient’s ability to tailor specific contract goals to combat overconcentration. \textit{Id.} at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. \textit{Id.} at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. \textit{Id.} at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs’ facial challenge to the Program fails, and granted the Federal Defendants’ motion for summary judgment. \textit{Id.}

\textbf{C. Facial challenged based on vagueness.} The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. \textit{Id.} at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. \textit{Id.}

The Court thus granted Federal Defendants’ motion for summary judgment with respect to plaintiffs’ facial claim for vagueness based on the allegation that the Federal DBE Program does not define “reasonable” for purposes of when a prime contractor is entitled to reject a DBEs’ bid on the basis of price alone. \textit{Id.}
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. \textit{Id.} at *17.

**Alleged failure to find evidence of discrimination.** The Court held that a state’s implementation of the Federal DBE Program must be narrowly tailored. \textit{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.” \textit{Id.}, quoting \textit{Sherbrook Turf, Inc.} at 973.

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. \textit{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.” \textit{Id.} at *18, quoting \textit{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. \textit{Id.} at *18.

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that 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. \textit{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. \textit{Id.}

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. \textit{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. \textit{Id.} at *18, quoting \textit{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 \textit{Sherbrooke Turf}, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. \textit{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. \textit{Id.} at *18. Accordingly, the Court granted the State defendants’ motion for summary judgment with respect to this claim.
Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. Id. at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. Id. Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. Id. But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. Id. Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. Id. Thus, the Court only considered plaintiffs’ challenges to the 2013–2015 goals. Id.

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT’s finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. Id. at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants’ studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT’s narrow tailoring as it relates to goal setting. Id.

Alleged overconcentration in the traffic control market. Plaintiffs’ final argument was that MnDOT’s implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. Id. at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs’ work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. Id. After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs’ type of work.

Plaintiffs’ expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. Id. at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business’ self-assessment of what industry group they fall into and what other businesses are similar. Id.

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. Id. at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. Id.

Because plaintiffs did not show that MnDOT’s reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. Id. at *20. Therefore, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

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.


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.
5. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff’d 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

E. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal


The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontracts 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. \textit{Id.} at 247. The Court pointed out that the Court in \textit{Rotie 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. \textit{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.” \textit{Id.} at 248, \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} at 248. The Court found that interview and focus-group responses echoed and underscored these reports. \textit{Id.}

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid
subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. Id. at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, quoting Concrete Works, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. Id. at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. Id. at 249. It was noted that the samples of the minority groups were randomly selected. Id.

The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. Id. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. Id. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. Id. at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. Id.

Thus, the Court held the State’s evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State’s anecdotal evidence of discrimination against these two groups sufficiently supplemented the State’s statistical showing. Id. The survey in the study exposed an informal, racially
exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

**Narrowly tailored.** The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

**Neutral measures.** The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [] … every conceivable race-neutral alternative.” 615 F.3d 233 at 252 quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

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

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

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

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

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

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

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

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

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

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

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

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

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

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government’s non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as “under-inclusive” (i.e., those that exclude persons from a particular racial classification) are subject to a “rational basis” review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. (“Jana Rock”) and the “son of a Spanish mother whose parents were born in Spain,” challenged the constitutionality of the State of New York’s definition of “Hispanic” under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, “Hispanic Americans” are defined as “persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.” Id. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise (“DBE”) under the federal regulations. Id.

However, unlike the federal regulations, the State of New York’s local minority-owned business program included in its definition of minorities “Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race.” The definition did not include all persons from, or descendants of persons from, Spain or Portugal. Id. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. Id. at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of “Hispanic” was fatally under-inclusive. Id. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis “allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program.” Id. at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. Id. at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. Id. at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” Id. Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. Id. at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish
and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham’s decision to hire Rapid Test’s competitor.


Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on
the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. Id.

The district court initially granted the defendants’ Motions for Summary Judgment on all of Virdi’s claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. Id. On remand, the district court granted the defendants’ Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants’ motion for a judgment as a matter of law on the remaining claims at the close of Virdi’s case. Id.

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. Id. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. Id. Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that ‘[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.’” Id. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. Id.

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. Id. The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. Id.

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. Id. The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. Id. at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. Id. Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. Id. Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. Id. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. Id. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but
because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id. at 266.* Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id. at 267.* The court first questioned whether the identified government interest was compelling. *Id. at 268.* However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id., citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id. at 268, n.8.* Accordingly, the court held the MVP was not narrowly tailored. *Id. at 268.*

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious … policies must be limited in time.” *Id., citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id. at 268.*

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id. at 269.* Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Virdi. *Id. at 270.*
5. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003),
cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice
Rehnquist, joined, dissenting from the denial of certiorari)

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

In Concrete Works the United States Court of Appeals for the Tenth Circuit held that the City and
County of Denver had a compelling interest in limiting race discrimination in the construction
industry, that the City had an important governmental interest in remediying 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. \textit{Id.} at 957-58, 959. The Court of Appeals also cited \textit{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 \textit{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. \textit{Id.} at 958, \textit{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. \textit{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.’” \textit{Id.}, \textit{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. \textit{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. \textit{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.” \textit{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.” \textit{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. \textit{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.” \textit{Id.}, \textit{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. \textit{Id.} at 962. The consulting firm hired by Denver utilized disparity indices in part. \textit{Id.} at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. \textit{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, “[s]uggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms.” Id. at 982. Similarly, the 1995 Study controlled for size, calculating, inter alia, disparity indices for firms with no paid employees which presumably are the same size.
Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver’s disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City’s position that a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver’s disparity studies because they did not control for firm specialization. The court noted the district court’s criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City’s expert, that the data he reviewed showed that MBEs were represented “widely across the different [construction] specializations.” *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver’s studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver’s studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver’s argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. *Id.* at 984.

Consistent with the court’s mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence
showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

**Summary.** The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.
To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

**Narrow tailoring.** Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver’s program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court’s conclusion with respect to the second prong of *Croson’s* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, citing *Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court’s earlier determination that Denver’s affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

**6. 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. Dreibik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-
conscious statute in advance of its enactment, and that governmental entities must identify that
discrimination with some specificity before they may use race-conscious relief. Memphis, 293 F.3d at
350-351, citing Drabik, 214 F.3d at 738.

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

7. Builders Ass’n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE
program and the evidence used to support that program. The decision emphasizes the need for any
race-conscious program to be based upon credible evidence of discrimination by the local
government against MBE/WBEs and to be narrowly tailored to remedy only that identified
discrimination.

In Builders Ass’n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001) the United
States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE
Program was unconstitutional. The court concluded there was insufficient evidence of a compelling
interest. The court held there was no credible evidence that Cook County in the award of
construction contacts discriminated against any of the groups “favored” by the Program. The court
also found that the Program was not “narrowly tailored” to remedy the wrong sought to be
redressed, in part because it was over-inclusive in the definition of minorities. The court noted the
list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive,
standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than
race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in United
States v. Virginia (“VMI”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter
standard than sex discrimination, although the court in Cook County stated the difference between the
applicable standards has become “vanishingly small.” Id. The court pointed out that the Supreme
Court said in the VMI case, that “parties who seek to defend gender-based government action must
demonstrate an ‘exceedingly persuasive’ justification for that action …” and, realistically, the law can
ask no more of race-based remedies either.” 256 F.3d at 644, quoting in part VMI, 518 U.S. at 533.
The court indicated that the Eleventh Circuit Court of Appeals in the Engineering Contract Association of
South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 910 (11th Cir. 1997) decision created the
“paradox that a public agency can provide stronger remedies for sex discrimination than for race
discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County
did not argue for a different standard for the minority and women’s “set aside programs,” the
women’s program the court determined must clear the same “hurdles” as the minority program.” 256
F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a
substantial portion of the subcontracts for minority contractors, which is inapplicable to private
projects, it is “to be expected that there would be more soliciting of these contractors on public than
on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit … to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—”that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. Id. at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. Id.

Ohio passed the MBEA in 1980. Id. at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. Id. Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. Id.

The Court noted it ruled in 1983 that the MBEA was constitutional, see Ohio Contractors Ass’n v. Keip, 713 F.2d 167 (6th Cir. 1983). Id. Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. Id. (see City of Richmond v. J.A. Croson Co. (1989) and Adarand Constructors, Inc. v. Pena (1995), citation omitted.) The Court noted that the decision in Keip was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to Croson. Id. at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. Id. at 734-735, citing Croson, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” Id. at 735.
The Court said there is no question that remediying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

**Statistical evidence: compelling interest.** The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. “If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the
firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. …" *Id.* at 737, quoting *Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

**Narrow tailoring.** A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting. …” *Id.* at 737, quoting *Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.
The district court had found that the supplementation of the state’s existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court’s hearing. Id. at 738. The Court stated that under Croson, the state must have had sufficient evidentiary justification for a racially-conscious statute in advance of its passage. Id. The Court said that Croson required governmental entities must identify that discrimination with some specificity before they may use race-conscious relief. Id. at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. Id. at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. Id. at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not reconcilable” with the Ohio Supreme Court’s decision in Ritchie Produce, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).


This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City’s enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City’s Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City’s construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

10. 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.

11. **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 Enzley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying Croson). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” Id. (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in United States v. Virginia, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. Id. at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. Id. at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. Id. at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (i.e., evidence based on data related to years following the initial enactment of the BBE program). Id. However, “such evidence carries with it the hazard that the
program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” Id. at 912. A district court should not “speculate about what the data might have shown had the BBE program never been enacted.” Id.

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

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

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

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

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

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

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

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

The Eleventh Circuit then explained the burden of proof:

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

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

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

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

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

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size.” *Id.*
(internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” Id.

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. Id. The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. Id. The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (i.e., most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). Id.

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. Id. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. Id. The Eleventh Circuit held that this decision was not clearly erroneous. Id.

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

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

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

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

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

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

*Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. Id.*

The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

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

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).
The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. \textit{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. \textit{Id}.

\textbf{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). \textit{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.” \textit{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.” \textit{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). \textit{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. \textit{Id}. The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. \textit{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. \textit{Id}.

The Eleventh Circuit held, in light of \textit{Croson}, the district court need not have accepted this theory. \textit{Id}. The Eleventh Circuit quoted \textit{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.” \textit{Id}, quoting \textit{Croson}, 488 U.S. at 503. Following the Supreme Court in \textit{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.” \textit{Id}, quoting \textit{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. \textit{Id}. at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. \textit{Id}. at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. \textit{Id}.
**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *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 “completely 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.

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

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

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

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

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson.* The court stated that according to the U.S. Supreme Court in *Croson,* a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, quoting *Coral Construction Company v. King County,* 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 quoting *Coral Construction,* 941 F.2d at 916.
The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. \textit{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. \textit{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.” \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} The Ninth Circuit stated than in its decision in \textit{Coral Construction}, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. \textit{Id.} at 1414, citing \textit{Coral Construction}, 941 F.2d at 918 and \textit{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. \textit{Id.} at 1414, quoting \textit{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. \textit{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. \textit{Id.} The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” \textit{Id.} at 1415 quoting \textit{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. \textit{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. \textit{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.
13. *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**


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.


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, 53.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. Id. at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. Id. at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston’s construction contracting over the last five and one-half years. Id. at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. Id. at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. Id. at 53. Plaintiff’s criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. Id. at 53-54. The MJ rejected Plaintiff’s proposed expert’s suggestion that analysis of bidder data is a better way to identify MWBEs. Id. at 54. The MJ noted that Kossman’s proposed expert presented no comparative evidence based on bidder data, and the
MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

**Disparity analysis.** The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program’s utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston’s *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston’s construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston’s remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston’s consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff’s argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that
contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston’s awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston’s race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*
The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.


In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* (“*Rowe*”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT’s MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute...
as revised was approved in 2006, which modified the previous MBE statute by eliminating the
10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with
the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff
alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied.
589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on
several motions, including the defendants’ Motion to Dismiss or for Partial Summary Judgment,
defendants’ Motion to Dismiss the Claim for Mootness and plaintiff’s Motion for Summary
Judgment. The court in its October 2007 Order granted in part and denied in part defendants’
Motion to Dismiss or for partial summary judgment; denied defendants’ Motion to Dismiss the
Claim for Mootness; and dismissed without prejudice plaintiff’s Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from
obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award
against any of the individual defendants in their official capacities. The court ruled that plaintiff’s
claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT
was dismissed from the case as a defendant. Plaintiff’s claims for interest, actual damages,
compensatory damages and punitive damages against the individual defendants sued in their official
capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held
that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal
law, and under the *Ex Parte Young* exception, plaintiff’s claim for declaratory and injunctive relief was
permitted to go forward as against the individual defendants who were acting in an official capacity
with the NCDOT. The court also held that the individual defendants were entitled to qualified
immunity, and therefore dismissed plaintiff’s claim for money damages against the individual

Defendants 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
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(c). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that
indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. See 615 F3d 233 (4th Cir. 2010), discussed above.


This case considered the validity of the City of Augusta’s local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. Id. at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. Id. at *6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” Id.

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. Id.

The court applied the strict scrutiny standard set forth in Croson and Engineering Contractors Association to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to Croson, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (citing to Croson), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the
Eleventh Circuit’s position that “gross statistical disparities” between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. Id. at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. Id. at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (e.g., socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. Id. at *8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” Id. The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” Id. at *9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under Adarand, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.


The decision in Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, is significant to the disparity study because it applied and followed the Engineering Contractors Association decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus Hershell Gill is instructive as to the analysis relating to architect and engineering services. The decision in Hershell Gill also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County
Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 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 then there was in contract construction.” Id. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. Id.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:
(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.


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 info USA, 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.


This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to
allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 et seq., such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” Florida A.G.C. Council, 303 F.Supp.2d at 1315, quoting Eng’g Contractors Ass’n, 122 F.3d at 928, quoting Croson, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting … [a] numerical target.’ Florida A.G.C. Council, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.


This case is instructive 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).

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 83 F. Supp. 2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.


Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F. Supp. 2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were
raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. *140 F.Supp. at 1237.*

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *140 F.Supp. 2d at 1239, citing Adarand VII, 228 F.3d 1147, 1174.*

**Compelling state interest.** The district court, following Adarand VII, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *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 “encourage[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law,
the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act’s minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.
Narrow tailoring. The district court found that even if the State’s goals could not be considered “compelling,” the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in Adarand VII identified six factors the court must consider in determining whether the MBE Act’s minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. Id. at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act’s racial preference program. Id. at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. Id. at 1243. In contrast to this “informational” program, the court noted the Tenth Circuit in Adarand VII favorably considered the federal government’s use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. Id. at 1243 citing Adarand VII, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma’s Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in Adarand VII, in the Supreme Court in the Croson decision, nor does it appear that the Program was racially neutral. Id. at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state’s goal prior to adoption of the minority bid preference provisions. Id. at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist all new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. Id. at 1243, footnote 15 citing Adarand VII.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” Id. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. Id. at 1244, footnote 16.
In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. \textit{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. \textit{Id.} Unlike the federal programs at issue in \textit{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. \textit{Id.} The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. \textit{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. \textit{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.” \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.}

The court stated that in \textit{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. \textit{Id.} at 1246. The court noted that the government submitted evidence in \textit{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. \textit{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. \textit{Id.} at 1246, citing \textit{Adarand VII}, 228 F.3d at 1181.

Unlike \textit{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. \textit{Id.} at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in \textit{Adarand v. Pena} 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. \textit{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. \textit{Id.} The court pointed out that the 5 percent preference is applicable to \textit{all} contracts awarded under the state’s Central Purchasing Act with no time limitation. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. \textit{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.


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.

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.” \textit{Id.} However, the court found that the Brimmer-Marshall Study contained no such data. \textit{Id.}

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. \textit{Id.} at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. \textit{Id.} The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. \textit{Id.}

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

\textit{Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.} \textit{Id.} The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. \textit{Id.} at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. \textit{Id.} at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. \textit{Id.} at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. \textit{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). \textit{Id.} (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted \textit{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.” \textit{Id., quoting Eng’g Contractors Ass’n}, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. \textit{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. \textit{Id.} The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. \textit{Id.} The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. \textit{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.’” \textit{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.” \textit{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. \textit{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).


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. \textit{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. \textit{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 \textit{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 \textit{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. \textit{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 \textit{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 \textit{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.

\textbf{Strict Scrutiny.} The district court held that the Supreme Court of Ohio decision in \textit{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. \textit{Id.} at 745.

2. A program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. \textit{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.” \textit{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. \textit{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. \textit{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.


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 in Other Jurisdictions

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

Recent Decisions in Federal Circuit Courts of Appeal


Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 2015 WL 4934560 at *1. It’s average annual gross receipts between 2007 and 2009 were over $52 million. Id. IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. Id. at *2. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. Id. at *3. These requests for modification are also known as “waivers.” Id.

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. Id. at *3. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. Id.

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. Id. at *3-1. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. Id.
The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at *5. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at *9, *17. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants’ motion for summary judgement and denied Dunnet Bay’s motion. *Id.* at *9. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.*. Dunnet Bay Construction Company v. Hannig, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at *31. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay’s challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in Northern Contracting, Inc. v. Illinois, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *10. (See discussion of the district court decision in Dunnet Bay below in Section E).

**Dunnet Bay lacks standing to raise an equal protection claim.** The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT’s DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at *10. Nothing in IDOT’s DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. IDOT’s DBE Program is not a “set aside program,” in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT’s DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.*
The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. Id. at *13. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. Id. This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. Id. Under IDOT’s DBE Program, all contractors are treated alike and subject to the same rules. Id.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. Id. at *14. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. Id. at 28.

The evidence established that Dunnet Bay’s bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. Id. In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. Id.

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. Id. at *15. For the three years preceding 2010, the year it bid on the project, Dunnet Bay’s average gross receipts were over $52 million. Id. Therefore, the court found Dunnet Bay’s size makes it ineligible to qualify as a DBE, regardless of the race of its owners. Id. Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay’s size. Id. Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. Id.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. Id. at *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. Id. at *16. The court concluded that Dunnet Bay’s claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state’s application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined “must be limited to the question of whether the state exceeded its authority.” Id. quoting, Northern Contracting, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay’s size. Id.

The court stated that Dunnet Bay did not establish causational or redressability. Id. at *17. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. Id. IDOT did not award the contract to anyone under the first bid and re-let the contract. Id. Therefore, Dunnet Bay suffered no injury because of the DBE Program. Id. The court also found that Dunnet Bay could not establish redressability because IDOT’s decision to re-let the contract redressed any injury. Id. at *17.
In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay’s attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at *17-18.

**Dunnet Bay did not produce sufficient evidence that IDOT’s implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority.** The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at *18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT “acted with discriminatory intent.” *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on “the federal government’s compelling interest inremedying the effects of past discrimination in the national construction market.” *Id.* at *19, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: “[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority.” *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract’s DBE participation goal at 22% without the required analysis; (2) implementing a “no-waiver” policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. *Id.* at *20. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at *20. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court’s conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 20.
The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at *20. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT’s record of granting waivers refutes any suggestion of a no-waiver policy. *Id.*

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at *21. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, 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 21-22.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at *22. The court said Dunnet Bay’s efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

**Conclusion.** The court affirmed the district court’s grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

**Petition for a Writ of Certiorari.** Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Petition is pending at the time of this report. *See* Docket No. 15-609.

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

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

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

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

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

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

**Evidence gathering and the 2007 Disparity Study.** On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

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

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

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

The Court pointed out that Washington DOT’s DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

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

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

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

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

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

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

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

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

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

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

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans’ program “adheres precisely to the narrow tailoring requirements of *Western States.*” *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime and subcontractors.” *Id.*

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

Second, the Court found that even if this requirement does apply to Caltrans’ program, narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.” *Id.* at 1199, citing *Gruetter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC’s claim that Caltrans’ program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.
Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans’ program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination in California. Id. at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). Id. at 1200.

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

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

3. 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. \textit{Id}. The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.


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 \textit{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.” \textit{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 \textit{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 \textit{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. \textit{Id}. at 1338.

Ninth Circuit Approach: \textit{Western States}. The district court analyzed the Ninth Circuit Court of Appeals approach in \textit{Western States Paving} and the Seventh Circuit approach in \textit{Milwaukee County Pavers Association v. Fiedler}, 922 F.2d 419 (7th Cir. 1991) and \textit{Northern Contracting}, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in \textit{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 \textit{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 \textit{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 \textit{Western States Paving}, 407 F.3d at 997.

In a footnote, the district court in \textit{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 \textit{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 \textit{Western States}.” 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the \textit{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 \textit{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.

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

In Northern Contracting, Inc. v. Illinois, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation’s (“IDOT”) DBE Program. Plaintiff Northern Contracting Inc. (“NCI”) was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. Id. at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. Id. at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. Id. The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. Id.

IDOT typically adopted a new DBE plan each year. Id. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. Id. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). Id. The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet’s Marketplace data. Id. This initial list was corrected for errors in the data by surveying the D&B list. Id. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. Id. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. Id. IDOT considered this, along with other data, including DBE utilization on IDOT’s “zero goal” experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). Id. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. Id.
Despite the fact the NCI forfeited the argument that IDOT’s DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. \textit{Id. at} 720. The court noted that, post-\textit{Adarand}, two other circuits have held that a state may rely on the federal government’s compelling interest in implementing a local DBE plan. \textit{Id. at} 720-21, \textit{citing Western States Paving Co., Inc. v. Washington State DOT}, 407 F.3d 983, 987 (9th Cir. 2005), \textit{cert. denied}, 126 S.Ct. 1332 (Feb. 21, 2006) and \textit{Sherbrooke Turf, Inc. v. Minnesota DOT}, 345 F.3d 964, 970 (8th Cir. 2003), \textit{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.” \textit{Id. at} 721, \textit{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. \textit{Id.} The court concluded its holding in \textit{Milwaukee} that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. \textit{Id. at} 721-22. The court noted that the Supreme Court in \textit{Adarand Constructors v. Pena}, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. \textit{Id. at} 722.

The court further clarified the \textit{Milwaukee} opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in \textit{Western States} and Eighth Circuit in \textit{Sherbrooke}. \textit{Id.} The court stated that the Ninth Circuit in \textit{Western States} misread the \textit{Milwaukee} decision in concluding that \textit{Milwaukee} did not address the situation of an as-applied challenge to a DBE program. \textit{Id. at} 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in \textit{Sherbrooke} (that the \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. \textit{Id.} NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. \textit{Id.} The court stated that while the federal regulations list several examples of methods for determining the local base figure, \textit{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.” \textit{Id. (citing 49 CFR § 26.45(c)(5))}. According to the court, the regulations make clear that “relative
availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. Id. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. Id. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. Id.

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. Id. The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. Id. According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. Id.

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. Id. at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. Id. at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. Id. According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. Id.

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. Id.


This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In Western States Paving, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). Id.

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. Id. at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. Id. The regulations require each state accepting federal
transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*
The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. Id. at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” Id. at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” Id. at 991, citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) and Adarand Constructors, Inc. v. Slater (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” Id. at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. Id. However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. Id. The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. Id. at 992-93. The court accordingly rejected plaintiff’s facial challenge. Id.

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. Id. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. Id. The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” Id. at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations … are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F.3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004). Id. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. Id. However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. Id. The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed.” Id. (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. Id. at 997.
The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. \textit{Id.} However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. \textit{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. \textit{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.” \textit{Id.} at 998. The court held that a Sixth Circuit decision to the contrary, \textit{Tennessee Asphalt Co. v. Farris}, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. \textit{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. \textit{Id.} at 998, \textit{citing Croson}, 488 U.S. at 478. The court also found that in \textit{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.” \textit{Id.} In \textit{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.’” \textit{Id.}, \textit{citing Monterey Mechanical}, 125 F.3d at 714. The court found that other courts are in accord. \textit{Id.} at 998-99, \textit{citing Builders Ass’n of Greater Chi. v. County of Cook}, 256 F.3d 642, 647 (7th Cir. 2001); \textit{Associated Gen. Contractors of Ohio, Inc. v. Drabik}, 214 F.3d 730, 737 (6th Cir. 2000); \textit{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. \textit{Id.} at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. \textit{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%). \textit{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].” \textit{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. \textit{Id.} at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. \textit{Id.} WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” \textit{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 \textit{(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. \textit{Id.}
Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra,* which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.


This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.
The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

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

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

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

**Recent District Court Decisions**


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

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

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

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality’s prime
contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing “hard proof” to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at *7. While narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court said it does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

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

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

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

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

**Facial challenge to the Federal DBE Program.** The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at *11. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*
The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id. at *11. Sixty-four of the studies had previously been presented to Congress. *Id. The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id. The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id. at *11.

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

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

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

**Federal DBE Program is narrowly tailored.** Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id. at *12. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id. The court stated that courts may also assess whether a program is “overinclusive.” *Id. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.
First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at *13. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at *13. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at *13. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

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

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

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

The court said Midwest’s primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at *14. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program’s approach. *Id.*
The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. \textit{Id.} at *14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. \textit{Id.}

The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. \textit{Id} at *14. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. \textit{Id.} at *14. The court thus granted summary judgment in favor of the Federal Defendants. \textit{Id.}

\textbf{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. \textit{Id.} The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT’s implementation of the Federal DBE Program. \textit{Id.} Following the Seventh Circuit’s decision in \textit{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. \textit{Id.} at *14, \textit{citing Northern Contracting, Inc. v. Illinois}, 473 F.3d 715 at 722 (7\textsuperscript{th} Cir. 2007). The court, \textit{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. \textit{Id.} at *14.

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. \textit{Id.} at *14. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. \textit{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. \textit{Id.} at *14. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. \textit{Id.}

\textbf{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. \textit{Id.} at *15. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. \textit{Id.} at *15. The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. \textit{Id.} at *15.

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. \textit{Id.} The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. \textit{Id.} The study applied NAICS codes to different types of contract work, assigning greater weight to
categories of work in which IDOT had expended the most money. *Id.* This resulted in a “weighted” DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

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

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

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

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

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

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

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

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

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

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

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at *17, citing *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at *17.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit
decision in *Northern Contract v. Illinois DOT*. *Id.* at *18. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

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

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

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

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

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at *19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

**Duration and flexibility.** The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at *19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that
it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. Id. at *19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. Id.

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

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

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

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

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

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. Id. at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. Id. at *21. The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. Id. The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. Id. at *21.
To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at *22. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

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

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

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

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

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at *23.

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants’ motion for summary judgment.
Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.


Factual and procedural background. In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s decision in Western States, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the
certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserted that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

**Western States Paving Co. v. Washington DOT.** The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Id.* at *2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 998.

**MDT study.** The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at *3. The Court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana’s DBE utilization after ceasing the use of contract goals.** The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL.
6686734 at *3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. In response to this decline, for fiscal years 2011-2014, the Court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MTD then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. 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. Thus, the new overall goal is to be made entirely through the use of race-neutral means.

Mountain West’s claims for relief. Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 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. Mountain West brings an as-applied challenge to Montana’s DBE program.

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, San Diego v. California DOT, 713 F.3d 1187, 1196, stated that under the two-prong test established in Western States, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. Mountain West, at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. Mountain West, at *3, citing Western States, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by Western States if, looking at the evidence in its entirety, “the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into ‘a system of racial exclusion practiced by elements of the local construction industry.’” Mountain West, at *5, quoting AGC, San Diego v. California DOT, 713 F.3d at 1197. The Court in Mountain West said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. Mountain West, at *5, citing AGC, San Diego, 713 F.3d at 1199.

The Court in Mountain West, following AGC, San Diego, concluded that a state’s implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute “an impermissible collateral attack on the facial validity of the federal Act and regulations.” Mountain West, at *5, quoting AGC, San Diego, at 1200.
Statistical evidence. The Court held that Montana’s DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana’s transportation contracting market. *Mountain West*, at *5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana’s transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana’s transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at *6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George “LaNoue” (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at *6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

Anecdotal evidence. The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana’s transportation contracting market, including evidence of a “good ole boy network.” *Id.* at *6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted “federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination.” *Mountain West*, at *6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue’s report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at *6. Contrary to Mountain West’s assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state’s DBE program must be supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana’s transportation contracting industry. *Id.* at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that “substantial statistical disparities alone would give rise to an inference of discrimination, and certainly… statistical evidence combined with anecdotal evidence passes constitutional muster.” *Mountain West* at *6, quoting *AGC, San Diego*, 713 F.3d at 1196.
Precipitous drop in utilization. The Court in *Mountain West* also found that neither Dr. LaNoue’s report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana’s transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at *6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at *6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

Conclusion and holding. In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at *7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.


In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.
Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

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

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

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

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

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. Id. at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. Id. The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. Id.
Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

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

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

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder’s good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

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

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.
**The “no-waiver” policy.** The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

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

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

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

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

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

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

**Dunnet Bay did not establish equal protection violation even if it had standing.** The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the “injury in fact” in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. Id. at *31. Dunnet Bay, the Court said, implied that but for the alleged “no-waiver” policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. Id. at *31. The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. Id. at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. Id. The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. Id. at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. Id. at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. Id. at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. Id. Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. Id. Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

**Conclusion.** The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. Id. at *32. Any other federal claims, the Court held, were foreclosed by the Northern Contracting decision because there is no evidence IDOT exceeded its authority under federal law. Id. Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.
Appeal. At the time of this report, Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision in August 2019. See above at E1. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which is pending at the time of this report.


This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. Id.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. Id. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. Id. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. Id. at *2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a pro forma effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. Id.

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana
Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court’s conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that MDT had $50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden’s favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden’s bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT’s DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE’s generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana’s highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit “has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented.” *Id., citing Associated General Contractors v. California Dept. of Transportation,* 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans’ DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).
The Court stated that particularly relevant in this case, “the Ninth Circuit held that California’s DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” Id. at 4, citing Associated General Contractors v. California DOT, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, quoting AGC v. California DOT, 713 F.3d at 1197. The Court, also quoting the decision in AGC v. California DOT, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” Id. at *4, quoting AGC v. California DOT, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the AGC v. California DOT case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. Id. at *4.

**Due Process claim.** The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest responsible bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. Id. at *5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.


This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans’ DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all
minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. Id. at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. Id.

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans’ motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans’ DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. Id. at 56.

The district court analyzed Caltrans’ implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in Western States Paving Company v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest “in ensuring that its funding is not distributed in a manner that 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.

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 *Good 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
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 citing 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.
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
Applying Western States Paving. The district court then analyzed whether the NJT program was narrowly tailored applying Western States Paving. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. Id. at 656, citing Western States Paving, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. Id. at 656. However, the court found that the plaintiffs’ argument failed as the facts in Western States Paving were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. Id. at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. Id. In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. Id.

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. Id. at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. Id. at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. Id. at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. Id. at 656, citing Sherbrook Turf, 345 F.3d at 972 (quoting Grutter v. Bollinger, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. Id. at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” Id. at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. Id. at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. Id. at 657, citing Western States Paving, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. Id. at 657, citing Western States Paving, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in Western States Paving found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. Id. at 657, citing Western States Paving, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. Id.
Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT’s DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.


Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT’s DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT’s DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT’s DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT’s disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT’s statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a “strong basis in evidence” of discrimination which justified a race- and sex-based program; NJT’s program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT’s program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments’ compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff’s argument that NJT cannot establish the need for its DBE program was a “red herring, which is unsupported.” The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states “inherit the federal governments’ compelling interest in establishing a DBE program.” *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.

Also, 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.

15. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff’d 473 F.3d 715 (7th Cir. 2007)

This decision is the district court’s order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments’ implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.


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). \textit{Id.}

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” \textit{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. \textit{Id.} The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. \textit{Id., citing} \textit{Adarand Constructors, Inc. v. Slater “Adarand VII”, 228 F.3d 1147, 1177 (10th Cir. 2000)} (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.


This case was before the district court pursuant to the Ninth Circuit’s remand order in \textit{Western States Paving Co. Washington DOT, USDOT, and FHWA, 407 F.3d 983 (9th Cir. 2005)}, \textit{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, \textit{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 \textit{Western States},” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff’s 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff’s 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that “a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a
violation of … Title VI.” The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT’s DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff’s claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff’s §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff’s race when calculating the annual utilization goal. The court held that since the policy was not “facially neutral” — and was in fact “specifically race conscious” — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT’s program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT’s Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.


This is the earlier decision in Northern Contracting, Inc., 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), see above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (i.e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in Northern Contracting, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants’ Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003) and Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (“Adarand VII”), cert. granted then dismissed as improvidently granted, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the Adarand VII and Sherbrooke Turf courts that the evidence presented to Congress is sufficient to establish a
compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government’s initial showing of the existence of a compelling interest in remedi ing the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, citing Adarand VII, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT’s implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient’s determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the Sherbrooke Turf and Adarand VII cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require “serious, good faith consideration of workable race-neutral alternatives.” 2004 WL422704 at *36, citing and quoting Sherbrooke Turf, 345 F.3d at 972, quoting Grutter v. Bollinger, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the Adarand VII and Sherbrooke Turf courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual’s personal net worth exceeds $750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror
that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the Sherbrooke Turf court’s assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners’ personal net worth exceed $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in Sherbrooke Turf, that a recipient’s implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with Sherbrooke Turf that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient’s implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT’s DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government’s compelling interest. The court, therefore, denied the contractor plaintiff’s Motion for Summary Judgment and the Illinois DOT’s Motion for Summary Judgment.


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 MBE/WBE/DBE Programs


A summary of the September 9, 2016 decision will be added in an update of Appendix B.


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 Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf, Western States Paving, Concrete Works, Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII, Sherbrooke Turf, and Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.
The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the Appendix to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the Appendix, which the court found stated that for the most part ‘the federal government does business in the same contracting markets as state and local governments.”
Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.”  *Id.* at 839, quoting 61 Fed.Reg. 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the Appendix to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id., quoting Rothe III*, 262 F.3d at 1331.
The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress’ adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only “serious, good faith consideration of workable race-neutral alternatives.” *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, quoting *Croson*, 488 U.S. at 492.
The court held that before resorting to race-conscious measures, the government must identify the
discrimination to be remedied, public or private, with some specificity, and must have a strong basis
of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, quoting
_Croson_, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of
persuading the court that it is unconstitutional, the Federal Circuit stated that the government first
bears a burden to produce strong evidence supporting the legislature’s decision to employ race-
conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the
statute must be narrowly tailored to further that interest. _Id_. The court noted that a narrow tailoring
analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-
neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the
relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on
the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial
classification. _Id_.

**Compelling interest — strong basis in evidence.** The Federal Circuit pointed out that the statistical
and anecdotal evidence relief upon by the district court in its ruling below included six disparity
studies of state or local contracting. The Federal Circuit also pointed out that the district court found
that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were
stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court
concluded that it would not rely on those three reports as evidence of a compelling interest for the
2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to _Rothe VI_, 499 F.Supp.2d at 875.
Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not
consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark
Study, and instead determined whether the evidence relied on by the district court was sufficient to
demonstrate a compelling interest. _Id_.

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant
to the compelling interest analysis because, as explained by the Supreme Court in _Croson_, “[w]here
there is a significant statistical disparity between the number of qualified minority contractors willing
and able to perform a particular service and the number of such contractors actually engaged by [a]
locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545
F.3d at 1037-1038, quoting _Croson_, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by
the Fifth Circuit Court of Appeals in _W.H. Scott Constr. Co. v. City of Jackson_, 199 F.3d 206 (5th Cir.
1999) that given _Croson’s_ emphasis on statistical evidence, other courts considering equal protection
challenges to minority-participation programs have looked to disparity indices, or to computations of
disparity percentages, in determining whether _Croson’s_ evidentiary burden is satisfied. 545 F.3d at
1038, quoting _W.H. Scott_, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or
disparity- between the number of contracts or contract dollars actually awarded minority-owned
businesses in a particular contract market, on the one hand, and the number of contracts or contract
dollars that one would expect to be awarded to minority-owned businesses given their presence in
that particular contract market, on the other hand. 545 F.3d at 1037.
Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by Rothe. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to Western States Paving v. Washington State Department of Transportation, 407 F.3d 983, 992 (9th Cir. 2005) and Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because Rothe did not point to more recent, available data. Id.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, quoting Rothe V, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. Id. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” Id. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the Dean v. City of Shreveport case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting Dean v. City of Shreveport, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — i.e., a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in Rothe V, 499 F.Supp.2d at 842; and citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.
The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of Croson and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. Id.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. Id. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting Engineering Contractors Association, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. Id. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. Id. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. Id. at 1044. The court pointed out that the studies could have accounted
for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 citing to Engineering Contractors Association, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. Id. at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. Id. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. Id. The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. Id. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. Id.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. Id. The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. Id.

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in Croson that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, citing Croson, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, quoting Concrete Works, 321 F.3d at 976-977.
In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the Croson ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, quoting W.H. Scott Constr. Co., 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.


Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of DynaLantic Corp. v. United States Department of Defense, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in DynaLantic sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See DynaLantic, 885 F.Supp.2d at 242. DynaLantic’s court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. See DynaLantic, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of DynaLantic in this Appendix below.)

The court in Rothe states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the DynaLantic case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from DynaLantic’s holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe’s motion to exclude Defendants’ expert testimony. Id. By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in Rothe agrees with the court’s reasoning in DynaLantic, and thus the court in Rothe also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff’s motion for summary judgment and grants Defendants’ cross-motion for summary judgment.
DynaLantic Corp. v. Department of Defense. The court in Rothe analyzed the DynaLantic case, and agreed with the findings, holding and conclusions of the court in DynaLantic. See 2015 WL 3536271 at *4-5. The court in Rothe noted that the court in DynaLantic engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. Id. at *5. The court in DynaLantic concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. Id. at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. Id. at *5, citing DynaLantic, 885 F.Supp.2d at 279.

The court in DynaLantic also found that DynaLantic had failed to present credible, particularized evidence that undermined the government’s compelling interest or that demonstrated that the government’s evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, citing DynaLantic, at 279.

With respect to narrow tailoring, the court in DynaLantic concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. Id. The court in Rothe also noted that the court in DynaLantic found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. Id.

**Defendants’ expert evidence.** One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. Id. In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. Id. Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. Id.

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. Id. at *10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The
expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. \textit{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. \textit{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. \textit{Id.}

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. \textit{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. \textit{Id.}, citing \textit{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 \textit{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. \textit{Id.}, citing \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.}

\textbf{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. \textit{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.” \textit{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. \textit{Id.}
The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe’s invitation to depart from the *DynaLantic* court’s conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government’s initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual’s participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of
government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.; citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court’s conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court’s conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe’s argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual’s status as socially or economically disadvantaged. *Id.* The court said that Rothe’s argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the “narrowness” of the narrow-tailoring mandate relates to the relationship between the government’s interest and the remedy it prescribes. *Id.*

**Conclusion.** The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See __ F.3d __, 2016 WL 471909 (D.C. Cir. September 9, 2016).
Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. Id. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. Id. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. Id.

As described in DynaLantic Corp. v. United States Department of Defense, 503 F.Supp. 2d 262 (D.D.C. 2007) (see below), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; see 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); see also 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); see also 15 U.S.C. § 637(a)(6)(A).


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 Sherbrookes, 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. Dept’ of Def. (“Rothe III “), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” DynaLantic, at *11. The Court rejected DynaLantic’s argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. DynaLantic, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. DynaLantic, at *11, citing Western States Paving v. Washington State DOT, 407 F.3d 983, 991 (9th Cir. 2005).
The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

**Evidence before Congress.** The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*
State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms utilized in the contracting market by the percentage of M/W/DBE firms available in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the availability and capacity of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O’Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence
from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id*. *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.
In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

**Facial challenge: Conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id*. Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson’s* reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson’s* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.
The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party’s definition of “industry” at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id* However, the Court stated, in this case the government did not argue with plaintiff’s industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.*
The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm’s participation in the program, places temporal limits on every individual’s participation in the program, and that a participant’s eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)’s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government’s evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants’ Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff’s Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.
Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.


*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.
Utilization Data Collection Plan

Appendix C explains the procurement-related data request, which includes:

1. Interested vendor list;
2. Certified firm list;
3. Vendor table;
4. Prequalification lists;
5. Procurements/payments data; and
6. Prime/subcontract data.

This appendix combines two documents that have been sent to certain participating entities concerning requested data.

1. Interested Vendor List

The study team seeks current information of firms interested in obtaining work with the participating entity. Only some participating entities maintain such lists (e.g., Admin maintains a list through SWIFT). Keen Independent is interested in lists that include any type of firm (not limited to targeted businesses). Pertinent information from such lists might include (if available):

- Business (SWIFT) vendor number;
- Interested firm name;
- Interested firm address, city, state and zip code;
- Interested firm certification;
- Interested firm email;
- Interested firm phone number;
- Interested firm race/ethnicity (if available);
- Interested firm gender (if available); and
- Interested firm primary industry classification(s) (SIC, NAICS, NIGP, etc.).

2. Certified Firm List

The study team will obtain cumulative directories of firms that are and have been certified under a program operated by a participating entity (e.g., DBEs, Minority/Women/Disabled Business, Economically Disadvantaged Owned Businesses, Veteran-Owned Businesses). Keen Independent seeks information about firms that had active certifications at any point during the study period, but are interested in earlier information as well.
The information from the directory should include (when possible):

- Business identification number;
- Business name;
- Business address, city, state and zip code;
- Business email;
- Business phone;
- Business owner race/ethnicity;
- Business owner gender;
- Business industry classification (SIC or NAICS);
- Business certification types;
- Business certification beginning and end dates (i.e., when active);
- Reason for the end of the certification (e.g., lapsed, decertified, exceeded size standard, etc.); and
- Any changes in certification during the study period (e.g., went from MBE to WBE).

3. Vendor Table

The study team seeks the name and address(es) of firms in each participating entity’s vendor tables, whether or not they received work during the study period. The vendor information should include (when possible):

- Vendor number;
- Business name;
- Business address, city, state and zip code (all registered addresses).
- Business email;
- Business phone;
- Business certification type(s) (M/W/D/ED/V);
- Business owner race/ethnicity;
- Business owner gender; and
- Business industry classification (SIC/NAICS);
4. Prequalification Lists

The study team seeks a list of firms that have prequalified for a type of service. This list should include (when possible):

- Vendor number;
- Business name;
- Business address, city, state and zip code (all registered addresses);
- Business email;
- Business phone;
- Business owner race/ethnicity;
- Business owner gender;
- Business industry classification (SIC/NAICS), if available;
- Business certification type(s) (M/W/D/ED/V); and
- Business prequalification type (for what kind of projects the firm is prequalified).

5. Procurements and Payments Data

The study team requests information about procurements active between July 1, 2011 and June 30, 2016. Each record should relate to a specific contract, purchase order, task order or master contract or master purchase order active during the study period.

These data should be organized by individual procurements (i.e., multiple records if a firm won multiple contracts), and include (when possible):

- ID number for the procurement;
- Vendor number;
- Business name;
- Procurement award (or execution) date;
- Type of procurement action (contract, task order/work order, etc.);
- Work code, and/or description of the type of work;
- Whether the procurement was made with a government agency or not-for-profit;
- Targeted business or other programs applied to the contract;
- Whether the awarded vendor received a preference through a program;
- Whether the procurement was off a cooperative agreement or another agency’s contract;
- Funding source (state vs. federal and if “federal,” type of federal funding);
- Location if a statewide entity (city or county, or “statewide” if not for a specific location, or “blank” if unknown); and
- Total payments (all forms of payment such as checks, ACH, etc.) by fiscal year for the specific procurement authorization (e.g., contract, PO, master PO).

If possible, we request that pcard purchases for individual vendors be included.
6. Prime contract/subcontract data collection for construction and professional services contracts

Keen Independent and participating entities are compiling prime contract and subcontract data for contracts that might have subcontractor or subconsultant involvement. This mostly involves larger (e.g., $100,000+) construction contracts and professional services contracts, as very small contracts are less likely to involve subcontractors. This data request includes certain goods or other services contracts with substantial subcontracting for which the entity has information.

The Keen Independent study team is not only seeking the names and descriptions of work for subcontractors, but also data on their subcontract amounts.

Each entity participating in the Joint Disparity Study has different systems for collecting any subcontract information, and these data might not be complete.

- Not every data element discussed in this appendix is essential, and the study team will discuss with each participating entity different ways to compile the data that are available.

- The requested data elements sometimes come from different data systems. Keen Independent can help link these data if needed (e.g., we can link contractor address information from a vendor file if helpful).

- Data might need to be provided in different formats (Excel spreadsheets or other flat files, Access databases, PDFs, hard copy, etc.). The participating entity can also provide access privileges to electronic data or PDFs stored on its own systems (we are already working this way with one entity).

- The Keen Independent study team can assist in any hard copy data collection and data entry.

- The study team is available to clarify the data request and answer questions as they arise.

Keen Independent is working with each participating entity to develop a schedule for when each entity expects to be able to provide information. As much as possible, this portion of the overall data collection will need to be substantially complete before December 2016, with most submissions in October.

(As of January 2017, Keen Independent was also investigating use of IC-134 data to obtain information about subcontracts for entity construction contracts.)

Types of Subcontracts and Subcontractors

The information below further explains what is included under the broad category of “subcontracts” and “subcontractors.” (Throughout, please note that our request for subcontract data includes “subconsultants” and “suppliers.”)
1. **Seeking information about all subcontractors, not just those that are certified as DBEs, MBE/WBEs/SBE, TGBs or MCUBs.** In our experience, public agencies often have readily available information for subcontractors certified as DBEs, MBE/WBEs, SBEs or another targeted group. Keen Independent and Felton Financial Forensics are seeking consistent information about all subcontractors involved in an entity’s contract, not just firms that are certified.

Entities should seek data for subcontractors using approaches that provide the same detail and quality of information for both certified and non-certified firms. Please explain when this is not the case (e.g., payment data only available for certified firms but not non-certified companies).

2. **Including any major suppliers, truckers, etc.** The study team also seeks information on any major suppliers identified in an entity’s data. When projects include trucking firms or other specialty services providers, and those data are available, we request that information as well. We understand that this information is sometimes more available for suppliers, truckers and other firms that are certified and used to meet a contract goal. (If so, let us know only certified firms are included.)

3. **Including lower tier subcontracts.** Some large projects might have second-tier or third-tier subs. If the entity has information, we request data for additional tiers, including identification of the firm retaining lower tier sub (e.g., the first-tier sub that hired the second-tier sub).

### Types of Information Needed

The study team is interested in information about:

- **The contract itself,** including a name and number, timing, total dollars, type of work, whether a DBE, MBE/WBE, SBE or similar type of program applied and its type, and whether it was federally-funded (and if so, whether the specific agency — EPA, HUD, etc. — that provided those funds). For Admin, MnDOT and Minnesota State, Keen Independent also requests that the location of the contract be identified (city, county, district, campus or other identifier, or whether the contract was simply for “headquarters”). If available, we are seeking information about the cumulative payments the participating entity has made to the prime contractor on that procurement (or task order on a procurement).

- **The prime contractor,** including name and address, and information about certification or ownership status of that firm, if available.

- **Each subcontract/subcontractor,** name and address, subcontract amount, general description of the work, who the sub was working for if a lower-tier sub, any information about certification or ownership status, and whether the sub was used to meet a contract goal). We are also seeking information about the amount of money paid to each subcontractor, if available.

Figure 1 at the end of this appendix identifies the requested data fields.
Contracts not Included in the Disparity Study

The study team is not collecting information about:

- USDOT-funded contracts.
- Agreements with other government agencies or non-profit organizations that do not involve further contracting tracked by the participating entity.

For example, if the State of Minnesota provided a grant for certain operations of a local government or a not-for-profit organization, that agreement is not included in the disparity study. However, if the State of Minnesota provided funding for a construction contract that was awarded by a local government, and required that certain procurement procedures are followed, that contract might be included.

Study Period

The Joint Disparity Study is focusing on procurements made between July 1, 2011 and June 30, 2016. In some instances, we request certain contract information outside this time frame as well.

1. Contracts awarded from July 2011 through June 2016. One might use award date, execution date, or other consistent “procurement decision” date to identify whether a prime contract fell within this time period. (Participating entities should let the study team know how to interpret the “dates” provided.)

2. Task orders, work orders or other procurements made between July 2011 through June 2016 pertaining to older contracts. In Keen Independent’s experience, there are sometimes standing “indefinite quantity” contracts that only result in actual work when a task order or work order is issued. These types of agreements often span multiple years.

Keen Independent is interested in data on those task orders, work orders or other procurements off of master contracts made within the July 1, 2011-June 30, 2016 study period even though the master contract originated before July 1, 2011. For example, if an entity has a “panel” of engineering firms that it uses as needed, we are interested in the task orders issued under those contracts within July 2011-June 2016 even if the master contract award date is in a previous year.

This does not include change orders to contracts awarded prior to July 2011.

There may also be very long construction projects where it makes sense to include discrete phases or components performed during the study period, even if the contract is before July 2011. Keen Independent will discuss these projects with each participating entity.

3. Capturing activity concerning a pre-June 30 2016 contract that occurred after that date.

Once a procurement for the prime contractor or consultant is identified as within the study period, Keen Independent seeks all relevant information about that work and the subcontractor involvement, even when that activity occurred after June 2016.
As an example, if the prime received a change order in August 2016, we request that the total contract amount reflect that change order.

Similarly, we request information about subcontracts executed after June 2016.

We also request information about cumulative payments at the time the data report is prepared (i.e., through fall 2016).

However, if the contract was similar to an indefinite quantity contract with no work assigned within the study period, that contract need not be included.
Figure 1.
Prime contract/subcontract data request

<table>
<thead>
<tr>
<th>CONTRACT/SUBCONTRACT INFORMATION</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Element</strong></td>
<td></td>
</tr>
<tr>
<td>Contract or task order information</td>
<td></td>
</tr>
<tr>
<td>Awarding organization</td>
<td></td>
</tr>
<tr>
<td>Awarding department, or if the award was made by a subrecipient (e.g., a local government or other group receiving money from the entity), the name of that subrecipient</td>
<td></td>
</tr>
<tr>
<td>Contract number or other unique identifying number</td>
<td></td>
</tr>
<tr>
<td>Name of contract or task order</td>
<td></td>
</tr>
<tr>
<td>If the entity has a name identifying the work</td>
<td></td>
</tr>
<tr>
<td>Type of procurement action (contract, task order/work order/etc.)</td>
<td></td>
</tr>
<tr>
<td>Identify whether a contract or a task order</td>
<td></td>
</tr>
<tr>
<td>Award/execute date</td>
<td></td>
</tr>
<tr>
<td>We are seeking a “decision date” and have some flexibility on whether that is “award,” “execution” or similar action</td>
<td></td>
</tr>
<tr>
<td>End date</td>
<td></td>
</tr>
<tr>
<td>Primarily interested in whether the end date is after June 30, 2016</td>
<td></td>
</tr>
<tr>
<td>Location (specific city, county, district, campus, etc. or state-wide)</td>
<td></td>
</tr>
<tr>
<td>Only needed for state-wide entities</td>
<td></td>
</tr>
<tr>
<td>Funding: local, state or federal (list federal agency)</td>
<td></td>
</tr>
<tr>
<td>If federally funded, please indicate the federal agency</td>
<td></td>
</tr>
<tr>
<td>DBE, TGB or other Program applied (“No” or ID type of program)</td>
<td></td>
</tr>
<tr>
<td>Indicate if the contract operated under a price preference or contract goals program (or both), and if so, which program(s)</td>
<td></td>
</tr>
<tr>
<td>Contract goals applied</td>
<td></td>
</tr>
<tr>
<td>If a contract goal was set, the specific goal set for the contract and type of goal (DBE, MBE and WBE, SBE, etc.)</td>
<td></td>
</tr>
<tr>
<td><strong>Firm information</strong></td>
<td>Information for the prime and each subcontractor</td>
</tr>
<tr>
<td>Firm name</td>
<td></td>
</tr>
<tr>
<td>Name of prime contractor or subcontractor</td>
<td></td>
</tr>
<tr>
<td>Vendor ID number (if any)</td>
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</tr>
<tr>
<td>If the entity has a separate vendor table that links using a vendor ID number, we can be responsible for linking any firm-specific information through this number</td>
<td></td>
</tr>
<tr>
<td>Role (prime, first tier sub, second tier sub, etc.)</td>
<td></td>
</tr>
<tr>
<td>Whether the firm is the prime, a sub or supplier, or lower-tier sub</td>
<td></td>
</tr>
<tr>
<td>If a lower tier sub, the name of the firm it is contracting with</td>
<td></td>
</tr>
<tr>
<td>For example, in record for ABC company subcontract, indicate “WYZ company” or its identification number if XYZ company (1st tier sub) contracted with ABC company (2nd tier sub)</td>
<td></td>
</tr>
<tr>
<td>Description of work performed by firm</td>
<td></td>
</tr>
<tr>
<td>We are coding the general type of work (e.g., paving work, electrical, engineering work, legal services), so some explanation of the work beyond “construction” or “professional, technical services” is useful</td>
<td></td>
</tr>
<tr>
<td>Total contract/subcontract amount</td>
<td></td>
</tr>
<tr>
<td>Include value of known change orders and amendments (or separately provide those numbers for us to add in), do not deduct for any subcontractors</td>
<td></td>
</tr>
<tr>
<td>Total payments July 1, 2011–June 30, 2016</td>
<td></td>
</tr>
<tr>
<td>If available (and can be cumulative through date when report is run)</td>
<td></td>
</tr>
<tr>
<td>Address</td>
<td></td>
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<tr>
<td>“Local” rather than HQ address if available</td>
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<tr>
<td>Contact phone number</td>
<td></td>
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<tr>
<td>If included in records</td>
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<tr>
<td>Certified (yes/no)</td>
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</tr>
<tr>
<td>Only if certified</td>
<td></td>
</tr>
<tr>
<td>Type of certification</td>
<td></td>
</tr>
<tr>
<td>Any other race/ethnicity/gender ownership info for firm</td>
<td></td>
</tr>
<tr>
<td>If available</td>
<td></td>
</tr>
<tr>
<td>Any other relevant disability, veteran ownership info for firm</td>
<td></td>
</tr>
<tr>
<td>If available</td>
<td></td>
</tr>
<tr>
<td>Any other useful information</td>
<td>As available</td>
</tr>
</tbody>
</table>
APPENDIX D.
Availability Data Collection Plan

The study team is using an approach similar to a “custom census” to compile data on MBEs, WBEs and majority-owned firms available for participating entity contracts. Keen Independent will then develop dollar-weighted estimates of MBE/WBE availability for each entity for construction, professional services, goods and other services contracts based on that organization’s prime contracts and subcontracts. Appendix D further explains the availability methodology and results in five parts:

A. General approach to collecting availability information;
B. Development of the survey instruments;
C. Execution of surveys;
D. Additional considerations related to measuring availability; and
E. Survey instrument.

A. General Approach to Collecting Availability Information

Keen Independent will collect information from firms about their availability for participating entity contracts through online, fax and telephone surveys.

Listings. The firms contacted in the availability surveys will come from two general sources:

- Companies that have previously identified themselves to participating entities as interested in learning about future work by registering on one or more of those organizations’ “interested firms lists.”
- Businesses that Dun & Bradstreet (D&B) identified in certain relevant subindustries within the relevant geographic market area for this study (D&B’s Hoover’s business establishment database).

The availability analysis will focus on companies in Minnesota and perhaps beyond (depending on the definition of the relevant geographic market areas) performing types of work most relevant to participating entities’ construction, professional services, goods and other services contracts (including subcontracts). As such, Keen Independent will not include all of the listings in the bidder/vendor lists or D&B database in the availability surveys, as described on the following page.
Interested firm lists. Participating entities have identified several lists of businesses that have identified that they are interested in learning about those organizations’ contract opportunities. The lists include:

- **SWIFT** – Businesses and individuals interested in doing business with the State of Minnesota can register as a vendor on the Statewide Integrated Financial Tools (SWIFT) a single internet portal for financial and procurement needs. Minnesota Department of Administration and Minnesota State will be able to provide a list of businesses registered in SWIFT.

- **Virtual Plan Room** – Businesses and individuals can download construction plans and specifications for the Department of Administration, Military Affairs, Natural Resources, and Transportation via Franz Reprographics Services. Firms that have purchased and download a construction plan are added to the plan holder list. Minnesota Department of Administration will be able to provide a list of firms that have registered and/or downloaded bid documentation via Franz Reprographics.

- **Document Holders** – Business and individuals can view and/or download contract plan documents or project plans for Metropolitan Council via QuestCDN eBidDoc™. Firms that have downloaded a plan will be added to a Document Holder list. Metropolitan Council will be able to provide this information.

- **Email subscription** – City of Minneapolis Finance and Property Services gives the opportunity to business and individuals to sign up for emails updates on RFPs, Formal Bids and Informal Bids.

- **Internal Vendor Lists**. Different entities maintain internal lists of potential vendors:
  - Minnesota State has a list of potential vendors that receive notifications of upcoming RFP opportunities.
  - Metropolitan Airports Commission has a “spreadsheet of vendors” that includes vendors that have contacted MAC directly via personal meetings, phone or email, or have previously won a contract.
  - City of Saint Paul keeps an “outreach vendor list” that includes vendors, CERT firms and firms registered in GovDelivery.com.
  - City of Minneapolis Civil Rights Department maintains an internal list of small businesses interested in doing business with the City of Minneapolis.

- **GovDelivery.com** – Businesses and individuals can register to GovDelivery.com to receive procurement alerts. The City of Minneapolis, City of Saint Paul and Hennepin County are subscribed to the GovDelivery platform.
Keen Independent will exclude any listings for government agencies or not-for-profit organizations. (And when they are not successfully excluded, the study team will ask each organization on the lists whether or not it is a for-profit business as part of the availability survey.)

**Dun & Bradstreet Hoover’s database.** There will be other firms available for participating entities’ contracts that do not appear on interested firm lists. Therefore, Keen Independent will supplement by acquiring Dun & Bradstreet data for firms in Minnesota (and beyond, as appropriate) doing business in relevant subindustries.

Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially-available database of U.S. businesses. The study team will use D&B listings to supplement the companies identified in the participating entities’ databases of interested firms.

Keen Independent will determine the types of work involved in participating entities’ contract elements by reviewing contract dollars (including subcontracts) that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes. Once the study team obtains and codes the contracts and subcontracts according to work specialization, Keen Independent will determine the subindustries appropriate for the availability analysis.

Keen Independent will then obtain a list of firms from the D&B Hoover’s database within relevant work codes that have locations in Minnesota (and other geographic areas, as appropriate). D&B will provide phone numbers for these businesses.

**Total listings.** Keen Independent will consolidate information when a firm has multiple listings across these data sources.

Keen Independent will not draw a sample of those firms for the availability analysis; rather, the study team will attempt to contact each business identified. Some courts have referred to similar approaches to gathering availability data as a “custom census.”

**Online surveys.** For firms from the sources described above for which email addresses are identified, Keen Independent will work with the State of Minnesota to distribute a request to complete the online availability survey. The study website will have a link to the online survey as well.

**Telephone surveys.** Keen Independent has retained Customer Research International (CRI) to conduct telephone surveys with listed businesses (that do not complete the online survey). After receiving the list described above, CRI will use the following steps to complete telephone surveys with business establishments:

- Firms will be contacted by telephone. Up to five phone calls will be made at different times of day and different days of the week to attempt to reach each company.

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1 D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.
Interviewers will indicate that the calls are made on behalf of the State of Minnesota agencies and colleges throughout the state and local governments serving the Twin Cities, including Hennepin County, the cities of Minneapolis and St. Paul, Met Council, the Airport and the Mosquito Control District. The purpose of the call will be described as expanding these entities’ lists of companies interested in performing work. (The study team plans to accommodate multiple languages as part of the telephone survey effort.)

Based on Keen Independent’s experience, some firms will indicate in the phone calls that they do not work in the relevant industry or have no interest in state and local government work, so no further survey questions will be necessary. (Such surveys will be treated as complete at that point.) Keen Independent will further examine these “no interest” questions upon survey completion to understand if there is any differences in rate of indicating no interest for minority-, women- and majority-owned firms.

Other avenues to complete a survey. Even if a company is not directly contacted by the study team, business owners can complete a survey for their company by clicking a link to the survey (will be on the disparity study website) or requesting a fax version of the survey. They can also mail a completed hard copy survey.

B. Development of the Survey Instruments

Keen Independent will develop survey instruments specific to each industry (e.g., there will be a construction-specific survey instrument with similar but not identical questions as other industry surveys instruments). Surveys completed online, via mail or fax, or through telephone calls will have nearly identical design.

The study team will develop the survey instruments through the following steps:

- Keen Independent has drafted a very preliminary version of the availability survey instrument (specific to construction), which is provided at the end of this appendix;
- We will discuss the availability analysis process with the Steering Committee and External Stakeholder Group as part of the Phase 1 report review; and
- Keen Independent will modify the survey instrument based on comments and other information gathered between fall 2016 and February 2017.

Survey structure. The availability survey includes nine sections. In most instances, the study team will not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information is a key component of the survey.
Areas of survey questions include:

- **Identification of purpose.** The surveys begin by identifying participating entities as the survey sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working on state and local government contracts”).

- **Verification of correct business name.** CRI will confirm that the business reached is in fact the business sought out.

- **Contact information.** CRI will then collect complete contact information for the establishment and the individual who completes the survey.

- **Verification of work related to relevant contracts.** The interviewer will ask whether the organization does work or provides materials related to specific industries or types of public sector contracts. Interviewers will continue the survey with businesses that respond “yes” to that question.

- **Verification of for-profit business status.** The survey will then ask whether the organization is a for-profit business as opposed to a government or not-for-profit organization. Interviewers will continue the survey with businesses that respond “yes” to that question.

- **Identification of main lines of business.** For certain industries (such as construction), businesses will then choose from a list of work types that their firm performs. In addition to choosing all areas that the firms perform work, the study team will ask businesses to briefly describe their main line of business.

- **Sole location or multiple locations.** The interviewer will ask business owners or managers if their businesses have other locations and whether their establishments are affiliates or subsidiaries of other firms. (Keen Independent combines responses from multiple locations into a single record for multi-establishment firms.)

- **Past bids or work with government agencies and private sector organizations.** The survey then asks about bids and work on past government and private sector contracts. For construction and professional services surveys, questions are asked in connection with both prime contracts and subcontracts.

- **Qualifications and interest in future work.** The interviewer will ask about businesses’ qualifications and interest in future work with state and local governments.

- **Geographic areas.** Interviewees will be asked whether they could do work in several geographic areas in Minnesota. The draft set of regions, subject for further review and refinement are: Twin Cities area, Central Minnesota (such as St. Cloud and Mankato), Northeast region, Northwest region, Southeast region and Southwest region. The interviewer will be able to provide examples of cities within each of these regions. Figure D-1 on the following page presents recommended regions for the availability analysis.
Figure D-1.
Suggested regional descriptions for the availability analysis

- **Largest contracts.** CRI will ask businesses to identify the value of the largest contract or subcontract on which they had bid on or had been awarded in Minnesota during the past six years (i.e., since 2011).

- **Ownership.** Businesses will be asked if at least 51 percent of the firm is owned and controlled by women and/or minorities. If a business indicates that it is minority-owned, it will also be asked about the race and ethnicity of its owner(s). (The study team will review reported ownership against other available data sources such as DBE and MBE/WBE directories.)

- **Business background.** CRI will ask businesses to identify the approximate year in which they were established. The interviewer will ask several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section will also ask about their revenues and number of employees across all locations.
Potential barriers in the marketplace. Establishments will be asked a series of questions concerning general insights about the marketplace and state and local government contracting practices including obtaining loans, bonding and insurance. The survey also includes an open-ended question about any additional barriers in the marketplace or attempting to work for state and local governments in Minnesota. In addition, the survey includes a question asking whether interviewees would be willing to participate in a follow-up survey about marketplace conditions.

C. Execution of Surveys

Surveys can be completed online, in hard copy via mail or fax, or over the phone. Keen Independent will hold planning and training sessions with CRI as part of the launch of the availability surveys. CRI will begin conducting full availability surveys in March 2017 and conduct those surveys over two to three months.

To minimize non-response, CRI will make at least five attempts at different times of day and on different days of the week to reach each business establishment. CRI will identify and attempt to interview an available company representative such as the owner, manager or other key official who can provide accurate and detailed responses to the questions included in the survey.

Planned reporting of survey performance. Keen Independent will report the disposition of the businesses the study team attempted to contact for availability surveys.

Non-working or wrong phone numbers. Some of the business listings that the study team will attempt to contact will turn out to be:

- Non-working phone numbers;
- Wrong numbers for the desired businesses.

Some non-working phone and wrong numbers will reflect business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them. (Keen Independent will provide this information to participating entities so they can update their records, if desired.)

Working phone numbers. For various reasons, the study team will likely be unable to contact some of the businesses with working phone numbers:

- No answer. Based on past experience, Keen Independent anticipates that some businesses will not be reached after at least five attempts at different times of the day and on different days of the week.
- Could not reach responsible staff member. Again based on similar past surveys, there will be a few firms for which the study team will not be able to reach a responsible staff person to complete the survey, even after repeated attempts.
Language barriers. Keen Independent is identifying language protocols when the individual answering the phone cannot proceed in English or provide someone who can speak English. In similar recent surveys, the principal additional language required was Spanish, which CRI staff can internally handle. Keen Independent may also need to provide call-backs in Hmong and Somali languages for the Minnesota Joint Disparity Study.

Unreturned fax or email surveys. The study team will send email invitations to those businesses that request a link to the online survey or request to do the survey via fax. In Keen Independent’s experience, there will be some businesses that request such surveys but do not return them.

Respondent indicated that they had already completed an online survey. There will be some respondents who say that they had already completed an online survey that will not be found within the online survey responses.

Establishments included in the availability database. Among businesses successfully contacted, Keen Independent will assess businesses for inclusion in the final availability database.

Establishments not interested in discussing availability for participating entities’ contracts. There will be some businesses successfully contacted that will not be interested in discussing their availability for state and local government work. In Keen Independent’s experience, those types of responses are often firms that do not perform relevant types of work. And, some respondents will indicate that their companies are no longer in business.

Businesses included in the availability database. Some firms completing availability surveys will not be included in the final availability database because they indicate that they do not perform work related to state or local government contracts or report that they are not a for-profit business. Keen Independent will also remove duplicate responses and combine responses from different locations of the same business into a single, summary data record.

After those final screening steps, Keen Independent will produce a database of businesses potentially available for participating entities’ work. We anticipate the final database to include thousands of businesses. Keen Independent will provide names of firms in the final availability database and firms that were not successfully contacted to participating entities.

D. Additional Considerations Related to Measuring Availability

The study team discusses several additional considerations related to its approach to measuring availability below.

Not providing a count of all businesses available for participating entities’ contracts. The purpose of the availability surveys is to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for participating entities’ contracts and subcontracts. The research appropriately focuses on firms in certain subindustries and the relevant geographic area for participating entity contracts.
Subindustries that comprise a very small portion of the total dollars of participating entities’ contracts will not be included.

Also, Keen Independent will not purchase Dun & Bradstreet data for firms outside the relevant geographic market area.

Not all firms on the list of businesses will complete surveys, even after repeated attempts to contact them.

Therefore, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of participating entities’ work and should not be used in that way.

Based on Keen Independent’s experience, there will be some firms receiving participating entity contracts and subcontracts that will not complete an availability survey. Some might be out of business by the time that the survey is conducted or might have been no longer interested in state or local government work. Others might be called to complete a survey, but not respond even after multiple attempts to reach them.

Keen Independent will review the firms receiving the most work to determine whether or not they are in the final availability database, and if not, why not. And, Keen Independent will analyze MBE/WBE and majority-owned firms receiving participating entity work to determine whether MBE/WBEs are as likely to have completed an availability survey as majority-owned firms.

Federal courts have approved similar approaches to measuring availability that Keen Independent is using in this study. The United States Department of Transportation’s (USDOT’s) “Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program” also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.²

**Not using a “headcount” based solely on participating entity lists.** Keen Independent’s approach to measuring availability in this study incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses’ qualifications, size of contracts they bid on and interest in participating entity work, which allows the study team to take a more refined approach to measuring availability.

**Using D&B lists.** Keen Independent will supplement business lists obtained from participating entities with Dun & Bradstreet business listings for Minnesota (and beyond, as appropriate). Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States.

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Even so, the database will not include all establishments operating in Minnesota due to the following reasons:

- There can be a lag between formation of a new business and inclusion in an interested firm list or a D&B listing, meaning that the newest businesses may be underrepresented.

- Some businesses providing relevant work might not be classified as such in the D&B data. (They may be in the D&B data, but their subindustry is not correctly identified in the data.)

Because Keen Independent will use participating entity listings for the availability survey as well as D&B lists, the final survey list will capture some firms that would not have been included based on the D&B data alone.

**Selection of specific subindustries.** Keen Independent will identify specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent’s use of additional participating entity data somewhat mitigates this potential concern.

**Companies reporting that they do not perform relevant work or are not interested in discussing state or local government work.** In Keen Independent’s experience, some firms contacted in the availability surveys will indicate that they do not perform related work or are otherwise not interested in state and local government work. One of the reasons for this result might be the fact that Keen Independent will be necessarily broad in the subindustries included in the survey when developing its initial lists.

For example, Dun & Bradstreet does not have a subindustry code that identifies the subset of electrical firms or trucking firms that perform state and local government construction work. Therefore, Keen Independent might acquire a general list of electrical firms (code 17310000) and local trucking firms (code 42120000), and through surveys identify which firms would perform work relevant to state and local government contracts. Many of these firms might indicate that they are not interested in discussing state and local government work.

**Non-response bias.** An analysis of non-response bias considers whether businesses that are not successfully surveyed are systematically different from those that are successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort in any type of study.

In similar availability studies, Keen Independent considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees; and
- Language barriers.
Research sponsorship. Interviewers will introduce themselves by identifying the State of Minnesota and other participating entities as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer is unable to identify the sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences will not lead to lower estimates of MBE/WBE availability than if the study team were able to successfully reach all firms.

Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that are biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete a survey is less important because the number of MBE/WBE trucking firms is compared with the number of total trucking firms when calculating availability for trucking work.

Keen Independent will examine whether minority- and women-owned firms are more difficult to reach in the telephone survey compared with majority-owned firms. The study team will examine response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet has for firms in the list purchased from this source. In past Keen Independent availability surveys using a similar methodology, there is usually no indication of differences in response rates that materially affect the estimates of MBE/WBE availability.

Potential language barriers. In similar availability analyses, Keen Independent examined whether language barriers affected outcomes. In all cases, results did not appear to have been affected by conducting the principal portions of the availability survey in English. Callbacks to firms in Spanish when an initial call identified an individual who only spoke Spanish appeared to be effective in minimizing any language barriers.

As Minnesota may differ in this respect, Keen Independent will further analyze appropriate methods to minimizing potential language barriers as part of this study. We plan to identify any barriers that emerge in the survey effort, and the desired languages. If any barriers appear to be substantial, we could have a team of people call those companies back to determine whether there is someone who can complete the survey in English. If not, we could conduct the survey in the desired language (Somali, Hmong or Vietnamese, as examples).

Response reliability. Business owners and managers will be asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent will explore the reliability of survey responses in a number of ways. For example:
Keen Independent will review data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of certified businesses compared with survey responses concerning business ownership.

Keen Independent will compare survey responses about the largest contracts that businesses won during the past six years with actual contract data from participating entities.

Keen Independent will use certification directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtains from availability surveys. The study team will re-contact companies for clarification in the event of any inconsistencies in race, ethnicity and gender ownership information for the firm.

E. Preliminary Draft of a Construction Availability Survey Instrument

Beginning on the next page of Appendix D, Keen Independent provides a preliminary draft survey instrument for construction. Note that it is subject to substantial revision before initiation of the survey effort. Survey instruments for professional services, goods and other services have similar structures but are specifically designed for those industries.
KEEN INDEPENDENT SURVEY OF MINNESOTA CONSTRUCTION BUSINESSES.
First draft subject to substantial revision

Introductory notes

[NOTE TO INTERVIEWER – PURPOSE OF THE SURVEY – INTERVIEW STARTS HERE:]

Hello. My name is [interviewer name]. We are calling on behalf of the State of Minnesota. This is not a sales call. The State is compiling a list of companies interested in performing construction, repair and maintenance on projects related to state agencies and colleges as well as local governments serving the Twin Cities, including Hennepin County, the cities of Minneapolis and St. Paul, Met Council, the Airport and the Mosquito Control District.

Who can I speak with to get the information we need from your firm?

[NOTE TO INTERVIEWER – AFTER REACHING THE OWNER OR AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE INTERVIEW OUTLINED ABOVE AND BEGIN WITH QUESTIONS.]

[NOTE TO INTERVIEWER – IF NEEDED, INTERVIEWER CAN ADD THIS:

We are contacting thousands of construction companies statewide.]

[NOTE TO INTERVIEWER – IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION:

You may call XXXX at the Department of Administration at XXXX for more information.]

[NOTE TO INTERVIEWER – IF ASKED:

The information developed in these interviews will add to State and local governments’ existing data on companies interested in working with state agencies and colleges, as well as local governments serving the Twin Cities, including Hennepin County, the cities of Minneapolis and St. Paul, Met Council, the Airport and the Mosquito Control District.]

General questions. The first set of questions allow the interviewer to determine whether the correct person and firm are being interviewed. These questions enable Keen Independent to quickly determine if the contact information should be updated or the firm removed from the call list.
X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=Right company – SKIP TO A1
2=Not right company
3=Refused to give information – TERMINATE

X2. Can you give me any information about [firm name]?

[NOTE TO INTERVIEWER – READ LIST.]

1=Yes, same owner doing business under a different name – SKIP TO X5
2=Yes, can give information about [firm name]
3=Company bought/sold/changed ownership – SKIP TO X5
4=No, does not have information – TERMINATE
5=Refused to give information – TERMINATE

X3. Can you give me the phone number of [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE OF NAMED COMPANY.]

1=VERBATIM

X4. Can you give me the complete address for [firm name]?

[NOTE TO INTERVIEWER – RECORD IN THE FOLLOWING FORMAT.]

. STREET ADDRESS
. CITY
. STATE
. ZIP
1=VERBATIM

X5. And what is the new name of the business that used to be [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM
X6. Can you give me the name of the owner or manager of this business? [NOTE TO INTERVIEWER – THIS IS THE BUSINESS FROM X5.]

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM

X7. Can I have a telephone number for them?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE NUMBER.]

1=VERBATIM

X8. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER – RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS
. CITY
. STATE
. ZIP]

1=VERBATIM
2=SAME AS X4

X9. Do you work for this new company?

1=Yes – CONTINUE
2=No – TERMINATE

A. Confirmation of business work. The next questions act as an additional screening to ensure we are talking to the right companies.

A1. Does your firm do any work related to construction for public sector or multifamily projects? [CAN BE EITHER]

1=Yes
2=No [END – INTERVIEW COMPLETE.]

98=(Don’t know) – SKIP TO A4
A2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

1=Yes

2=No [END – INTERVIEW COMPLETE.]

98=(Don’t know) – SKIP TO A4

A3. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is this correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY.]

1=Yes – SKIP TO A5

2=No

98=(Don’t know)

99=(Refused)

A4. What would you say is the main line of business?

[NOTE TO INTERVIEWER – ENTER VERBATIM RESPONSE.]

1=VERBATIM

A5. 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)

A6. 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
A7. What is the name of your parent company?

1=ENTER NAME

98=(Don’t know) – SKIP TO B1

99=(Refused) – SKIP TO B1

A7. [NOTE TO INTERVIEWER – ENTER NAME OF PARENT COMPANY.]

1=VERBATIM

B. Type of work. The next questions are about the type of construction work the company does.

B1. What types of work does your firm perform related to construction? Please check all that apply. [NOTE TO INTERVIEWER – READ, MULTIPUNCH.]

1=Developer of properties, including commercial or multifamily residential properties

2=Multifamily building construction

3=Building construction for public or commercial buildings

4=Water or sewer treatment plants

5=Underground utilities, including water and sewer lines

6=Plumbing, heating or air conditioning

7=Asphalt and concrete paving

8=Bridge and elevated highway construction

9=Pavement surface treatment (such as sealing)

10=Pavement milling

11=Striping or pavement marking

12=General road construction and widening

13=Installation of guardrails, fencing or signs

14=Temporary traffic control

15=Excavation, site prep, grading and drainage

16=Wrecking and demolition
17=Drilling and foundations  
18=Electrical work including lighting and signals  
19=Landscaping and related work including erosion control  
20=Painting  
21=Concrete work  
22=Structural steel work  
23=Other [DON’T READ]  
98=(Don’t know)  
99=(Refused)  

[NOTE: SUBINDUSTRIES TO BE REFINED AFTER ANALYSIS OF PARTICIPATING ENTITY CONSTRUCTION CONTRACT DOLLARS.]  

C. Role in construction work. The next questions are about the company’s involvement in construction-related contracts.  

C1. Thinking about work in the past six years in Minnesota, has your company bid on or been awarded work related to public agencies, colleges or other government-related projects?  

1=Yes  
2=No – SKIP TO C3  
3=Other [DON’T READ] – SKIP TO C3  
98=(Don’t know) – SKIP TO C3  
99=(Refused) – SKIP TO C3
C2. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

1=Prime contractor
2=Subcontractor
3=Supplier (or manufacturer)
4=Prime and Sub
5=Sub and Supplier
6=Prime and Supplier
7=Prime, Sub, and Supplier
98=(Don’t know)
99=(Refused)

C3. Is your company qualified and interested in working with public agencies in Minnesota as a prime contractor?

1=Yes
2=No
98=(Don’t know)
99=(Refused)

C4. Is your company qualified and interested in working with public agencies in Minnesota as a subcontractor?

1=Yes
2=No
98=(Don’t know)
99=(Refused)
D. Geographic areas your company serves in Minnesota. The next questions are about the geographic areas in Minnesota where the company can work.

D1. Can your company do work in the Twin Cities metropolitan area?
   1=Yes
   2=No
   98=(Don’t know)

D2. Can your company do work in Central Minnesota (such as St. Cloud or Willmar)?
   1=Yes
   2=No
   98=(Don’t know)

D3. Can your company do work in the Northeast region (such as Duluth)?
   1=Yes
   2=No
   98=(Don’t know)

D4. Can your company do work in the Northwest region (such as Brainerd or Moorhead)?
   1=Yes
   2=No
   98=(Don’t know)

D5. Can your company do work in the Southeast region (such as Rochester)?
   1=Yes
   2=No
   98=(Don’t know)
D6. Can your company do work in the Southwest region (such as Mankato or Worthington)?

1=Yes
2=No
98=(Don’t know)

E. Contract history. The next questions are about the firm’s contract history.

E1. In rough dollar terms, what was the largest contract or subcontract your company was awarded within Minnesota, during the past six years?

[NOTE TO INTERVIEWER – INCLUDES CONTRACTS NOT YET COMPLETED.]
[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY:]

1=$100,000 or less
2=More than $100,000 to $500,000
3=More than $500,000 to $1 million
4=More than $1 million to $2 million
5=More than $2 million to $5 million
6=More than $5 million to $10 million
7=More than $10 million to $20 million
8=$20 million to $100 million
9=$100 million or more
97=(None) – SKIP TO F1
98=(Don’t know) – SKIP TO F1
99=(Refused) – SKIP TO F1

E2. Was this the largest contract or subcontract that your company bid on or submitted quotes for in Minnesota during the past six years?

1=Yes – SKIP TO F1
2=No
98=(Don’t know) – SKIP TO F1
E3. What was the largest contract or subcontract that your company bid on or submitted quotes for in Minnesota during the past six years?

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY:]

1 = $100,000 or less
2 = More than $100,000 to $500,000
3 = More than $500,000 to $1 million
4 = More than $1 million to $2 million
5 = More than $2 million to $5 million
6 = More than $5 million to $10 million
7 = More than $10 million to $20 million
8 = More than $20 million to $100 million
9 = $100 million or more
97 = (None)
98 = (Don’t know)
99 = (Refused)

F. Ownership. The next questions are about business ownership.

F1. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

1 = Yes
2 = No
98 = (Don’t know)
99 = (Refused)
F2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?

1=Yes
2=No – SKIP TO F1
98=(Don’t know)
99=(Refused)

F3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American or Native American?

1=African American
2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia or Hong Kong)
3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)
4=Native American (American Indians, Eskimos, Aleuts or Native Hawaiians)
5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)
6=Other group [SPECIFY]
98=(Don’t know)
99=(Refused)

F3. [NOTE TO INTERVIEWER – OTHER GROUP – SPECIFY.]

1=VERBATIM
**G. Business background.** The next questions are about the business background and its positioning in the marketplace.

G1. My next questions are about the background of the business. About what year was your firm established?

[NOTE TO INTERVIEWER – RECORD FOUR-DIGIT YEAR, e.g., '1977'.]

9998=(Don’t know)

9999=(Refused)

1=NUMERIC (1600-2016)

G2. My next set of questions pertain to annual averages for your company for 2014 through 2016 [NOTE TO INTERVIEWER – OR JUST YEARS IN BUSINESS IF FORMED AFTER 2014]. Dun & Bradstreet indicates that your company has about [number] employees working out of just your location. Is that an accurate estimate of your company’s average employees from 2014 through 2016?

[NOTE TO INTERVIEWER – INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION.]

1=Yes – SKIP TO F4

2=No

98=(Don’t know) – SKIP TO F4

99=(Refused) – SKIP TO F4

G3. About how many employees did you have working out of just your location, on average, from 2014 through 2016?

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES.]

1=NUMERIC (1-999999999)
G4. Dun & Bradstreet lists the annual gross revenue of your company, just considering your location, to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue from 2014 through 2016 (or for the years your company was in business if started after 2014)?

1=Yes – SKIP TO G6
2=No
98=(Don’t know) – SKIP TO G6
99=(Refused) – SKIP TO G6

G5. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2014 through 2016? Would you say . . . [NOTE TO INTERVIEWER – READ LIST:]

1=Less than $1 million
2=$1 million to $5 million
3=$5.1 million to $7.5 million
4=$7.6 million to $11 million
5=$11.1 million to $15 million
6=$15.1 million to $20.5 million
7=$20.6 million to $27.5 million
8=$27.6 million to $38.5 million
9=More than $38.5 million
98=(Don’t know)
99=(Refused)

G6. [NOTE TO INTERVIEWER – IF MULTI-LOCATION FIRM NOTED IN A5, OTHERWISE GO TO H1a] About how many employees did you have, on average, for all of your Minnesota locations from 2014 through 2016?

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES:]

1= NUMERIC (1-999999999)
98=(Don’t know)
99=(Refused)
G7. Roughly, what was the average annual gross revenue of your company, for all of your Minnesota locations from 2014 through 2016 (or for the years your company was in business if started after 2014)? Would you say . . . [NOTE TO INTERVIEWER – READ LIST:]

1=Less than $1 million
2=$1 million to $5 million
3=$5.1 million to $7.5 million
4=$7.6 million to $11 million
5=$11.1 million to $15 million
6=$15.1 million to $20.5 million
7=$20.6 million to $27.5 million
8=$27.6 million to $38.5 million
9=More than $38.5 million
98=(Don’t know)
99=(Refused)

H. Market barriers or difficulties. Finally, we’re interested in whether the company has experienced barriers or difficulties associated with business start-up or expansion in the industry, or with obtaining work. We ask them to think about their experiences within the past six years as they answer the following questions.

H1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1b. Has your company obtained or tried to obtain a bond for a project?

1=Yes
2=No – SKIP TO H1d
97=(Does not apply) – SKIP TO H1d

98=(Don’t know) – SKIP TO H1d

99=(Refused) – SKIP TO H1d
H1c. Has your company had any difficulties obtaining bonds needed for a project?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1d. Have you had any difficulty in being prequalified for work?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1e. Have any insurance requirements on projects presented a barrier to bidding?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1f. Has the large size of projects presented a barrier to bidding?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)
H1g. Has your company experienced any difficulties learning about bid opportunities directly with state agencies or local governments in Minnesota?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1h. Has your company experienced any difficulties with learning about bid opportunities in the private sector in general in Minnesota?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1i. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors in Minnesota?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1j. Has your company experienced any difficulties receiving payment from state agencies or local governments in Minnesota?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
H1k. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1l. Has your company experienced any difficulties receiving payment from other clients in a timely manner?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

H1m. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)
H2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Minnesota?

1=VERBATIM [NOTE TO INTERVIEWER – PROBE FOR COMPLETE THOUGHTS.]

97=(Nothing/None/No comments)

98=(Don’t know)

99=(Refused)

H3. Would you be willing to participate in a follow-up interview about any of these issues?

1=Yes

2=No

97=(Does not apply)

98=(Don’t know)

99=(Refused)

I. Additional questions.

I1. Just a few last questions. What is your name?

[NOTE TO INTERVIEWER – RECORD FULL NAME.]

1=VERBATIM

I2. 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)

I2. [NOTE TO INTERVIEWER – ENTER OTHER – SPECIFY:]

1=VERBATIM

I3. For purposes of receiving procurement information from the State agencies and colleges and local governments, is your mailing address [firm address]?

1=Yes – SKIP TO H5

2=No

98=(Don’t know)

99=(Refused)

I4. What mailing address should AHA use to get any materials to you?

1=VERBATIM

I5. What fax number could they use to fax any materials to you?

1=NUMERIC (1000000000-9999999999)

I6. What e-mail address could they use to get any materials to you?

1=ENTER E-MAIL

97=(No email address)

98=(Don’t know)

99=(Refused)


1=VERBATIM

[NOTE TO INTERVIEWER – END OF SURVEY MESSAGE:]

Thank you for your time. This is very helpful for the Department of Administration.
APPENDIX E.
Summary of Participating Entity Programs

Each participating entity operates certain programs providing preferences or assistance to minority- and women-owned businesses, businesses owned by persons with disabilities, veteran-owned businesses, businesses in economically disadvantaged areas and/or small businesses.

The following is a draft description of federal, state and local programs, which will be revised and updated in the course of the study. Each participating entity provided information about its programs, which Keen Independent supplemented from other sources.

A. Program Descriptions

A summary of participating entities’ programs follows. Each entity’s website provides more detailed information.

Figure E-1 on the following page identifies the major programs applied by each entity.

**Federal DBE Program.** The U.S. Department of Transportation requires state and local governments receiving funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation. As such, the Minnesota Department of Transportation, Metropolitan Council and Metropolitan Airports Commission have many contracts where they apply the Federal DBE Program, typically by setting DBE contract goals.

To be certified as a DBE, a firm must be socially and economically disadvantaged. Revenue limits, personal net worth limits and other restrictions apply. Most DBEs are minority- or women-owned firms, but white male-owned firms that can demonstrate social and economic disadvantage can be certified as DBEs as well.

**Federal ACDBE Program.** An agency receiving FAA funds is also required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to certain airport concessions activities. The MAC operates the Federal ACDBE Program.

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3 See [https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/](https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/).
### Figure E-1.
Program application by participating entity, 2016

<table>
<thead>
<tr>
<th>Agencies</th>
<th>Federal DBE Program (USDOT)</th>
<th>Federal ACDBE Program (USDOT)</th>
<th>HUD Programs</th>
<th>EPA DBE Program</th>
<th>TGB</th>
<th>VOB</th>
<th>Econ. Disadv. Business</th>
<th>MCUB</th>
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</table>

1/ Not including African-American for professional services or other services; American Indian for other services, and Asian American for construction subcontracts or other services.

2/ Not including African American for construction subcontracts; American Indian for professional services and goods and supplies; and Asian American for construction subcontracts and goods and supplies.

3/ Not including American Indian for architecture and engineering and goods and supplies.

Source: Admin Minnesota Targeted Group Eligibility - Matrices and Orders [http://www.mmd.admin.state.mn.us/tgeligibility.htm](http://www.mmd.admin.state.mn.us/tgeligibility.htm)
U.S. Housing and Urban Development MBE Program and Section 3 Program. HUD has its own MBE Program that extends requirements to open contract opportunities for minority- and women-owned firms to state and local agencies receiving HUD financial assistance. This includes local public housing agencies. These agencies must provide regular reports of MBE and WBE participation to HUD. Information related to grantees is also available. HUD also has a Section 3 Program that encourages utilization of residents and businesses in HUD-supported projects.

U.S. Environmental Protection Agency DBE Program. As with HUD, the U.S. EPA has a DBE Program that encourages participation of minority- and women-owned firms, and other groups, in state and local contracts receiving EPA financial assistance.

Minnesota Targeted Group Business Program. The Minnesota Department of Administration and several other agencies operate a Targeted Group Business Program that provides preferences to certified minority- and women-owned firms and companies owned by people with a substantial physical disability located in Minnesota. The program does not apply to certain federally-funded contracts.

Minnesota Economically Disadvantaged Business Program. Similar to the TGB program, the Minnesota Department of Administration provides preferences for small businesses certified as economically disadvantaged small businesses. A company located in an economically disadvantaged county, which includes federally-designated labor surplus areas and low income counties, can be certified as an economically disadvantaged small business. A firm can also be certified as such if the owner resides in an economically disadvantaged area.

Minnesota Veteran-owned Business Program. The Minnesota Department of Administration operates a veteran-owned business program in parallel to the TGB and Economically Disadvantaged Business Program, including application of preferences. A firm owned and controlled by a veteran and located in Minnesota can be certified under this program.

City of Minneapolis Vendor Outreach Program (VOP). The City of Saint Paul applies its Vendor Outreach Program to small businesses and minority- and women-owned businesses. The City sets contract goals for MBEs and WBEs in its contracting. It relies on certification through the CERT System.

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7 See [http://www.mmd.admin.state.mn.us/mn02001.htm](http://www.mmd.admin.state.mn.us/mn02001.htm).
8 See [http://www.mmd.admin.state.mn.us/mn02001.htm](http://www.mmd.admin.state.mn.us/mn02001.htm).
11 See [https://cert.smwbc.com/](https://cert.smwbc.com/).
**Hennepin County Small Business Enterprise (SBE) Program.** Hennepin County has an SBE program for small business enterprises. The County relies on certification through the CERT System.\(^\text{12}\)

**City of Minneapolis Small Underutilized Business Program (SUBP).** The City of Minneapolis operates the Small Underutilized Business Program for minority- and women-owned firms.\(^\text{13}\)

**Metropolitan Council Underutilized Business (MCUB) Program.** In addition to operating the Federal DBE Program for USDOT-funded contracts, the Metropolitan Council applies the MCUB program to non-federally funded contracts. MCUB businesses include certified Targeted Group Businesses, DBE-certified businesses based in Minnesota and veteran-owned businesses certified by the Department of Veteran Affairs or the Department of Administration. For the MCUB program, the Metropolitan Council mirrors Federal DBE Program regulations.\(^\text{14}\)

**B. Program Eligibility**

Figure E-2 summarizes eligibility and certification requirements for each program, and identifies certifying agencies. In general, certification limits eligibility based on:

- Revenue or employment size of business;
- Personal net worth of the business owner (for Federal DBE and ACDBE Program);
- Location of business; and
- Race, ethnicity or gender of business (for race- and gender-conscious programs).

Note that both the City of St. Paul and Hennepin County programs use CERT certification.

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\(^{12}\) See [https://cert.smwbe.com/](https://cert.smwbe.com/).

\(^{13}\) See [http://www.ci.minneapolis.mn.us/civilrights/contractcompliance/subp/WCMS1P-124726](http://www.ci.minneapolis.mn.us/civilrights/contractcompliance/subp/WCMS1P-124726).

Figure E-2.
Summary of certifications used under each participating entity program

<table>
<thead>
<tr>
<th>Firm ownership eligibility criteria</th>
<th>Federal DBE Program (USDOT)</th>
<th>Federal ACDBE Program (USDOT)</th>
<th>EPA DBE Program</th>
<th>TGB</th>
<th>VOB</th>
<th>Econ. Disadv. Business</th>
<th>MCUB</th>
<th>SUREP</th>
<th>VOP (CERT)</th>
<th>SBE (CERT)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned small businesses</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Woman-owned small businesses</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Other small businesses</td>
<td>*</td>
<td>*</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Small businesses owned by persons with disabilities</td>
<td>*</td>
<td>*</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Veteran-owned small business</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small businesses (or owners) located in labor surplus or low income counties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Firm location eligibility criteria</th>
<th>11-County Metro Area</th>
<th>15-County Metro Area</th>
<th>Minnesota</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
</tbody>
</table>

*Can apply for social disadvantage under the Federal DBE Program
**Separate contract goals for MBE, WBE and SBE
Figure E-3 presents relevant certifications and certifying agencies for the programs operated by each participating entity.

**Figure E-3.**
Summary of certifications used and certifying agencies for participating entity programs

<table>
<thead>
<tr>
<th>Certification</th>
<th>DBE ACBE</th>
<th>CERT</th>
<th>TGB (MBE/WBE/Disability)</th>
<th>Other</th>
<th>Economic Disadvantaged</th>
<th>Veteran</th>
</tr>
</thead>
<tbody>
<tr>
<td>MnDOT</td>
<td></td>
<td></td>
<td>Admin certifies TGB firms</td>
<td></td>
<td>Admin certifies ED firms</td>
<td>Admin certifies Veteran firms</td>
</tr>
<tr>
<td>MnDOT</td>
<td></td>
<td></td>
<td>MnDOT uses Admin TGB directory</td>
<td></td>
<td></td>
<td>MnDOT uses VetBiz.com directories</td>
</tr>
<tr>
<td>MnSCU</td>
<td></td>
<td></td>
<td>MnSCU uses Admin TGB directory</td>
<td></td>
<td>MnSCU uses Admin ED directory</td>
<td>MnSCU uses Admin Veteran directory</td>
</tr>
<tr>
<td>MAC</td>
<td></td>
<td></td>
<td>MAC uses the Department of Administrations TGB (M/W/D) Certification Directory</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Met Council</td>
<td></td>
<td></td>
<td>Met Council certifies DBE firms and maintains the MnUCP directory</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mosquito Control District</td>
<td></td>
<td></td>
<td>Mosquito Control District uses Admin TGB directory</td>
<td></td>
<td>Mosquito Control District uses Admin ED directory</td>
<td>Mosquito Control District uses Admin Vet directory</td>
</tr>
<tr>
<td>Hennepin County</td>
<td></td>
<td></td>
<td>Hennepin accepts the CERT (DBE/MBE/WBE) program</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of Minneapolis</td>
<td></td>
<td></td>
<td>City of Minneapolis certifies small and underutilized businesses (accepts DBE certification within 11-county area)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of St. Paul</td>
<td></td>
<td></td>
<td>Lead agency of the CERT program and certifies firms as small businesses, and women- and minority-owned businesses (SW/WBEs)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
C. Program Application

Each program uses a set of tools to encourage participation of minority- and women-owned businesses or other groups.

**Price preferences.** The TGB Program, Veteran-owned Business Program and Economically Disadvantaged Business Program apply price preferences (or other point preferences) for certified firms when bidding or proposing on certain procurements. The preference can be as much as 6 percent. Sometimes there is a limit on the amount of price preference applied (e.g., maximum of $60,000). Figure E-4 on the following page describes the application of preferences at the time of this Phase 1 report.

**Contract goals.** Certain programs includes use of contract goals, where prime contractors must either include a level of participation of a particular group in their bid or proposal that meets the goal set for the contract or show good faith efforts to do so. Participating entities can set 0 percent goals or not set a goal at all in certain instances (for example, when there are very limited subcontracting opportunities on a contract).

Programs that provide for use of contract goals include the Federal DBE Program, TGB Program, Veteran-owned Business Program and Economically Disadvantaged Business Program, Met Council’s MCUB Program, City of Minneapolis’ SUBP program, City of Saint Paul’s Vendor Outreach Program and Hennepin County’s SBE Program.

**Sheltered market programs.** A sheltered market program limits participating in bidding for certain procurements to certified firms. Note that City of St. Paul has authority for such a program for contracts under $100,000, but has not yet implemented the program.
Figure E-4.
Summary of price preference and contract goals program tools used by participating entities

<table>
<thead>
<tr>
<th></th>
<th>Price/point preference for bidder or proposer</th>
<th>Contract goals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Construction</td>
<td>Professional services</td>
</tr>
<tr>
<td>Minn Dept. of Admin</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>MnDOT</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MnSCU</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MAC</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>Met Council</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>Mosquito Control District</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>Hennepin County</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>City of Minneapolis</td>
<td>■</td>
<td>■</td>
</tr>
<tr>
<td>City of St. Paul*</td>
<td>■</td>
<td>■</td>
</tr>
</tbody>
</table>

TGB was created in 2012, and effective January 2013 for construction
Professional services was included in 2014 for TGB/Vet programs

*Also has authority for a sheltered market program for procurements under $100,000.
APPENDIX F.
General Plan for Disparity Analyses for Participating Entities

To conduct the disparity analysis for each entity, Keen Independent will compare the actual utilization of MBE/WBEs on a participating entity’s contracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work. (Availability is also referred to as the “utilization benchmark.”) Keen Independent will make those comparisons for individual MBE/WBE groups for each industry.

A. Disparity Analyses to be Performed

For each of the participating entities, the study team will prepare individual utilization, availability and disparity analyses for the following sets of contracts:

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

Disparity analysis will examine overall results within an industry as well as subsets of contracts, especially those for which each organization’s race- and gender-conscious programs do not apply.

Keen Independent will perform utilization analyses, as possible, for firms owned by veterans and persons with disabilities, but will not be performing disparity analyses. Based on guidance from the courts, disparity analyses may not be required for programs assisting veteran-owned businesses, companies owned by persons with disabilities, businesses in economically disadvantaged regions or small businesses overall.

Disparity analyses for each MBE group and for white women-owned firms. Keen Independent will produce disparity results for each racial and ethnic group of minority-owned firms (African Americans, Asian Americans\(^1\), Hispanic Americans, and Native Americans), as well as for white women-owned firms.\(^2\)

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1 The study team will disaggregate results for Asian Americans into Asian-Pacific Americans and Subcontinent Asian Americans as possible.

2 The study team will report utilization results, as possible, that separate minority male-owned and minority female-owned firms.
Special emphasis on contracts without programs applied. Keen Independent’s disparity analyses might reveal no underutilization of minority- and women-owned firms when a participating entity’s race- or gender-conscious programs apply.

- Such a result might simply show that programs are effective.
- Analysis of contracts where no MBE/WBE-type programs apply will be most instructive as to the need for remedial measures.

Also, Keen Independent will not include USDOT-funded contracts in the disparity analyses, as the Federal DBE Program applies to these contracts.

Disparity analyses not required for other groups. As discussed in the Phase 1 report and in Appendix B, disparity analyses are not needed for businesses owned by persons with disabilities, veteran-owned businesses, businesses in economically disadvantaged regions or small businesses.

B. Disparity Indices

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

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

Figure F-1 describes how Keen Independent calculates disparity indices.

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

- Qualifications and interest of companies in state or local government prime contracts and subcontracts;
- Specific types of work performed by the firm;
- Bid capacity of the firm;
- Locations where the firm works; and
- When the business was established in the local marketplace.

C. Statistical Significance of Disparity Analysis Results

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

**Statistical confidence in availability results.**
Keen Independent will not draw a sample of companies to research in the availability analysis. The study team will attempt to reach each firm in the relevant geographic market area identified in participating entities’ interested firm lists or by Dun & Bradstreet as possibly doing business within relevant subindustries.

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

- One measure is whether firms receiving the most participating entity work are represented on the list of firms to be contacted in the availability survey.

- The second issue is how many of the potentially available firms were successfully contacted in the availability survey. Keen Independent will examine the number of firms successfully reached compared with the number of firms with valid contact information on the initial list (i.e., calculate a “response rate” to the survey). Figure F-2 explains the high level of statistical confidence in the availability results due to the number of responses and the high response rate that Keen Independent typically achieves in similar availability surveys.
The third issue is whether there is any indication that availability results would differ if 100 percent of the firms the study team attempted to contact were successfully reached.

As the response rate affects this possibility, Keen Independent will compare the number of respondents with the total number of firms with valid contact information on the initial list of potentially available firms.

The survey approach also minimizes this possibility. There will be multiple callbacks at different times of day and different days of the week to reach companies that do not respond to the first contact, and interviewees will be given multiple ways to complete a survey (phone, online, fax, email). Interviewers clearly identify that they are calling as part of a State of Minnesota/other participating entity-sponsored study. Efforts to address potential language barriers will also minimize the possibility of under-reaching certain groups.

Finally, Keen Independent will review whether there is any difference in response rates for minority- and women-owned firms compared with other firms. As discussed in Appendix D, Keen Independent will perform this analysis by comparing the representation of minority- and women-owned firms in the initial list and the representation in the set of successfully contacted firms. Ownership information for firms in both lists will come from D&B ownership records for those firms. If results are consistent, it suggests minimal potential for any non-response bias affecting the availability results.

In sum, Keen Independent will review whether it is reasonable to view the quality of the availability data as approaching that of a “population” of available firms.

**Statistical confidence in utilization results.** Keen Independent will also attempt to compile a complete “population” of participating entity contracts for the study period. At this time, we plan no sampling of the contract data.

The study team will perform in-depth research regarding ownership status of all firms obtaining at least $10,000 of participating entity contract dollars during the study period. Keen Independent will also code ownership of firms below this threshold, but will not perform in-depth research on every firm no matter how little money it received.

Participating entities and the External Stakeholder Group will also review firm ownership information. Although inaccuracies in ownership information are possible, Keen Independent’s methodology is designed to make it extremely unlikely that they could materially affect utilization results.

In sum, Keen Independent will evaluate whether it is appropriate to use the utilization results as reflecting a population of participating entity contracts. If availability results also approach a population, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”
**Additional analysis of statistical confidence in results of the disparity analysis.** As outlined below, the study team will also use a sophisticated statistical simulation tool to examine whether there are a sufficient number of contracts and subcontracts examined to be confident that results indicating disparities could not be easily replicated by chance in contract awards.

**Monte Carlo analysis.** One can be more confident in making certain interpretations from the disparity results if they are not easily replicated by chance in contract awards. For example, if there were only ten State of Minnesota contracts examined in the disparity study, one might be concerned that any resulting disparity might be explained by random chance in the award of those contracts.

**Calculations.** Figure F-3 describes Keen Independent’s use of Monte Carlo analysis to statistically examine this issue.

The study team will report Monte Carlo simulation results as the probability that chance in contract awards can replicate the disparity for MBEs and WBEs. Applying a 95 percent confidence level for “statistical significance,” Keen Independent will determine if one can reasonably reject chance in contract awards as the explanation of any disparity.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure F-2 and elsewhere in this chapter), and it may not be appropriate for very small populations of firms.\(^4\)

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\(^4\) Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.
APPENDIX G.
Keen Independent Quality Assurance/Quality Control Plan

Keen Independent incorporates four components in its Quality Assurance/Quality Control (QA/QC) Plan:

A. QA processes for evaluating, identifying, and recommending adjustments to the activities or tasks (and associated resources) that must be performed in the project to provide confidence that the project will satisfy the relevant quality standards.

B. QC process for validating consultant’s deliverables for completeness and accuracy, as well as identifying and assessing issues and risks.

C. QA/QC processes must take into account consultant’s internal activities and those activities performed by any subconsultants.

D. Reporting to Admin on non-conformance assessments and proposed corrective actions.

This document provides the Keen Independent Quality Assurance/Quality Control approach for the 2017 Minnesota Joint Disparity Study in order of the four components listed above. Also note that the QA/QC Plan supports the Data Collection Plans.

A. QA Processes for Evaluating Adjustments to Activities or Tasks

Keen Independent employs flexibility to adapt activities and tasks to what is learned in the initial stages of a project, and sometimes at later stages. The following list of processes is not exhaustive, but illustrates processes for:

- Identifying issues;
- Determining which issues are critical; and
- Deciding whether to make recommendations to adjust activities and processes.

1. Adjustments related to study components. The processes described below pertain to a typical Keen Independent assignment, including disparity studies. For each step, we describe the process typically employed for identifying issues, how they are evaluated, when this step is performed and who performs the step. We also identify whether and how the step is incorporated in to the 2017 Minnesota Joint Disparity Study.

a. Pre-proposal exploration of issues. Before commencing a project, Keen Independent explores the background, environment and objectives for the assignment. The client has often identified issues in meetings or other communications at this point in the process.
If there are any concerns, Keen Independent often will meet with or submit communications to the client to address them. We will recommend changes when the objectives of the assignment will not be met without adjustment.

David Keen and Annette Humm Keen went through this process before starting on the proposal for the 2017 Minnesota Joint Disparity Study.

b. Preparation of a proposal or workscope for an assignment. Keen Independent thoroughly explores client needs before preparing a proposal or contract for the assignment. Our proposal or workscope identifies study background, objectives, tasks, information sources, schedule, needed study resources and reporting relationships.

Once retained to complete the work, Keen Independent schedules kick-off meetings or other initial discussions with the client to refine our understanding of background, issues, desired schedule and deliverables, and other aspects of the study.

Initial contract negotiation in February through June 2016 and June 21, 2016 project kick-off meeting with Admin and the participating entities are the 2017 Minnesota Joint Disparity Study equivalent of the preliminary meetings and discussions Keen Independent typically has at the outset of a project. Our work in Phase 1 resulted in refinements to study approach. This process is fully documented, including meeting minutes, monthly progress reports and written plans for study components.

Admin has a record of the contract negotiations, kick-off meeting and other meetings, draft and revised plans, monthly progress reports and other Phase 1 deliverables from February through June 2016. The Admin project manager was a participant in all of these meetings and the participating entities were involved in the June 21 kick-off meeting.

c. Formal Project, Communications and Outreach, Data Collection and QA/QC plans. Keen Independent has prepared formal Communication and Data Collection plans shared with Admin and the participating entities as part of this study (as well as this QA/QC plan).

Admin and the participating entities will review draft plans submitted by Keen Independent.

d. Monthly reporting of study progress and any issues. Keen Independent keeps clients apprised of study progress as well as any difficulties or need to redirect specific tasks or project timing. We do so through frequent verbal and/or email communications. We usually submit formal monthly progress reports that can also identify any study issues. For the 2017 Minnesota Joint Disparity Study, Keen Independent schedules regular Steering Committee and External Stakeholder Group meetings.

Keen Independent is following this process in the 2017 Minnesota Joint Disparity Study.
e. **Phase 1 start-up report.** Keen Independent has prepared a draft start-up report at the end of Phase 1 for Admin and Steering Committee review. This provides another opportunity to ensure that the analytical steps will meet project objectives and required schedule.

*Based on input from Admin, the participating entities (Steering Committee members) and the External Stakeholder Group members, Keen Independent will document any recommendations for adjustments in study approach.*

f. **Review of draft report materials.** Keen Independent often accelerates preparation of draft report materials as a means to internally identify any gaps or questions concerning results. We also typically share early versions of draft materials with our clients. Keen Independent finds that this is often the best way to ensure that the research is meeting study objectives, and where further investigation or reshaping of the project is needed.

*Keen Independent is following this process in the 2017 Minnesota Joint Disparity Study. We will have accelerated delivery of draft report materials for Admin, participating entities and the External Stakeholder Group members beginning with submission of the draft Phase 1 report.*

### 2. Adjustments related to changes in legal or regulatory environment.

Any of our assignments, but especially disparity studies, can be affected by changes in the legal or regulatory environment.

- Keith Wiener of Holland & Knight will closely monitor new court decisions, changes to federal regulations and Minnesota state law, and other legal developments throughout the study.

- We will discuss the merits of any changes in approaches based on any such developments. Mr. Wiener and Mr. Keen will do so through telephone or in-person communications with Admin.

- Mr. Wiener will document any changes in the legal environment in the legal appendix. He will revise the appendix as necessary over the course of the disparity study.

*The Admin project manager, as appropriate, will be involved in any discussions of needed changes to the study based on any new legal decisions, changes in federal regulations, changes in state law or other developments. Both the project manager and the participating entities will have access to the draft legal appendix and any revisions to the appendix.*

### 3. Adjustments related to client data.

Many Keen Independent projects involve data collection from a client or other entities. All disparity studies do. The need to extract client data that are often compiled for uses other than the Keen Independent study is often a cause for redirection or other adjustments to the study plan. Unanticipated issues often arise.

Keen Independent employs the following process to identify and respond to any issues related to data needed from a client.
a. **Initial data collection discussions with Admin and the participating entities.** Keen Independent began by discussing required information and potential data sources with each participating entity. These discussions often identify potential issues with availability, completeness, format or other aspects of the data. This first step provides an opportunity to redirect the data collection phase of a project.

*Each participating entity is involved in entity-based data discussions.*

b. **Written data requests.** Keen Independent usually follows the data discussions by preparing and sending a written data request. Data requests are helpful as they clearly set forth the types of information needed in the study. Data are sometimes not complete, and can be augmented with subsequent requests. Entity-based review of the data request sometimes identifies additional issues concerning needed information. This provides a second opportunity to refine, redirect or expand data collection strategies.

A second step in the data request process is to clarify the data request, or to discuss with each participating entity any need to identify alternative data sources.

*The written data requests and any redirection based on early data discussions important aspects of the QA/QC process.*

c. **Initial review of information received.** Once initial data are received, Keen Independent begins a comprehensive review process to determine if they meet study needs. (Examples of specific QC steps are discussed under Part B of this Plan.) The detailed review of the data also provides an opportunity to redirect data collection and analysis approaches.

*Client data and Keen Independent review of the data will be available for Admin and participating entity review as outlined later in the QA/QC Plan.*

d. **Documentation of data or other information refinement.** The Keen Independent study team typically employs many iterative steps to refine or adapt the data collection and analysis approaches, documenting each major change.

*Admin and the participating entities will have copies of these emails, monthly progress reports and other documents. Keen Independent will also compile this information in Phase 3.*

e. **Preparation and review of preliminary analyses.** Keen Independent typically prepares preliminary analyses using client data and reviews them internally and with the client for a “sniff test” preliminary review. We often broaden the client staff or management review of these analyses beyond the staff providing the data. This provides a concrete way to elicit client reactions and suggestions that may redirect data collection and analysis efforts. Keen Independent prepares meeting notes from these review sessions.

*Keen Independent will provide Admin and the participating entities preliminary analyses and notes from meetings where the analyses are discussed.*
4. Adjustments related to resources. Our experience with past studies is that Keen Independent team members and subconsultant resources are often shifted between priorities to ensure best completion of the project in a timely manner.

- A Keen Independent Principal will make the decision to increase a subconsultant’s budget if its scope of services is materially increased.

- When necessary, Keen Independent will provide other study team resources to a particular subconsultant task if it is under-budgeted or behind schedule.

Any major revisions to subconsultant budgets will be reported to Admin in a monthly progress report and will be available for Admin and participating entity review.

B. QC Process for Validating Deliverables for Completeness and Accuracy

Keen Independent will employ QC procedures throughout the study to validate deliverables for completeness and accuracy. As data (or other information) are rarely “perfect,” we also have processes for identifying and assessing issues and risks related to any possible imperfections in the information.

1. Internal team review and data-checking. There are multiple steps of internal team review and information-checking in any Keen Independent study, including reviewing completeness and accuracy of data or other information. Keen Independent also has processes for evaluating whether any data issues warrant further action, or whether they have no material effect on the research.

Below are some of the questions we answer when validating information and deliverables for completeness and accuracy.

a. **Is the information complete?** This means that the information requested or intended to be compiled is present. Tools include comparisons to control totals, review of any data gaps, and assessment of underrepresentation of certain types of records. This process occurs throughout the data collection stages of a project.

b. **Has information outside the scope of the analysis been properly excluded and are there any duplicate records in the data?** Keen Independent checks for data or other information that is properly excluded because of study scope. (For example, does contract data contain an entity’s employee payments or contracts for time periods outside the study scope?). We also perform checks for duplicate records.

c. **Does any aggregated or compiled information accurately represent source information?** Keen Independent asks this question when there are opportunities for errors between the source information (hard copy contract records, audio recordings of interviews, transcripts of public meetings) and the compiled or summarized information (databases, interview write-ups, or summaries of public meetings). For a subset of the compiled information, Keen Independent staff will access the source information to ensure consistency. There is no one sampling plan, and the timing of this review may vary or only be done when questions arise about the set of compiled
information. For example, Keen Independent thoroughly reviews a sampling of the audio recordings of in-depth interviews when assessing interview write-ups for team members who may be new to this task.

d. **Is the information understandable?** This means that Keen Independent understands the values for each data element or other information provided. When we do not, we ask the provider of the information questions about the information. We may also need to conduct further research when the information comes from secondary sources (such as explanations of U.S. Bureau of the Census data). A qualitative example is whether a quote from an interviewee makes sense or requires further review.

e. **Does the data appear to have correct values and entries/does the collected information appear reasonable?** The Keen Independent team is constantly assessing the reasonableness of the information collected. An example is when a contract amount field contains zeros or negative values, or a numeric field contains alpha data. Staff run internal checks to test for correct values, compare against control totals, examine outliers, analyze whether values for subparts exceed the whole, and other techniques. An example for qualitative information is whether a response to a question is inconsistent with study team experience (for example, if someone reported that she started a business when she was 10.) Keen Independent will follow up when those types of issues arise.

f. **Is the information internally consistent?** This means that certain information such as firm revenue is consistent with other information for a record such as number of employees. (Or in a qualitative example, whether answers provided in one part of an interview are consistent with another part of an interview.) Keen Independent has a number of tools to check for internal consistency of information, from calculating ratios or examining outliers to reviewing qualitative information for internal consistency.

g. **Is the information consistent between sources?** Consistency of information across data sources is important in any Keen Independent study, but is especially critical in a disparity study. Consistent information about the race, ethnicity and gender ownership of a firm is one example. Keen Independent links data sources to review the consistency of key pieces of information across datasets. We take steps to clarify inconsistent information when the issue arises (for example, calling a firm to identify the race, ethnicity and gender ownership of the firm, or to clarify the type of work it performs.

h. **Do results of preliminary analyses make sense?** Keen Independent often prepares preliminary analyses to test basic assumptions about the data or other information, from steps as simple as preparing control totals to complex analyses such as regression models.
i. **Can another team member replicate the results?** For certain analyses, Keen Independent has a second team member attempt to replicate results based on the data set used for that analysis. One example is whether a second team member can replicate disparity analysis results.

*Keen Independent is employing each of these techniques as part of the 2017 Minnesota Joint Disparity Study.*

2. **Internal review of written documents.** Keen Independent maintains the following QC protocols for written and other communications, which will help to ensure quality of report elements and other written materials throughout the study.

   a. **Instruction and training for written documents and graphics.** Keen Independent trains staff members who prepare or review written communications about audiences, style conventions, reading level and word choice, and use of specific terms. Keen Independent maintains and regularly updates a style manual for different forms of written and tabular/graphical communication. Standard protocols include checking for spelling and grammar errors, overuse of passive voice and appropriate readability scores (in Word) and spell checking in Excel and PowerPoint documents and in emails. Keen Independent also maintains a style guide for graphics.

   b. **Internal (and external) use of track changes and comments in Word, Excel and PowerPoint documents.** Keen Independent routinely uses track changes to communicate issues regarding draft materials among authors and reviewers. Depending on the project, we encourage our clients to use this as well.

   c. **Draft proofing and final review.** In addition to staff review of materials, one or both Keen Independent Principals review draft and final materials before forwarding to a client. This involves review of written material, tables and graphics. Keen Independent often requests subconsultant review of draft materials, depending on the subject matter. Keen Independent will typically review any sensitive information that a subconsultant has prepared before forwarding it to the client.

   d. **Seeking and responding to external review.** Keen Independent has protocols for requesting and receiving client review of draft materials (and public input regarding those materials). We typically will receive verbal and written feedback from the client concerning draft materials. We maintain copies of client communications related to their review and, when appropriate, ask clients to return Word or PowerPoint documents with track changes and comments. Keen Independent reports back to clients concerning how any high-level comments or requested changes have been addressed.

   Keen Independent also has protocols for collecting and reviewing public comments about draft materials (an issue typically only for disparity study reports). We compile these comments and typically analyze them in a portion of the final report (including verbatim comments as appropriate).

*Keen Independent is employing each of these techniques as part of the 2017 Minnesota Joint Disparity Study.*
3. External review of data and other information. Certain data and other information will be provided to the Admin project manager, the Steering Committee and the External Stakeholder Group for review. Certain confidential information collected as part of the study will be restricted to use by the study team. The study team will provide the databases in Excel through a DropBox account or other means.

Keen Independent will provide participating entities the following deliverables for review and external QC:

a. Materials related to analysis of contract data. In chronological order, Keen Independent will provide Admin and the participating entities information including:

   > Data Collection Plans (September 2016);
   > Data memos describing efforts to collect information from each participating entity (September 2016);
   > Preliminary databases of participating entities’ contracts and subcontracts (projected for February 2017);
   > Preliminary analysis of relevant geographic market area and subindustries (projected for late February 2016);
   > Preliminary utilization databases, including race, ethnicity and gender ownership information (projected for spring 2016);
   > Preliminary analysis of the utilization of minority- and women-owned firms in participating entities’ contracts (projected for spring 2017);
   > Draft report chapter and appendix discussing utilization methodology and results (projected for late spring 2017).

b. Materials related to public meetings. In addition to communications materials for the August 2016 and the 2017 public meetings, materials for Admin and participating entity review will include draft agendas, topic area lists and PowerPoint presentations to be used at each session. The study team also analyzes results in draft documents that are submitted for review.

c. Materials related to availability data collection and analysis. Keen Independent will provide Admin and the participating entities the following deliverables for review and external QC:

   > Availability Data Collection Plan (see Appendix D);
   > Availability survey instrument (preliminary survey instrument for construction included in Appendix D of this report, refined survey instrument prior to February 2017);
List of firms for telephone interviews (February or March 2017);

Ability to monitor real-time CRI telephone interviews (March-April 2017); or test the online interview option (March 2017);

Preliminary counts of available firms by racial, ethnic and gender group (spring 2017);

Preliminary analysis of response rates and assessment of any potential non-response bias (spring 2017);

Preliminary analysis of availability of minority- and women-owned firms, by race, ethnicity and gender, for participating entity contracts (summer 2017); and

For each participating entity, draft report chapter and appendix discussing availability methodology and results (projected for summer 2017).

d. Materials related to in-depth interviews with trade associations, business owners, Admin staff, other local public agencies and other groups. The study team will provide the Admin project manager and the participating entities materials including:

   Qualitative Information Collection Plan (see Appendix J);

   Preliminary discussions concerning results to date (February and late spring 2017); and

   Draft report chapters and appendices discussing the interview process and analyzing interview results (summer 2017).

e. Materials related to quantitative analyses of the local marketplace.
   Keen Independent will make available to Admin and the participating entities the following materials concerning local marketplace analyses:

   Preliminary results, as appropriate (projected for spring 2017);

   Any underlying data requested; and

   Draft report chapters and appendices discussing data sources, analyses and results (summer 2017).
f. **Materials related to disparity analysis.** The disparity analysis will use data from the utilization and availability analyses. We will also provide Admin and the participating entities:

- General Plan describing the disparity analysis (Appendix F of this report);
- Documentation of the disparity analysis calculations (as requested); and
- Draft report chapters and appendices discussing data sources, analyses and results (summer 2017).

g. **Draft and final report materials.** Many of the above review components include Admin and participating entity review of draft report chapters and appendices. Keen Independent will provide:

- Draft disparity study report chapters and appendices as they are completed (beginning in spring 2017 and continuing through summer 2017); and
- Draft final report chapters and appendices (fall 2017).

h. **Other reporting.** Keen Independent will provide Admin and the participating entities monthly reports, plans and other materials described throughout this document.

### C. QA/QC Processes Concerning Subconsultant Activities

QA/QC is not only for internal purposes but extends to subconsultant activities.

1. **Performance of subconsultants’ own internal QA/QC processes.** Keen Independent typically retains subconsultants who have their own QA/QC processes. We inquire about those processes and work with the subconsultants to augment or improve them as necessary. This typically takes place on a task-by-task basis (e.g., training subconsultants to conduct different types of interviews).

In the 2017 Minnesota Joint Disparity Study, each subconsultant has its own internal quality control steps. For example, Customer Research International and Felton Financial Forensics have their own data-checking processes. All of our subconsultants conducting in-depth interviews and communications have internal quality procedures as well.

David Keen and Annette Humm Keen discuss internal QA/QC with each subconsultant and make suggestions about additional steps.
2. **Keen Independent subconsultant training and supervision.** David Keen and Annette Humm Keen are heavily involved in training and supervision of subconsultants, especially concerning aspects of the study that they have not performed before with Keen Independent (CRI and Holland & Knight have already performed their corresponding study tasks with Keen Independent multiple times).

a. **Training, review and feedback concerning in-depth interviews.** Keen Independent training will include thorough coaching of subconsultants before initiating activities such as in-depth personal interviews with trade associations and business owners, including performing some of the interviews with our subconsultants. Training began in summer 2016 with a first meeting between Keen Independent and other study team members.

In the fall of 2016, Annette Humm Keen of Keen Independent will conduct a number of in-depth interviews with businesses by phone. After requesting interviewees’ approvals, we will arrange for our subconsultant interview team to listen in on a number of calls and review audio recordings. We have had recent success using this method of training for a State of Montana study, as it allowed for simultaneous listen-and-learn, and post-interview group training debriefs and question and answer sessions.

We will provide intensive post-interview feedback for subconsultants as they complete initial interviews. Because Keen Independent staff will prepare interview reports for each interview performed based on the audio recordings for those interviews, our team can immediately provide feedback to the subconsultant performing an interview.

b. **Training, review and feedback concerning availability telephone interviews.**

David Keen, Annette Humm Keen and other Keen Independent staff will hold training sessions (via telephone) for CRI and provide feedback from listening in to initial interviews.

*Admin and the participating entities will also have opportunities to review any of this subconsultant work, including listening in on CRI availability interview calls (except for any confidential information).*

3. **Keen Independent review of subconsultant work product.** David Keen, Annette Humm Keen and other Keen Independent staff will also review subconsultant interim and final work product.

*Admin and the participating entities will also have opportunities to review any of this subconsultant work, including data prepared by the subconsultants (except for any confidential information).*

**D. Reporting Issues and Corrective Actions to Admin**

David Keen and Annette Humm Keen and other Keen Independent staff will report issues and proposed corrective actions to the Admin project manager on a monthly basis, or more frequently as necessary.
APPENDIX H.
Preliminary Outline of Draft 2017 Entity Disparity Study Report

Each participating entity will receive its own individualized disparity study report, with certain appendices that are shared between reports. Appendix H presents a possible outline for a participating entity’s draft report. The outline is very preliminary and will be revised prior to preparing the draft report. Also, the report structure may vary somewhat between participating entities to best organize the information for that entity.

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B. Summary of the disparity study research

C. Key results

D. Program options

E. Request for public comments

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APPENDIX I.
Communications Materials

Keen Independent helped to prepare a fact sheet suitable for internal and external use. The fact sheet follows.
2017 Minnesota Joint Disparity Study

Eight state and local government entities have come together to analyze whether there is a level playing field for minority- and women-owned firms in the local marketplace. The 2017 Minnesota Joint Disparity Study is examining procurement of construction, professional services, goods, and other services in the public and private sectors. Additionally, the study will research conditions for veteran-owned businesses and companies owned by persons with disabilities. The following eight governmental entities are participating:

- State of Minnesota, including the Department of Transportation;
- Metropolitan Council;
- Metropolitan Airports Commission;
- Minnesota State;
- Mosquito Control District;
- City of Minneapolis;
- City of Saint Paul, including the Housing Redevelopment Authority; and
- Hennepin County.

The Minnesota Department of Administration is coordinating this effort and Keen Independent Research is leading the research team.

Stakeholder and other Public Involvement

There are a number of ways you can get involved. The research team will collect and analyze public input throughout the study, which will be incorporated in a final report. To get involved:

- Participate in the survey of Minnesota businesses via phone or email (early 2017).
- Participate in a public forum held on August 31, 2016 at the Minneapolis Central Library (Doty Board Room, 3:00 – 4:45 p.m. or 5:00 – 7:00 p.m.). Additional public forums will be scheduled (fall 2017) once preliminary results are released;
- Give us your name and contact information to participate in an in-depth interview or focus group;
- Call the study hotline, provide online comments, or send an email or letter with input; and
- Provide comments on the draft report when distributed to the public (fall 2017).

Schedule

The Minnesota Department of Administration initiated the disparity study in June 2016. Keen Independent Research will submit preliminary results to each participating agency in fall 2017. Preliminary results will also be available for public review in fall 2017. The study will be completed in December 2017.

Learn More or Provide Input

To learn more, you may contact the State, your local participating entity, or Keen Independent.

- Contact the State: Disparity.Study@state.mn.us
- Disparity Study Website: www.mn.gov/disparity-study
- Contact Keen Independent by email: JointMNDisparityStudy2017@keenindependent.com
- Contact Keen Independent by phone: (612) 888-2017
APPENDIX J.
Plan for Qualitative Information Collection (and Results of the First Public Forum)

Through multiple qualitative information gathering methods, business owners and managers and other groups will have the opportunity to discuss their experiences working in the Minnesota marketplace; experiences working with the participating entities and other public agencies; perceptions of the local programs and other topics important to them.

This appendix provides the Keen Independent plan for qualitative information collection, the results of the first public forum held at the end of August 2016, and in-depth interview guides for business interviews and trade associations. The appendix includes the following sections:

A. Qualitative information collection plan;
B. August 31, 2016 public forum; and
C. In-depth interview discussion guides (business interviews and trade associations).

A. Qualitative Information Collection Plan

The Keen Independent qualitative information collection plan includes:

- Five public hearings;
- Two focus groups with representatives of chambers, trade associations, business services providers and related organizations (one in Saint Paul and one in Minneapolis);
- Two focus groups with public agency contracting and business services staff (one in Saint Paul and one in Minneapolis);
- 70 personal interviews with business owners throughout the state;
- Ten personal interviews with other key organizations throughout the state;
- Eight-to-ten in-depth interviews with associations, businesses and other groups related to persons with disabilities.
- Qualitative information from 3,000+ telephone and online availability surveys;
- Review of complaints received by agencies;
- Compilation and analysis of any reports concerning discrimination affecting businesses Minnesota (or related issues) since the most recently prepared disparity studies;
- Written public comments received as part of the outreach process and request for input concerning the draft reports; and
- Comments via the study telephone hotline and dedicated email address.

In-depth personal interviews with business owners throughout the state and other key groups begin in fall of 2016. Keen Independent plans four focus groups as well (as part of Phase 2 of this disparity study).
In August 2016, the participating entities led by the State of Minnesota Department of Administration (Admin) held the first of five public forums. There are plans for four public forums in late summer or fall of 2017 (as part of Phase 3 of the disparity study). Public forum participants offer comments verbally or by submitting a comment card distributed at the start of each public forum.

Study team members responsible for gathering anecdotal information are:

- Keen Independent;
- KLD Consulting (KLD), a Minneapolis-based communications/public outreach firm;
- Fondungallah & Kigham, LLC, a St. Paul-based law firm with focus on issues of discrimination; and
- CJ Petersen & Associates LLC, a St. Paul-based market research and planning firm.

Past qualitative information from reports and other sources. Keen Independent reviewed media, other research reports and past disparity studies, which informed the development of questions in the qualitative research for the 2017 Minnesota Joint Disparity Study. For example, identified topics included: access to capital, financing, bonding and insurance; any stereotypical attitudes and allegations of discriminatory treatment; any unfavorable work environments; and other relevant topics.

In-depth personal interviews. The study team plans to conduct 90 in-depth personal interviews with businesses, trade associations and other groups (interviewees will include minority- and women-owned firms, majority-owned businesses, veteran-owned businesses, trade associations and other groups, and eight to ten interviews with associations, businesses and other groups representing persons with disabilities). The interviews focus on discussions about interviewees’ perceptions and anecdotes regarding procurement of construction, professional services, goods, and other services in the public and private sectors.

The study team will identify interview participants primarily from businesses completing availability surveys, stratified by business type, location, and the race, ethnicity and gender of business owner. Interviewees will primarily be owners, presidents, chief executive officers or managers of the business or association. Among the construction businesses that the study team will interview, some will work exclusively or primarily as prime contractors or subcontractors, and some will work as both. All of the businesses will conduct work in Minnesota marketplace. Interviewees will be identified in the final report by interviewee number (i.e., #1, #2, #3, etc.) rather than by name.

Interviewees are often quite specific in their comments. As a result, the study team may report them in more general form to minimize the chance that readers can readily identify the interviewees or other individuals or businesses mentioned in the interviews. The study team reports whether each interviewee represents a certified business and also reports the race/ethnicity and gender of the business owner, when known.¹

¹ Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.
Availability surveys. Keen Independent plans for input from firm owners and managers providing comments at the end of the online or telephone availability surveys. Availability interview comments will be referenced as “AI” in Appendix J. (See Appendix D for more information about availability survey methodology and schedule.)

Hotline, email and other comments. The study telephone hotline (612-888-2017) and designated email address (JointMNDisparityStudy2017@keenindependent.com) encourage public input. The study team also receives written comments via fax and mail. Admin and Keen Independent collectively received eight public comments (six emails, one phone call and one by mail). Admin and/or Keen Independent appropriately responded to each comment.

Focus groups. The Keen Independent study team plans for two focus groups with public agency contracting and business services staff (one in Saint Paul and one in Minneapolis).

Additionally, Keen Independent plans another two focus groups with representatives of chambers, trade associations, business services providers and related organizations (one in Saint Paul and one in Minneapolis). Focus groups are planned for spring 2017 as part of Phase 2 of the disparity study.

Public forums. Admin organized the first public forum, which was held in Minneapolis on August 31, 2016. Four additional public forums will be scheduled for late summer or fall of 2017 as part of Phase 3 of the disparity study. These public forums will be one avenue to collect public input on the 2017 Minnesota Joint Disparity Study draft reports, which will be distributed in advance of the public forums. The Phase 3 public forums will be held in different regions of the state.

The study team references public forum comments as “PFP” in Appendix J and public forum comment cards as “PFCC.” A synthesis of the results of the first public forum follows.

B. August 31, 2016 Public Forum

On behalf of the participating entities, the State of Minnesota Department of Administration organized a Phase 1 August 31, 2016 public forum to gather initial public input for the 2017 Minnesota Joint Disparity Study. This was the first of five public forums. It was held at the Minneapolis Central Library, Mary and David Doty Board Room, 300 Nicollet Mall, Minneapolis, Minnesota.

The public was invited to attend one or both sessions (3:00 pm to 4:45 pm, 5:00 pm to 7:00 pm). Met Council offered free transit passes to increase public participation. Admin provided snacks.

Attendance. Representatives from Admin and the participating entities, Keen Independent and interested parties from the Minnesota business community attended the first public forum. Commissioner Matt Massman attended a portion of each session. Keen Independent consultants in attendance included:

- David Keen, project manager and Keen Independent Principal;
- Annette Humm Keen, Keen Independent Principal; and
- Blanca Monter, Keen Independent Consultant.
Keen Independent subconsultants in attendance included:

- Mark Felton, CPA, Felton Financial Forensics;
- Connor Schaefer, Public Outreach Assistant, KLD Consulting; and
- Cathy Petersen, Principal, CJ Petersen & Associates.

Public Forum participants, identified by the August 31 public forum sign-in sheet, totaled 65 including business owners and representatives, members of the Minnesota business community and a number of the participating entities. At least two public forum participants did not sign in. (Admin staff, Keen Independent study team staff and Commissioner Massman add 12 attendees bringing the total to about 80 attendees.)

**Introduction to the disparity study.** David Keen, Principal at Keen Independent, introduced the 2017 Minnesota Joint Disparity Study background and workscope. The floor was then opened for discussion, questions, comments and suggestions. Prompts for input included:

- What are the strengths and weaknesses of past disparity studies?
- Is there a level playing field for businesses in the Twin Cities and statewide marketplace?
  > MBEs
  > WBEs
  > Business owned by persons with disabilities
  > Veteran-owned businesses
  > Small businesses in general
- Are current state and local government programs effective? Needed?
- What are the key issues to examine in the new study?
- Any other issues?

**Synthesis of August 31 public forum comments.** In total, 22 of the 29 public forum participants who spoke made public comments. Keen Independent randomly assigned each of the public forum participants, who offered a comment, a public forum participant “PFP” identifier (i.e., PFP#1, PFP#2 and so on). In Appendix J, we identify oral comments from the public forums by these randomly-assigned “PFP” identifiers.

The study team encouraged public forum participants, who preferred to comment in writing, to submit a comment card. A single August 31 public forum participant submitted a comment card, identified as PFCC#1 in this appendix.

A synthesis of oral and written public comments from the August 31, 2016 public forum follows.

A number of Public forum participants commented that there is a need for improved outreach and dissemination of information regarding minority- and women-owned businesses and veteran-owned businesses. An African American owner of an MBE-certified specialty-contracting firm remarked that a list of minority buyers would be beneficial to small firms, because he has
difficulties locating minority firms. To save time and money in the process, he added that his firm could reach out to other minority firms if a comprehensive list existed. [PFP#20]

An African American female owner of a MBE/WBE-certified professional services firm commented that it is difficult for certified firms to get information from public entities on public procurement opportunities. [PFP#24]

An Asian American male owner of a CERT-certified services company commented that there is limited flow of information from the certification program once a firm is certified. [PFP#27]

A male representative of a veteran-owned business group commented that his group had previously requested that Minnesota have a public forum for veterans’ groups. He added that he appreciated that MnDOT developed a state certification program for veterans and that there is a need now to reach out to veteran-owned firms to apply for certification. He commented that as certified veteran business owners are retiring, younger veterans are not replacing them. [PFP#1]

A white female owner of a DBE-certified professional services firm commented that she and her colleagues have had not success with any “meet and greets” and considered them “obligatory by the generals.” She added that some “meet and greets” cost money to attend and take a lot of time from her day. [PFP#25]

A number of public forum participants commented on barriers to relationship-building and accountability in the procurement process. An African American male representative of a DBE-certified goods firm remarked that he has positive experiences when working with “the leadership,” however, when he works with the purchasing staff, he faces challenges. He reported not wanting to go over the purchasing representative to their supervisor, as a remedy. He reported that retribution could limit opportunities to sell his goods. [PFP#16]

A white female owner of a DBE-certified specialty-contracting firm remarked that relationships that are created with diversity department representatives are overruled at the procurement level. She added that if a business owner goes over the head of a procurement representative, that owner faces the challenge of alienating someone that she must work with in the field. [PFP#3]

Some public forum participants commented on challenges with leveling the playing field. An Asian American male president of an Asian American female-owned general contracting firm commented that there is no level playing field for minority-owned firms. He remarked that though his firm is established, they still experience discrimination in revenue, relationships and other areas. He added that race neutral programs can create a glass ceiling that defeats the intention of those programs. [PFP#22]

A white female owner of a DBE-certified professional services firm remarked, that based on her experiences and those of African American female colleagues, “there is not a level playing field.” She further commented that “unconscious bias” exists and she has “seen it.” [PFP#25]

An African American male owner of a DBE-certified goods firm commented that he faces challenges with the playing field since his firm is in a highly-specialized industry where the competition is only large competitors. [PFP#28]
Several public forum participants commented on challenges faced by minority- and woman-owned firms related to opportunities for work, goal setting, compliance and monitoring of programs. A Hispanic American male owner of a DBE-certified specialty-contracting firm commented that he has sought the insight of public officials, without results, regarding disparities in his specialty contracting industry. He commented that there is nothing in place to enforce compliance with goals. [PFP#13]

A white female member of the public added that enforcement of hiring women-owned firms needs immediate improvements offering a number of entities and publications that might enhance procurement lists of women-owned firms. She added that disparities between minority- and women-owned firms and majority-owned firms need addressing. [PFP#8]

A white male representative of a minority female-owned engineering firm reported scope limits on some public agency projects for minority-owned architecture and engineering firms. He added that this results in primes want to “meet goals; not exceed the goals.” [PFP#23]

A white female owner of a DBE-certified professional services firm remarked that differences exist between agencies and large firms valuing diversity and those that attempt only to meet goals. [PFP#25]

An Asian American male owner of a CERT-certified services company commented that the flow of money from the state to the prime contractors is troublesome and he recommends monitoring of the programs for subcontractor participation. [PFP#27]

A few reported commented on filing complaints. An unnamed female participant commented that legal expenses are barriers to small businesses if they need to file complaints. [PFP#18]

A white female member of the public remarked that her sister had a “horrendous” experience when she was required to hold a heavy drill over her head on a construction project. She commented that the utility company did not want her to succeed in the construction industry and she had to file a legal dispute as a remedy. [PFP#8]

Two public forum participants commented on interest in and effectiveness of equity programs. An African American female representative of an MBE-certified specialty contracting firm offered her recommendation that in addition to small businesses and minority- and women-owned firms, that the study include input from large firms that care about the success of programs and the outcome of the study. [PFP#10]

An African American female owner of a DBE-certified professional services firm remarked that the current state and local government programs, DBE/TGB/WBE/MBE, are necessary, but “the jury is still out” on the effectiveness of the programs. She added that participation in programs and gaining business are “successful ‘measurables’” for her firm. [PFP#26]

Two business representatives commented on the task of preparing proposals and then not receiving award notifications. A male representative of a white woman-owned, TGB-certified professional services firm reported that the firm invests a lot of time writing proposals. He added, “… at least 50 percent of the time,” the firm does not hear the results of the submission or details of
the award. He commented that women- and minority-owned firms want to know why they did not win the project especially when knowing it was in their “wheel house.” He added that women- and minority-owned firms need to know their strengths and weaknesses; not knowing the outcome of an award causes challenges for them. [PFP#7]

A female owner of a WBE- and DBE-certified specialty-contracting firm reported that notification of awards and information on status of submitted bids should be made available. [PFCC#1]

A number of public forum participants reported on unbundling of contracts. A white female representative of a majority-owned general contracting firm commented that large firms have opportunities to unbundle contracts that would expand opportunities for small firms. [PFP#11]

An African American male representative of a DBE-certified, white woman-owned professional services firm explained that engineering and architecture firms establish the framework of a project via the construction documents. He added that how the project is broken down to support small businesses is not included in the construction plan, reporting that unbundling begins with A&E. [PFP#2]

A public forum participant commented that location can cause barriers for minority-owned firms. A white male representative of a minority female-owned engineering firm with multiple locations commented that some Minnesota entities preclude his firm from bidding on projects based on their locations within the state. [PFP#23]

Two public forum participants commented on the challenges with certification processes. A white female owner of a DBE-certified professional services firm commented that certification and recertification processes were time consuming and paperwork intensive. She added that it would be better if MnDOT and Saint Paul processes were coordinated. [PFP#25]

An Asian American male owner of a CERT-certified services company commented that he recently went through the long tedious certification process and attended unproductive meetings. [PFP#27]

One public forum participant reported on challenging procurement processes. An African American female owner of a DBE-certified professional services firm remarked that prequalification requirements, retainage, revenue and late payments are challenges to certified firms. [PFP#26]

One business owner commented that small businesses face challenges finding, training and retaining qualified employees. An Asian American female owner of a DBE-certified specialty-contracting firm stated that she faces challenges related to the hiring pool. She commented that students coming out of trade schools are not ready to work in her industry. [PFP#19]

She added that small business owners must spend money training ill-qualified employees and it affects profits. She reported that small businesses should be receive government assistance while they are providing on-the-job-training to lesser qualified graduates from trade schools, who move to larger firms once trained. [PFP#19]

A public forum participant commented that the union requirements on some public sector contracting opportunities shut out small businesses and minority-owned businesses that often
do not operate as union shops, another commented on living wages. A male representative of a contracting firm commented that many public sector contracting opportunities require firms to be union shops, and most small and minority-owned firms are not unionized. He added that public opportunities are therefore “slim to none” for small and minority-owned firms. He reported that if small or minority firms could gain access to public sector opportunities as subcontractors, it would “level the playing field.” He added that if goals exist, they are not providing a level playing field because the same minority contractors are getting the work “over and over again.” [PFP#29]

A white female member of the public forum indicated her appreciation for the study and public forum, commenting that living wages must be part of the study topics and that a $9.50 minimum wage “is insulting.” [PFP#8]

A public forum participant commented on the barriers she faced regarding untimely payments. A white female owner of a DBE-certified professional services firm commented that she had faced challenges with untimely payments. She remarked, for example, that she only recently received payment for work she performed in January. [PFP#25]

One mentioned bonding as a barrier to doing business. An unnamed female participant commented that bonding is a “huge expense” to DBEs. [PFP#18]

One commented on challenges regarding insurance requirements. A white female owner of a DBE-certified professional services firm commented that excessive professional liability requirements are excessive and arbitrary. [PFP#25]

A public forum participant reported on the impacts of competition on growing a business. A female African American representative of a specialty professional services firm commented that that challenges exist for small firms competing for MAC projects. She indicated that competing for kiosk opportunities at the airport is “daunting.” [PFP#9]

This business representative remarked that in order to for small businesses to compete and grow they need funds. She remarked that start-ups receive help, but recommended that more focus be on established firms that need assistance for growth. [PFP#9]

One public forum participant commented on challenges faced by the food service industry. A white female representative of a food council organization, recommended that the food service industry be included in the disparity study stating, “… the big dogs [in the food service industry] have taken over … and [that] causes challenges for equity ….” [PFP#12]

She reported that industry representatives are studying public agency procurement in the food service industry and they are studying practices in public schools, parks, prisons, universities, medical institutions, and other venues. [PFP#12]

C. In-depth Interview Discussion Guides

On the remaining pages (10-27) of Appendix J, we include the 2017 Minnesota Joint Disparity Study draft in-depth interview guides for business interviews and trade associations. We plan for further refinement of these guides before initiating the interviews.
KEEN INDEPENDENT.
Draft 2017 Minnesota Joint Disparity Study In-depth Interview Guide for Business Interviews

*Read to the Interviewee.* Thank you for agreeing to participate in 2017 Minnesota Joint Disparity Study in-depth interviews.

Participating state and local government entities have come together to analyze whether there is a level playing field for minority- and women-owned firms in the local marketplace. The 2017 Minnesota Joint Disparity Study is examining procurement of construction, professional services, goods, and other services in the public and private sectors. Additionally, the study will research conditions for veteran-owned businesses and companies owned by persons with disabilities.

The participating entities are:

- State of Minnesota, including the Department of Transportation;
- Metropolitan Council;
- Metropolitan Airports Commission;
- Minnesota State;
- Mosquito Control District;
- City of Minneapolis;
- City of St. Paul, including the Housing Redevelopment Authority; and
- Hennepin County.

The State of Minnesota Department of Administration (Admin) is coordinating this effort.

We will be recording our interview so that we do not need to take detailed notes. Are you okay with our recording this interview? [If yes, inform the interviewee that you will initiate recording. Then ask again to confirm the interviewee’s approval at the start of the recording.]
A. Background Information (Owner and/or Interviewee)

<table>
<thead>
<tr>
<th><strong>Fill all boxes. Complete as much as possible prior to interview.</strong></th>
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<tbody>
<tr>
<td><strong>Interviewer name</strong></td>
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<td>Date and location of interview</td>
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<td><strong>Interviewee name, title and responsibilities</strong></td>
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<td><strong>Length of time interviewee has been with company</strong></td>
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<td><strong>Gender of firm owner(s)</strong></td>
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<td>(include % ownership if multiple owners)</td>
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<td><strong>Race/ethnicity of owner(s):</strong> African American, Hispanic American, Native American, Asian-Pacific American, Subcontinent Asian American, non-Hispanic white</td>
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<td><strong>Gender of interviewee(s)</strong></td>
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<tr>
<td><strong>EDSB/MBE/WBE/WOSB/DBE/VOSB/SDVOSB/TG/ED/VO/TGB/Veteran business and other certifications for the business</strong></td>
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<td><strong>Type of business</strong></td>
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<td><strong>Number of years in business</strong></td>
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<td><strong>Approx. number of employees (including owner(s))</strong></td>
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<tr>
<td><strong>Whether a subsidiary or affiliate of another firm (or is a publicly-traded company)</strong></td>
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</table>
B. Background on the Firm and Industry

I would like to ask you about the history/background of your firm.

1. When and how was your business established?

2. What are the challenges in starting a business in your line of work (in general and specifically for your business)?

3. Have you or others experienced any barriers to entering your industry?

4. In what regions of the state do you typically work? [Probe for reasons for working locally, statewide, other ... e.g., are there any barriers to expanding the firm's territory]

5. Any changes in the regions over time where your firm conducts work?

6. Describe the types of work your firm performs.

7. Any changes over time in the types of work the company has performed?

8. Any changes in the size of the firm over time?
   a. Probe: Does the company expand and contract depending on work opportunities, season or market conditions?

9. What types and sizes of contracts (and subcontracts) is your company involved in?
   a. What determines the types and sizes of projects or contracts for your company and other firms in the industry? [e.g., what limits how big a project/contract]
   b. Do you work on both public sector and private sector work?
   c. Do you work as a prime or a subcontractor/subconsultant, or both? (if applies to industry)
d. Have you conducted work for any of the participating entities? Have there been any differences in how you work for them? [Probe for differences in prime/sub, contract type and size, other]

- State of Minnesota
- Minnesota Department of Transportation;
- Metropolitan Council;
- Metropolitan Airports Commission;
- Minnesota State;
- Mosquito Control District;
- City of Minneapolis;
- City of St. Paul, including Housing Redevelopment Authority; and
- Hennepin County.

10. What are the current economic conditions for companies in your field in the Minnesota marketplace? Are these conditions affecting your ability to get work?

11. What are the key factors that contribute to your firm’s success?

[If needed, probe for comments about how the following items contribute to the firm’s success (or if any of these present any challenges). It is not necessary to cover each item]:

a. Relationships with customers and others.

b. Employees/hiring.

c. Project labor agreement/union.

d. Equipment.

e. Access to favorable pricing and credit regarding materials or products.

f. Financing/access to capital.

g. Bonding [if necessary].

h. Insurance.

i. Distributorships [if applies].

j. Pricing on materials and equipment.

k. Other.
12. What gives one firm in your industry an advantage over another?

13. Are there instances in which firms such as yours are treated unfairly when pursuing opportunities or when performing work in your field in the Minnesota marketplace?

14. Do you know of any unfair treatment or disadvantages for small businesses in your field in the Minnesota marketplace?

15. Are there any additional unfair treatment or disadvantages for minority- or women-owned firms in your field in the Minnesota marketplace? Veteran-owned businesses? Businesses owned by persons with disabilities?

16. Are there additional difficulties for minorities or women starting businesses in your line of work? Veteran-owned businesses? Businesses owned by persons with disabilities?

17. [If not mentioned, probe for any stereotypical attitudes] Do “good ol’ boy” networks, closed networks or other information networks exist that affect firms in your industry in the Minnesota marketplace? If so, does this have a negative effect on minority or women-owned firms? Veteran-owned businesses? Businesses owned by persons with disabilities?

C. Working on projects with one or more of the participating entities

1. Describe your experience working with each of the participating entities. Probe for:
   a. What are the major types of public sector contracts you see in the Minnesota marketplace? Among the participating entities?
   b. How do you decide to pursue opportunities with one or more of the participating entities?
   c. Do you face any challenges learning about opportunities with any of the participating entities?
   d. Describe your experiences working with each of the participating entities.
   e. Are there any barriers to working with any of the participating entities? [Probe for prequalification, restrictive contract specifications, insurance, bonding, prevailing wage, timely payment, etc.]
   f. Are there other difficulties trying to get work with any of the participating entities?
g. Do you know of barriers that might affect minority- or woman-owned businesses in learning about or participating in contracts with any of the participating entities? Veteran-owned businesses? Businesses owned by persons with disabilities?

h. Are there any barriers for small firms in general?

i. What suggestions would you have for any of the participating entities to improve procurement practices?

2. Describe how you generally perceive contractor-subcontractor relationships [if applies].

a. Do you hire subcontractors/subconsultants? How do you hire firms as subcontractors/subconsultants?

b. Do you make any efforts to include MBEs, WBEs, small businesses, veteran-owned businesses and businesses owned by persons with disabilities in public contracts? If so, why? How? (And, how do you know have certification?)

c. Describe challenges or barriers that you might have faced when hiring and/or working with minority- or woman-owned businesses, small businesses, veteran-owned businesses or businesses owned by persons with disabilities.

d. How are prime contractors/consultants encouraged to include, as subcontractors/subconsultants, MBE/WBEs, small businesses, veteran-owned businesses and businesses owned by persons with disabilities?

e. [If does make efforts] Without your and others’ efforts, would MBE/WBEs be successful in obtaining work on public sector contracts? Why or why not?

f. What about veteran-owned businesses?

g. What about firms owned by persons with disabilities?

h. What about small businesses?

i. How do primes generally find out about public and private sector work, and specifically work with one or more of the participating entities?

j. How do subs generally find out about public and private sector work, and specifically work with one or more of the participating entities?
D. Is there a level playing field for minority- and women-owned firms in your industry in the Minnesota marketplace? Small businesses? Veteran-owned businesses? Businesses owned by persons with disabilities?

We now turn to any other instances of unfavorable treatment that you may have experienced or witnessed in the public or private sector in the Minnesota marketplace. We are focusing on recent events or those in the past that may have a lasting effect. [Probe for more than yes/no.]

1. Overall, is there a level playing field for minority- and women-owned firms in your industry in the Minnesota marketplace? Do you think minority- or women-owned firms face challenges not faced by other businesses? Why or why not?

   Please also answer for small businesses, veteran-owned businesses and businesses owned by persons with disabilities.

2. Please explain if you have or your firm has ever witnessed or experienced any of the following (as a prime or sub):
   a. Issues with prompt payment.
   b. Denial of opportunity to bid.
   c. Unfair rejection of bid.
   d. Submitting bids or proposals and not getting feedback.
   e. Bid shopping.
   f. Bid manipulation.
   g. Double standards for minority- or women-owned firms when performing work.
   h. Unfair treatment regarding approval of work for minorities and women.
   i. Unfavorable work environment for minorities or women (e.g., harassment based on race or gender on jobsites).
   j. Any “fronts” or false reporting of good faith efforts.
   k. Any barriers specific to economically disadvantaged small businesses, veteran-owned businesses and businesses owned by persons with disabilities?
   l. Specifically, unfair treatment by one or more of the participating entities.
   m. Other.
3. If there are any barriers or disadvantages for minority- and women-owned firms, do you have suggestions for initiatives to address them?

Please also answer for small businesses, veteran-owned businesses and businesses owned by persons with disabilities.

E. Insights Regarding Business Assistance Programs and Certification

Next, I’d like to discuss business assistance programs and certification.

1. Have you taken advantage of or have any knowledge of any contract preference goals programs or any business assistance programs in Minnesota?

[Probe for participating entity-specific programs, use history, barriers to participation, benefits from participation]

   a. Price preference.
   b. Contract goals.
   c. Sheltered market (where bidding is restricted to certified firms).
   d. Prompt payment requirements.
   e. Business assistance (including financing, bonding and mentor-protégé, others).
   f. Others.

2. Please tell us about your knowledge of or experiences with certification, thinking about becoming certified/becoming certified or certification agencies.

[Probe for responses related to awareness and specific experiences]

   a. Are you aware of any certification programs in Minnesota? [Probe for type of certification]
   b. If you are aware of any certification programs, is it easy or difficult to become certified? Are there any advantages or disadvantages of certification? [Probe for type of certification]
   c. Have you had any differences in experiences when certifying with more than one certification agency in Minnesota? If so, please explain.
   d. Do you have any recommendations regarding certification protocols implemented by any or all of the certification agencies in the Minnesota marketplace?
F. Any other Insights and Recommendations

1. What, if anything, do you think the participating entities are doing well in their minority- and women-owned business practices specifically? Are there any programs or practices you would like to see more of? Improved or retired?

2. Any additional comments regarding programs for small businesses, veteran-owned businesses and businesses owned by persons with disabilities?

3. Do you have any other suggestions for how any or all of the participating entities can improve, or for any other insights, feedback or recommendations?
KEEN INDEPENDENT.
Draft 2017 Minnesota Joint Disparity Study In-depth Interview Guide for Industry Associations

Read to the Interviewee. Thank you for agreeing to participate in 2017 Minnesota Joint Disparity Study in-depth interviews.

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- Hennepin County.

The State of Minnesota Department of Administration (Admin) is coordinating this effort.

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<tbody>
<tr>
<td>Date and location of interview</td>
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<tr>
<td>Interviewee(s) name(s), title(s) and responsibilities with the industry association</td>
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<td>Length of time interviewee(s) with industry association</td>
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<tr>
<td>Race/ethnicities industry association represents: Race/ethnicity of owner(s): African American, Hispanic American, Native American, Asian-Pacific American, Subcontinent Asian American, non-Hispanic white</td>
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<td>Type of industries represented</td>
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<td>Association affiliations, if any</td>
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</table>
B. Background on the Industry Association and Industry

Encourage discussion. I would like to ask you about the history/background of the groups or businesses you represent.

1. Please tell me about your [industry association] and what kinds of firms you represent.

2. What are the challenges that firms you represent face in starting their businesses in the industry (in general and for specific businesses)?

3. For the businesses you represent, have you observed any barriers to entry into the industry you represent?

4. In what regions of the state do the firms you represent typically work? [Probe for reasons for working locally, statewide, other ... e.g., are there any barriers to expanding the firm’s territory]

5. Have you observed any changes over time in the regions companies in your industry work?

6. Describe the types of work the firms you represent generally perform.

7. Have you observed any changes over time in the types of work companies in your industry perform?

8. Any changes in the size of the firms over time?
   a. Probe: Do the companies generally expand and contract depending on work opportunities, season or market conditions?

9. What types and sizes of contracts and subcontracts are the companies you represent involved in?
   a. What determines the types and sizes of projects or contracts for firms in the industry you represent? [e.g., what limits how big a project/contract]
   b. Do the firms you represent work on both public sector and private sector work?
   c. Do the firms you represent generally work as primes or subcontractors/subconsultants, or both? (if applies to industry)
d. Have the firms you represent conducted work for any of the participating entities? Have there been any differences in how they work for them? [Probe for differences in prime/sub, contract type and size, other]

- State of Minnesota;
- Department of Transportation;
- Metropolitan Council;
- Metropolitan Airports Commission;
- Minnesota State;
- Mosquito Control District;
- City of Minneapolis;
- City of St. Paul, including the Housing Redevelopment Authority; and
- Hennepin County.

10. What are the current economic conditions for companies in your field in the Minnesota marketplace? Do these conditions affect the ability of firms in your industry to get work?

11. What are the key factors that contribute to the success of the firms you represent?

[If needed, probe for comments about how the following items contribute to a firm’s success (or if any of these present any challenges). It is not necessary to cover each item]:

a. Relationships with customers and others.

b. Employees/hiring.

c. Project labor agreement/union.

d. Equipment.

e. Access to favorable pricing and credit regarding materials or products.

f. Financing/access to capital.

g. Bonding [if necessary].

h. Insurance.

i. Distributorships [if applies].

j. Pricing on materials and equipment.

k. Other.
12. What gives one firm in your industry an advantage over another?

13. Are there instances in which firms you represent are treated unfairly when pursuing opportunities or when performing work in the field you represent in the Minnesota marketplace?

14. Do you know of any unfair treatment or disadvantages for small businesses in the field you represent in the Minnesota marketplace?

15. Are there any additional unfair treatment or disadvantages for minority- or women-owned firms in the field in the Minnesota marketplace? Veteran-owned businesses? Businesses owned by persons with disabilities?

16. Are there additional difficulties for minorities or women starting businesses in the line of work your association represents? Veteran-owned businesses? Businesses owned by persons with disabilities?

17. [If not mentioned, probe for any stereotypical attitudes] Do “good ol’ boy” networks, closed networks or other information networks exist that affect firms in your industry in the Minnesota marketplace? If so, does this have a negative effect on minority or women-owned firms? Veteran-owned businesses? Businesses owned by persons with disabilities?

C. Working on projects with one or more of the participating entities

1. Describe any experiences working with each of the participating entities. Probe for:

   a. What are the major types of public sector contracts you see in the Minnesota marketplace? Among the participating entities?

   b. How do the firms you represent generally decide to pursue opportunities with one or more of the participating entities?

   c. Do they face any challenges learning about opportunities with any of the participating entities?

   d. Describe their experiences working with each of the participating entities.

   e. Are there any barriers to working with any of the participating entities? [Probe for prequalification, restrictive contract specifications, insurance, bonding, prevailing wage, timely payment, etc.]

   f. Are there other difficulties trying to get work with any of the participating entities?
g. Do you know of barriers that might affect minority- or woman-owned businesses in learning about or participating in contracts with any of the participating entities? Veteran-owned businesses? Businesses owned by persons with disabilities?

h. Are there any barriers for small firms in general?

i. What suggestions would you have for any of the participating entities to improve procurement practices?

2. Describe how you generally perceive contractor-subcontractor relationships.

a. Do prime contractors typically have subcontractors or subconsultants that participate in the work? How are they selected? Are there any requirements for subcontractors/subconsultants?

b. Do the firms you represent make any effort to include MBEs, WBEs, small businesses, veteran-owned businesses and businesses owned by persons with disabilities in public contracts? If so, why? How? (And, how do they know the firms they include have certification?)

c. Describe challenges or barriers that primes might have faced when hiring and/or working with minority- or woman-owned businesses, small businesses, veteran-owned businesses or businesses owned by persons with disabilities.

d. How are prime contractors/consultants encouraged to include, as subcontractors/subconsultants, MBE/WBEs, small businesses, veteran-owned businesses and businesses owned by persons with disabilities?

e. [If does make efforts] Without your and others’ effort, would MBE/WBEs be successful in obtaining work on public sector contracts? Why or why not?

f. What about veteran-owned businesses?

g. What about firms owned by persons with disabilities?

h. What about small businesses?

i. How do primes generally find out about public and private sector work, and specifically work with one or more of the participating entities?

j. How do subs generally find out about public and private sector work, and specifically work with one or more of the participating entities?
D. Is there a level playing field for minority- and women-owned firms in your industry in the Minnesota marketplace? Small businesses? Veteran-owned businesses? Businesses owned by persons with disabilities?

We now turn to any other instances of unfavorable treatment that you may have experienced or witnessed in the public or private sector in Minnesota marketplace. We are focusing on recent events or those in the past that may have a lasting effect. [Probe for more than yes/no.]

1. Overall, is there a level playing field for minority- and women-owned firms in your industry in the Minnesota marketplace? Do you think minority- or women-owned firms face challenges not faced by other businesses? Why or why not?

Please also answer for small businesses, veteran-owned businesses and businesses owned by persons with disabilities.

2. Please explain if you have or your industry association has ever witnessed or experienced any of the following (as a prime or sub):

   a. Issues with prompt payment.
   b. Denial of opportunity to bid.
   c. Unfair rejection of bid.
   d. Submitting bids or proposals and not getting feedback.
   e. Bid shopping.
   f. Bid manipulation.
   g. Double standards for minority- or women-owned firms when performing work.
   h. Unfair treatment regarding approval of work for minorities and women.
   i. Unfavorable work environment for minorities or women (e.g., harassment based on race or gender on jobsites).
   j. Any “fronts” or false reporting of good faith efforts.
   k. Any barriers specific to economically disadvantaged small businesses, veteran-owned businesses and businesses owned by persons with disabilities?
   l. Specifically, unfair treatment by any of the participating entities during performance of work.
   m. Other.
3. If there are any barriers or disadvantages for minority- and women-owned firms, do you have suggestions for initiatives to address them?

Please also answer for small businesses, veteran-owned businesses and businesses owned by persons with disabilities.

E. Insights Regarding Business Assistance Programs and Certification

Next, I’d like to discuss business assistance programs and certification.

1. Have any of the businesses you represent taken advantage of or have any knowledge of any contract preference goals programs or any business assistance programs in Minnesota?

[Probe for participating entity-specific programs, barriers to participation, benefits from participation]

a. Price preference.

b. Contract goals.

c. Sheltered market (where bidding is restricted to certified firms).

d. Prompt payment requirements.

e. Business assistance (including financing, bonding and mentor-protégé, others).

f. Others.

2. Please tell us about your knowledge of or experiences with certifications and certification agencies.

[Probe for responses related to awareness and specific experiences]

e. Are you aware of any certification programs in Minnesota? [Probe for type of certification]

f. If you are aware of any certification programs, is it easy or difficult to become certified? Are there any advantages or disadvantages of certification? [Probe for type of certification]

g. Are you aware of any differences in experiences when certifying with more than one certification agency in the Minnesota marketplace? If so, please explain.

h. Do you have any recommendations regarding certification protocols implemented by any or all of the certification agencies in the Minnesota marketplace?
F. Any other Insights and Recommendations

1. What, if anything, do you think the participating entities are doing well in their minority- and women-owned business practices specifically? Are there any programs or practices you would like to see more of? Improved or retired?

2. Any additional comments regarding programs for small businesses, veteran-owned businesses and businesses owned by persons with disabilities?

3. Do you have any other suggestions for how any or all of the participating entities can improve, or for any other insights, feedback or recommendations?