



**2024 Commonwealth of
Pennsylvania Department of
General Services Disparity Study**

FINAL REPORT

Final Report

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2024 Commonwealth of Pennsylvania Department of General Services Disparity Study

Prepared for

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SECTION ES.

Executive Summary

BBC Research & Consulting (BBC) conducted a *disparity study* to evaluate whether person of color (POC)-; woman-; veteran-; disabled-; service-disabled veteran (SDV)-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses (referred to collectively as *diverse businesses*) face any barriers in the Commonwealth of Pennsylvania's (the Commonwealth's) construction, professional services, and non-professional services and goods contracts and procurements. As part of the disparity study, we examined whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars state agencies awarded to diverse businesses during the *study period*, which was July 1, 2017 through June 30, 2022 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect state agencies to award to diverse businesses based on their availability to perform specific types and sizes of those prime contracts and subcontracts (i.e., *availability*).

Information from the disparity study will help the Commonwealth and the Department of General Services (DGS) better understand outcomes for diverse businesses in its contracting and procurement and help the organization address any substantial disparities between the participation and availability of those businesses for state agency work. Moreover, if DGS determines that it is appropriate to continue using *race- and gender-conscious* measures as part of its contracting and procurement processes to address any substantial disparities for POC- and woman-owned businesses (e.g., awarding individual projects with the use of contract-specific participation goals), then the organization can rely on information from the disparity study to help ensure its use of such measures adheres to the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

A. Disparity Study Results

BBC analyzed approximately \$14 billion worth of contracts and procurements executive branch state agencies awarded during the study period to measure the participation and availability of POC- and woman-owned businesses for state agency work to assess whether any disparities exist between those measures. We summarize key results from those analyses below and identify sections of the report that provide more details about the methodology and results of each analysis.

1. Availability analysis (Chapter 6 and Appendix D of the report). BBC conducted a *custom census availability analysis* to estimate the availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work while accounting for the specific characteristics of relevant businesses that exist in the Pennsylvania marketplace and the specific characteristics of the relevant prime contracts and subcontracts state agencies award. Figure ES-1 presents the availability of each relevant group of diverse businesses for all relevant contracts and procurements state agencies award, considered together. The availability of those businesses for that work is 27.0 percent. The business groups that exhibit the greatest availability for state agency work are white woman-owned businesses (15.5%), Subcontinent Asian American-owned businesses (5.7%), and Black American-

owned businesses (3.6%). BBC also examined the overall availability of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work. Those analyses indicated that the availability of veteran-owned businesses for state agency work is 2.6 percent, the availability of SDV-owned businesses is 3.8 percent, the availability of disabled-owned businesses is 0.6 percent, and the availability of LGBTQ+-owned businesses is 0.03 percent.¹

Figure ES-1.
Availability estimates
for state agency work

Note:

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

Source:

BBC availability analysis.

Business group	Availability
White woman-owned	15.5 %
Asian Pacific American-owned	0.6 %
Black American-owned	3.6 %
Hispanic American-owned	1.5 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	5.7 %
Total POC-owned	11.5 %
Total POC- and woman-owned	27.0 %

2. Utilization analysis (Chapter 7 of the report). BBC also calculated the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+- businesses in the relevant contracts and procurements state agencies awarded during the study period. As shown in Figure ES-2, during the study period, state agencies awarded 16.8 percent of their relevant contract and procurement dollars to POC- and woman-owned businesses. The groups that exhibited the greatest levels of participation in that work were white woman-owned businesses (9.9%), Subcontinent Asian American-owned businesses (4.2%), and Asian Pacific American-owned businesses (1.0%). BBC also examined the overall participation of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for DGS work. During the study period, state agencies awarded 0.4 percent of relevant contract and procurement dollars to veteran-owned businesses, 0.3percent to SDV-owned businesses, 0.04 percent to disabled-owned businesses, and 0.04 percent to LGBTQ+-owned businesses.

Figure ES-2.
Utilization analysis results
for state agency work

Note:

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

Source:

BBC utilization analysis.

Business group	Utilization
White woman-owned	9.9 %
Asian Pacific American-owned	1.0 %
Black American-owned	0.9 %
Hispanic American-owned	0.6 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	4.2 %
Total POC-owned	6.9 %
Total POC- and woman-owned	16.8 %

¹ Results for veteran-, SDV-, disabled, and LGBTQ+-owned businesses do not include veteran-, SDV-, disabled, and LGBTQ+-owned businesses that are also POC- and woman-owned. Those results are included with results for the corresponding race and gender groups.

3. Disparity analysis (Chapter 8 and Appendix E). The crux of the disparity study was to assess whether any disparities exist between the participation and availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work. For POC- and woman-owned businesses in particular, a *substantial disparity* between participation and availability—that is, a disparity where participation is 80 percent or less of availability—for a particular business group is interpreted by courts as an inference of discrimination against that group in the marketplace and often serves as evidence that the organization of interest could consider using race- or gender-conscious measures to address corresponding barriers for that group (for details, see Chapter 2).

Figure ES-3 presents a visualization of various project sets for which relevant POC- and woman-owned business groups exhibited substantial disparities, as indicated by black circles. As shown in Figure ES-3, most relevant POC- and woman-owned business groups consistently showed substantial disparities for most—if not all—the project sets BBC examined as part of the disparity study. A notable exception was Asian Pacific American-owned businesses, which only showed substantial disparities for construction projects, prime contracts, and projects state agencies awarded with the use of condition-of-award goals for the participation of certified Small Diverse Businesses (SDBs) in that work.² BBC also assessed whether veteran-, SDV-, disabled-, and LGBTQ+-owned businesses exhibited disparities between their participation and availability for state agency work. Veteran-owned businesses, SDV-owned businesses, disabled-owned businesses, and LGBTQ+-owned businesses all exhibited substantial disparities for all relevant state agency contracts and procurements considered together.

Figure ES-3.
Substantial disparities observed for state agency work

Contract set	Business group							
	All POC and white woman	White woman	All POC	Asian Pacific American	Black American	Hispanic American	Native American	Subcontinent Asian
All work	●	●	●		●	●	●	●
Construction	●	●	●	●	●	●	●	●
Professional services	●		●		●		●	●
Non-prof. svcs. and goods	●	●	●		●		●	●
Prime contracts	●		●	●	●	●	●	●
Subcontracts					●	●	●	
SDB/VBE goals	●	●	●	●		●	●	●
No goals	●	●	●		●	●	●	●

Notes: ● indicates substantial disparity (i.e., disparity index of 80 or less)

“All POC and white women” and “All POC” aggregate the participation and availability for relevant POC- and woman-owned business groups to assess whether the group as a whole exhibits a substantial disparity.

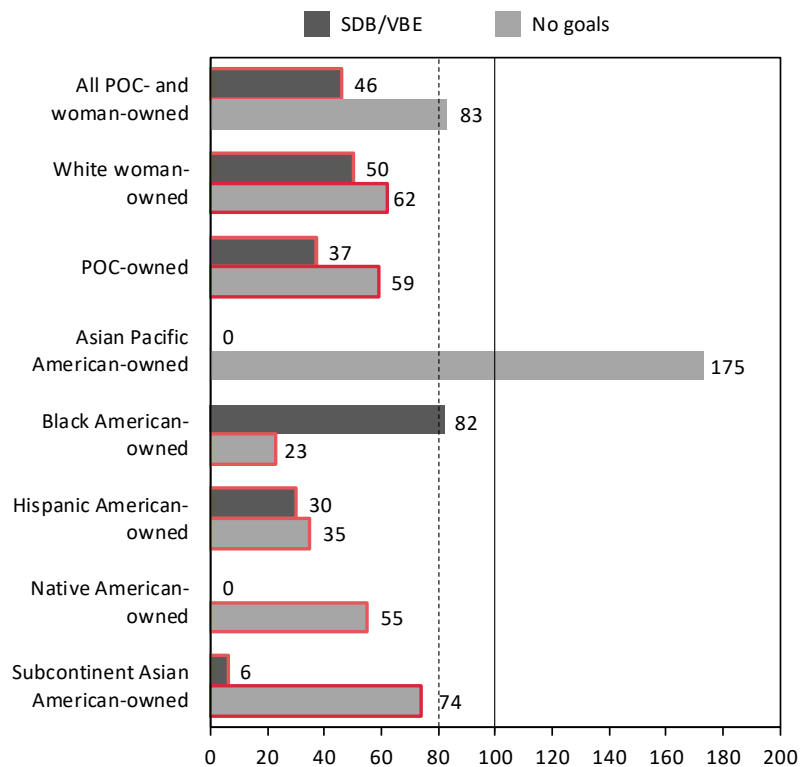
Source: BBC disparity analysis.

² DGS certifies socially and economically diverse businesses as SDBs as part of the SDB Program, which the department operates.

a. SDB/VBE goals. DGS uses contract goals to encourage the participation of certified SDBs and Veteran Business Enterprises (VBEs) in projects state agencies award. BBC assessed whether disparities for POC- and woman-owned businesses differed between projects state agencies award with the use of SDB/VBE contract goals (*SDB/VBE goals projects*) and projects state agencies awarded without the use of any goals (*no goals projects*). As shown in Figure ES-4, in general, POC- and woman-owned businesses actually exhibited larger disparities on goals projects than no goals projects. The only exception was Black American-owned businesses, which exhibited a substantial disparity on no goals projects but not on goals projects. Taken together, disparity analysis results for SDB/VBE goals projects and no goals projects suggest that the effectiveness of the SDB Program in encouraging the participation of POC- and woman-owned businesses in DGS work may be limited and that Black American-owned businesses benefit from the use of those goals more than other POC- and woman-owned business groups.

Figure ES-4.
Disparity indices for goals and no goals projects

Source:
 BBC disparity analysis.

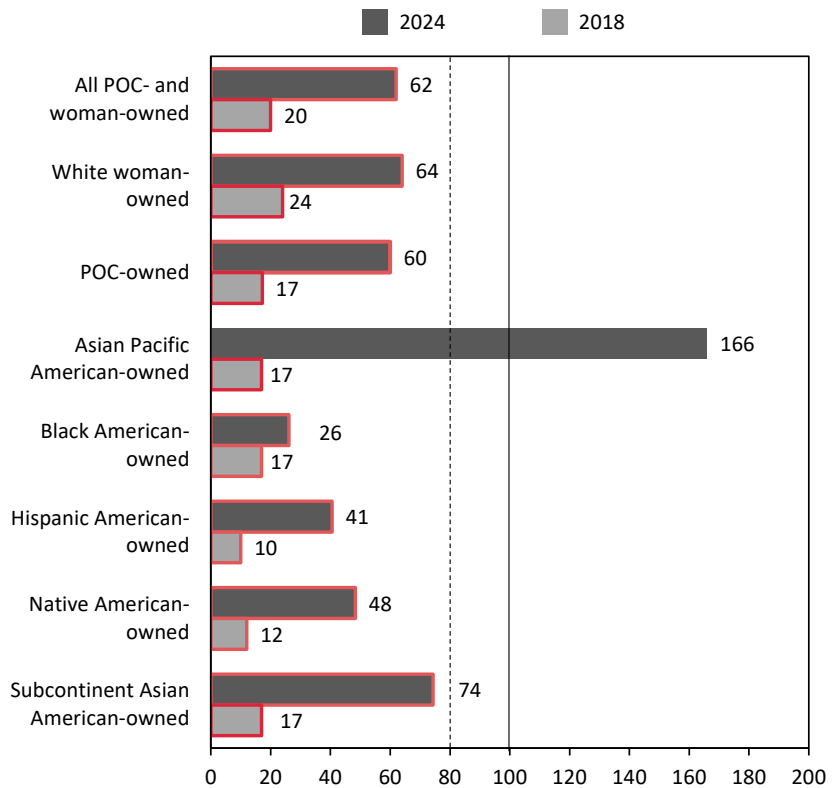


b. Comparisons to 2018 DGS disparity study. BBC last conducted a disparity study for DGS in 2018. It is instructive to compare disparity indices for POC- and woman-owned businesses in state agency work between the 2024 and 2018 disparity studies to assess whether outcomes are improving for those businesses in DGS work over time. Figure ES-5 presents overall disparity indices for POC- and woman-owned business groups for all relevant state agency projects considered together and separately from the 2024 disparity study and the 2018 disparity study. As shown in Figure ES-5, all relevant POC- and woman-owned business groups exhibited smaller disparities in 2024 than in 2018 (i.e., larger disparity indices in 2024), potentially suggesting that outcomes for those businesses for state agency projects

have improved in the six years since the 2018 disparity.³ Those improvements appear to be due primarily to increased participation of POC- and woman-owned businesses in DGS work, which has increased from 4.5 percent in the 2018 disparity study to 16.8 percent in the 2024 disparity study.⁴

Figure ES-5.
Overall disparity indices
for state agency work
from 2024 and 2018
disparity studies

Source:
 BBC disparity analysis from 2024
 and 2018 DGS disparity studies



B. Guidance

The disparity study provides substantial information the Commonwealth and DGS should examine as it considers potential refinements to its implementation of the SDB Program, the Veteran Business Enterprise (VBE) Program, and other efforts to further encourage the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in state agency contracts and procurements. BBC presents several recommendations the Commonwealth and DGS should consider.

1. Overall SDB and VBE Goals. In 2022, then-Governor Tom Wolf established an overall aspirational goal of 26.3 percent for the participation of SDBs and 4.6 percent for the participation of VBEs in state agency contracting and procurement. The Commonwealth should consider updating its overall SDB and VBE goals based on results from the availability analysis, which indicated that the availability of SDB groups—POC-, woman-, SDV-, disabled-, and LGBTQ+-owned businesses—is 31.3 percent, and the

³ Because BBC did not assess disparities separately for Asian Pacific American- and Subcontinent Asian American-owned businesses in the 2018 disparity study, Figure 10-5 presents the disparity index of 17 we observed for all Asian American-owned businesses considered together for both Asian Pacific American-owned and Subcontinent Asian American-owned businesses for 2018 results.

⁴ There was a smaller increase in the availability of POC- and woman-owned businesses for DGS work from 22.1 percent in the 2018 disparity study to 27.0 percent in the 2024 disparity study.

availability of veteran-owned for state agency work is 2.6 percent.⁵ The Commonwealth could also examine various factors to determine whether adjustments to the 31.3 percent or 2.6 percent figures are warranted to account for any characteristics of the Pennsylvania marketplace that might affect the ability of diverse businesses to compete for or participate in state agency work. For example, the Federal Disadvantaged Business Enterprise Program sets forth several factors organization could consider when assessing whether to adjust its base figure:

- Past participation of SDBs and VBEs in its work;
- Information related to employment, business ownership, education, training, and unions;
- Information related to financing, bonding, and insurance; and
- Other relevant information.

If the Commonwealth decides to make an adjustment to either of its base figures, it would have to decide which factors it would consider in making an adjustment, the direction of the adjustment, and the magnitude of the adjustment based on its assessment of relevant factors.

2. SDB contract goals. As part of its implementation of the SDB Program, DGS sets contract-specific goals for the participation of certified SDBs in construction and professional services contracts and procurements worth \$400,000 or greater and non-professional services and goods contracts and procurements worth \$250,000 or greater that state agencies award.⁶ Because the use of SDB contract goals is a race- and gender-conscious measure, agencies must ensure their use meets the requirements of the *strict scrutiny* standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring their use is *narrowly tailored*. Because DGS already uses myriad *race- and gender-neutral measures* to encourage the participation of small and diverse businesses, including many POC- and woman-owned businesses, in its work, and because those measures have not addressed disparities for those businesses, the agency might consider continuing to use SDB contract goals to award certain state agency projects.

Disparity analysis results indicated that:

- All relevant race and gender groups—Asian Pacific American-, Black American-, Hispanic American-, Native American-, Subcontinent Asian American-, and white woman-owned businesses—exhibited substantial disparities on the construction projects state agencies awarded during the study period without the use of SDB goals.
- Only Black American-, Native American-, and Subcontinent Asian American-owned businesses exhibited substantial disparities on the professional services projects state agencies awarded during the study period without the use of SDB goals.

⁵ Although SDV participation can be counted toward attainment of VBE goals, the availability of potential SDVs factors into the overall SDB goal and not into the overall VBE goal.

⁶ DGS also sets contract specific goals for the participation of certified VBEs. However, those goals are not race- and gender-conscious in nature.

- Only white woman-, Black American-, Native American-, and Subcontinent Asian-American owned businesses exhibited substantial disparities on non-professional services and goods projects state agencies awarded during the study period without the use of SDB goals.

If DGS bases its decisions on which groups are eligible to participate in its SDB contract goals program based on disparity study results alone, then it should consider deeming all relevant race and gender groups as eligible to participate in the goals program for construction projects; Black American-, Native American-, and Subcontinent Asian American-owned businesses as eligible to participate in the goals program for professional services projects; and white woman-, Black American-, Native American-, and Subcontinent Asian-American owned businesses as eligible to participate in the goals program for non-professional services and goods projects.

As an alternative to the above approach, some organizations base their decisions on which groups are eligible to participate in their race- and gender-conscious goals programs on disparity analysis results for all no goals projects considered together, regardless of industry. If DGS chooses to base eligibility decisions on all no goals projects considered together, then, as shown in Figure ES-3, it would consider Black American-, Hispanic American-, Native American-, Subcontinent Asian-American, and white woman-owned businesses as eligible to participate in the SDB goals program.

It is important to note that DGS currently does not collect or maintain information on the race/ethnicity of the owners of SDB-certified businesses. To more accurately monitor the participation of POC- and woman-owned businesses in state agency work and to properly tailor the use of SDB contract goals to those business groups that exhibit substantial disparities, DGS should consider collecting information on the race/ethnicity of the owners of certified SDBs. The department can begin that process by using information BBC collected as part of the availability and utilization analyses related to the race/ethnicity of business owners and then augment that information by conducting short surveys with remaining SDB-certified business representatives to collect race/ethnicity information about their owners.

3. Small business set asides. DGS currently implements the Small Business Reserve (SBR) Program, which enables small businesses (defined as businesses with 100 or fewer employees) to compete exclusively among themselves for specific state agency projects as prime contractors. State agencies are required to identify and target 15 percent of their total agency spend for SBR opportunities. DGS could consider expanding its target for such opportunities or setting aside all prime contracts under a certain value threshold exclusively for small business bidding to encourage the participation of small businesses, including many POC- and woman-owned businesses, as prime contractors in state agency work. The expanded use of small business set asides could help small businesses work directly with DGS and build the technical skills and capacity to perform as prime contractors on larger projects over time.

4. Microbusiness program. For certain industries, United States Small Business Administration size thresholds for small businesses allow gross receipts of up to \$47 million. Anecdotal evidence suggests that smaller, *microbusinesses* are unable to compete with larger small businesses. DGS should consider adding an additional certification classification for microbusinesses with smaller revenue requirements. For example, the State of California Department of General Services has a microbusiness program (implemented as a subset of the agency's small business program) for businesses with gross annual receipts of \$5 million or less. In addition, the San Francisco Bay Area Rapid Transit District has a Micro Small Business Entity certification for businesses whose average gross receipts over the prior three years do not exceed \$10 million for construction or \$6 million for professional services, non-

professional services, and goods, which are thresholds DGS could consider. The organization could then add preferences and benefits exclusive to microbusinesses, including proposal points, bid reductions, or setting aside certain opportunities exclusively for microbusiness competition (e.g., contracts under a certain threshold, such as \$100,000).

5. Vendor selection. Comments from in-depth interviews indicate that the Commonwealth’s contract and evaluation requirements often favor larger companies and inhibit the ability of small businesses or sole proprietorships to win work with the organization. In addition, results from the utilization analysis indicated that 15 percent of all POC- and woman-owned businesses that participated in state agency projects during the study period were awarded 75 percent of all the dollars associated with that work. DGS should consider reviewing its evaluation criteria to ensure they are not unduly restrictive for small businesses or businesses that have not worked with state agencies in the past. In addition, the department should consider expanding its vendor pool through targeted advertising and outreach and revising evaluation criteria and policies to encourage the use of vendors with which state agencies or prime contractors have never worked.

CHAPTER 1.

Introduction

The Commonwealth of Pennsylvania's (the Commonwealth) Department of General Services (DGS) supports the business operations of all Commonwealth agencies. As part of its responsibilities, DGS oversees the procurement of necessary goods and services that agencies require to operate effectively and efficiently. DGS' Bureau of Diversity, Inclusion, and Small Business Opportunity (BDISBO) implements the Small Diverse Business (SDB) Program, which is designed to encourage the participation of person of color (POC)-; woman-; disabled-; service-disabled veteran (SDV)-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses in its contracts and procurements. BDISBO also operates the Veteran Business Enterprise (VBE) Program, which is designed to encourage the participation of veteran- and SDV-owned businesses in its contracts and procurements. In addition, the Pennsylvania Department of Transportation (PennDOT), an executive branch agency of the Commonwealth, operates the Diverse Business (DB) Program to maximize diverse business participation on the state-funded transportation projects it awards.

DGS retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether POC-, woman-, veteran-, SDV-, disabled, and LGBTQ+-owned businesses (referred to collectively as *diverse businesses*) face any barriers in competing for or obtaining state agency work. We examined DGS contracts and procurements covering work in construction, professional services, and non-professional services and goods to assess whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars state agencies awarded to diverse businesses during the *study period*, which was July 1, 2017 through June 30, 2022 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect state agencies to award to diverse businesses based on their availability to perform specific types and sizes of those prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding DGS' contracting and procurement practices, policies, and statutes and its implementations of the SDB and VBE Programs as well as of PennDOT's implementation of the DB Program;
- Conditions in the marketplace for POCs, women, veterans, SDVs, persons living with disabilities, members of the LGBTQ+ community, and diverse businesses; and
- Contracting practices and business assistance programs DGS has in place or could consider implementing in the future to better encourage the participation of small and diverse businesses in state agency work.

There are several ways information from the disparity study could be useful to DGS:

- The study provides information about whether small and diverse businesses face any barriers in competing for or obtaining state agency work.

- The study identifies barriers POCs, women, veterans, SDVs, persons living with disabilities, members of the LGBTQ+ community, and socially and economically disadvantaged businesses face in the marketplace that might affect their ability to compete for or obtain DGS work.
- The study provides an evaluation of the effectiveness of DGS' implementations of the SDB and VBE Programs, as well as PennDOT's implementation of the DB Program, in encouraging diverse business participation in agency contracts and procurements.
- The study provides insights into how DGS could refine its contracting processes and program measures to better encourage the participation of small and diverse businesses in its work and help address any barriers those businesses face in the marketplace.

BBC introduces the 2024 Commonwealth of Pennsylvania Disparity Study in three parts:

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

A. Background

In 2015, then Governor Tom Wolf issued Executive Order 2015-11, *Diversity, Inclusion and Small Business Opportunities in Commonwealth Procurement and in Pennsylvania's Economy*, which recognized the need for goal-setting and results monitoring to ensure and increase diversity, inclusion, and small business opportunities in Commonwealth contracting. On July 8, 2016, DGS amended its policies relating to its Small Disadvantaged Business Program by changing the program's name to the Small Diverse Business Program, and expanding the program to include not only Minority Business Enterprises (MBEs), Woman Business Enterprises (WBEs), Veteran Business Enterprises (VBEs), and Service-Disabled Veteran Business Enterprises (SDVBEs) but also Disability-Owned Business Enterprises (DOBEs) and Lesbian, Gay, Bisexual, and Transgender-owned Business Enterprises (LGBTBEs).

Until the issuance of the Bureau of Procurement (BOP) Policy Directive 2020-1 on June 15, 2020, all the above types of businesses were referred to as SDBs and were eligible to participate in the SDB Program. As part of the BOP Policy Directive 2020-1, DGS removed VBEs from the definition of SDBs and created a separate program for them. However, SDVBEs were able to participate in both the SDB and VBE Programs. The directive also implemented policies for the administration of both programs by establishing the criteria and policies for self-certification as small businesses and verification of SDB and VBE status. In September 2023, Pennsylvania Governor Josh Shapiro signed Executive Order 2023-18, which supersedes Executive Order 2015-11. Executive Order 2023-18 establishes additional policies to encourage the participation of diverse businesses in Commonwealth contracting.

PennDOT established the Diverse Business (DB) Program in accordance with Section 303 of Title 74 of Pennsylvania's Consolidated Statutes to maximize the participation of POC-, woman-, SDV-, and veteran-owned businesses (referred to collectively as *diverse businesses*) in its work. Section 303 requires that certain public entities provide opportunities for DBs to participate in public transportation projects that are wholly state-funded. PennDOT, the Pennsylvania Turnpike Commission, and local transportation organizations must include DB requirements in construction and professional service projects that are funded pursuant to Title 74.

1. SDB Program. As part of the SDB Program, in 2020 DGS set an aspirational goal of 26.3 percent for the participation of SDBs in state agency contracts and procurements. To achieve this aspirational goal, DGS uses various *race- and gender-neutral* measures as well as condition-of-award, *race- and gender-based* participation goals in awarding certain construction and professional design services contracts and procurements worth more than \$400,000 and certain non-construction services and goods contracts and procurements worth more than \$250,000. Prime contractors can meet those goals either by making subcontracting commitments to certified SDBs as part of their bids or by demonstrating they made *good faith efforts* (GFEs) to do so but failed.

2. VBE Program. As part of the VBE Program, DGS has set an aspirational goal of 4.6 percent for the participation of VBEs in state agency contracts and procurements. The goal is set by statute (51 P.A.C. sec 9603) at a minimum of 3.0 percent. To achieve this aspirational goal, DGS uses various race- and gender-neutral measures as well as condition-of-award participation goals in awarding certain construction and professional design services contracts and procurements worth more than \$400,000 and certain non-construction services and goods contracts and procurements worth more than \$250,000. Projects DGS awards using SDB contract goals also include VBE goals and vice versa.

3. DB Program. PennDOT's DB program requires that non-DB bidders that do not anticipate self-performing the entirety of the projects for which they are competing make GFEs to partner with DB-certified subcontractors. Bidders must submit documentation of their GFEs as a contractual obligation when bidding on projects subject to the program. PennDOT also uses various race- and gender-neutral measures to encourage the participation of small businesses and DBs in its work.

B. Study Scope

BBC conducted the disparity study based on all state-funded construction, professional services, and non-professional services and goods contracts and procurements state agencies awarded between July 1, 2017 and June 30, 2022.

1. Definitions of diverse businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC defined POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses; certified SDBs; certified VBEs; and certified DBs in its analyses.

a. POC-owned businesses. BBC defined a POC-owned business as a business with at least 51 percent ownership and control by individuals who identified with one of the following race groups presumed to be disadvantaged in 49 Code of Federal Regulations (CFR) Part 26: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans. We considered businesses to be POC-owned based on the known races of their business owners, regardless of whether they were SDB-certified or held any other types of certification. Our definition of POC-owned businesses included businesses owned by men of color and women of color. For example, we grouped results for businesses owned by Black American women with results for businesses owned by Black American men to assess outcomes for Black American-owned businesses in general.

b. Woman-owned businesses. BBC defined a woman-owned business as a business with at least 51 percent ownership and control by white women. As described above, we classified businesses owned by women of color along with businesses owned by men of color according to their corresponding race groups.

c. Veteran-owned businesses. BBC defined a veteran-owned business as a business with at least 51 percent ownership and control by veterans of the United States military.

d. SDV-owned businesses. BBC defined an SDV-owned business as a business with at least 51 percent ownership and control by veterans of the United States military who suffer from physical or mental disabilities resulting from their military service.

e. Disabled-owned businesses. BBC defined a disabled-owned business as a business with at least 51 percent ownership and control by individuals who identify themselves as having physical or mental impairments that substantially limit major life activities.

f. LGBTQ+-owned businesses. BBC defined an LGBTQ+-owned business as a business with at least 51 percent ownership and control by individuals who identify as lesbian, gay, bisexual, transgender, queer, or other gender or sexual orientations.

g. SDBs. SDBs are small POC-, woman-, disabled-, SDV-, or LGBTQ+-owned businesses specifically certified as such by BDISBO. To become certified, a business must first self-certify as a small business with BDISBO and then must submit documentation of certification as a diverse business by a BDISBO-approved third-party certification entity.¹

h. VBEs. VBEs are small veteran- or SDV-owned businesses specifically certified as such by BDISBO. To become certified, a business must first self-certify as a small business with BDISBO, and then must submit documentation of certification as a veteran- or SDV-owned business by a BDISBO-approved third-party certification entity.²

i. DBs. DBs are disadvantaged business enterprises (DBEs) as well as POC-, woman-, veteran-, or SDV-owned businesses that have been verified as such by PennDOT. All contractors that are certified as DBEs by the Pennsylvania Unified Certification Program are automatically recognized as DBs. Businesses that are not certified as DBEs must submit documentation of certification with a PennDOT-approved third-party certification entity.³

2. Analyses in the disparity study. The crux of the disparity study was to assess whether any disparities exist between the participation and availability of diverse businesses for the contracts and procurements state agencies award. Those analyses focused on construction, professional services, and non-professional services and goods prime contracts and subcontracts state agencies awarded between July 1, 2017 and June 30, 2022. The study also includes various analyses related to outcomes for POCs, women, veterans, SDVs, persons living with disabilities, members of the LGBTQ+ community, and diverse businesses throughout the marketplace. BBC presents disparity study analyses in the report as follows:

¹ BDISBO accepts third-party certifications from a Unified Certification Program from any state, the Woman's Business Enterprise National Council, the National Minority Supplier Development Council, the United States Small Business Administration 8(a) Program, the Vets First Verification Program, Disability:IN, and the National LGBT Chamber of Commerce.

² BDISBO accepts third-party certifications from the Vets First Verification Program and Disability:IN.

³ PennDOT accepts third-party certifications from the National Minority Supplier Development Council, the Women's Business Enterprise Council, the Small Business Administration, the Department of Veterans Affairs, and the Pennsylvania UCP.

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant laws, legal decisions, and other information to guide the methodology for the study and inform our recommendations as well as DGS' implementations of the SDB and VBE Programs as well as PennDOT's implementation of the DB Program. BBC presents the legal framework and analysis for the study in **Chapter 2** and **Appendix B**.

b. Marketplace conditions. The study team conducted extensive quantitative analyses of conditions and potential barriers in the marketplace for POCs; women; veterans; members of the LGBTQ+ community; and POC-, woman-, veteran-, and LGBTQ+-owned businesses. In addition, we collected qualitative evidence about potential barriers diverse individuals and businesses face in the marketplace through in-depth interviews, focus groups, public meetings, and other engagement efforts. BBC presents quantitative information about marketplace conditions in **Chapter 3** and **Appendix C** and qualitative information in **Chapter 4**.

c. Data collection. BBC examined contract, procurement, and vendor data from multiple sources to complete the utilization and availability analyses. We present the study team's contract, procurement, and vendor data collection process in **Chapter 5**.

d. Availability analysis. BBC analyzed the percentage of contract and procurement dollars one might expect state agencies to award to diverse businesses based on their availability to perform specific types and sizes of agency work. That analysis was based on agency data and surveys we conducted with more than 2,000 businesses in the local marketplace that work in industries related to the types of contracts and procurements state agencies award. We present results from the availability analysis in **Chapter 6** and **Appendix D**.

e. Utilization analysis. BBC analyzed contract and procurement dollars state agencies awarded to diverse businesses during the study period, including information about associated subcontracts. We present results from the utilization analysis in **Chapter 7**.

f. Disparity analysis. The study team examined whether there were any disparities between the participation and availability of diverse businesses on contracts and procurements state agencies awarded during the study period. We also assessed whether any observed disparities were statistically significant and explored potential explanations for those disparities. BBC presents results from the disparity analysis in **Chapter 8** and **Appendix E**.

g. Program measures. BBC reviewed measures DGS uses to encourage the participation of small and diverse businesses in its contracts and procurements as well as its implementations of the SDB and VBE Programs as well as PennDOT's implementation of the DB Program. We present that information in **Chapter 9**.

h. Recommendations. The study team provided guidance related to additional program options and changes to current contracting practices DGS could consider. BBC presents our recommendations in **Chapter 10**.

C. Study Team Members

The BBC study team was made up of seven firms that, collectively, possess decades of experience related to conducting disparity studies in connection with small and diverse business programs.

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

2. A2Z Diversity Solutions (A2Z). A2Z is a Black American-owned consulting firm based in Harrisburg, Pennsylvania that specializes in supplier diversity. A2Z conducted in-depth interviews and focus groups with business owners and other key stakeholders, assisted with community engagement tasks, and conducted a review of DGS' programs and policies.

3. Always Busy Consulting (ABC). ABC is a Black American woman-owned diversity consulting firm based in Pittsburgh, Pennsylvania. ABC conducted in-depth interviews and focus groups with business owners and other key stakeholders and assisted with community engagement tasks.

4. Brown Consulting Associates (BCA). BCA is a Black American-owned administrative support services firm based in Harrisburg, Pennsylvania. BCA conducted in-depth interviews and focus groups with business owners and other key stakeholders and assisted with community engagement tasks.

5. Davis Research. Davis Research is a survey firm based in Calabasas, California. The firm conducted telephone and online surveys with thousands of businesses in the marketplace to gather information to serve as the basis for the utilization and availability analyses.

6. ECS ATAP Consulting (ECS ATAP). ECS ATAP is a Black American SDV-owned management consulting firm based in Lancaster, Pennsylvania. ECS ATAP conducted in-depth interviews and focus groups with business owners and other key stakeholders and assisted with community engagement tasks.

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

CHAPTER 2.

Legal Analysis

The Commonwealth of Pennsylvania (the Commonwealth) commissioned a *disparity study* to assess whether there are statistically significant disparities between the participation and availability of person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses (referred to collectively as *diverse businesses*) for the contracts and procurements state agencies award. One of the primary reasons for those assessments is to determine whether sufficient evidence of discrimination exists for individual business groups and whether the Commonwealth should consider the continued use of any *race- or gender-conscious* measures as part of its contracting and procurement processes, and if so, to guide the effective and constitutional use of such measures. In the context of government contracting and procurement, race- and gender-conscious measures are efforts designed to encourage the participation of certified POC-, woman-, and LGBTQ+-owned businesses, specifically, in a government organization’s work (e.g., condition-of-award goals for the participation of certain eligible business groups in the award of individual projects). In contrast, *race- and gender-neutral* measures are efforts designed to encourage the participation of certain groups of businesses—for example, small businesses—in an organization’s work, regardless of the race, gender, or sexual orientation of business owners.¹

Chapter 2 summarizes the legal standards that govern the use of race- and gender-conscious and race- and gender-neutral measures in three parts:

- A. Legal standards for different types of measures;
- B. Seminal court decisions; and
- C. Addressing legal requirements with the disparity study.

A. Legal Standards for Different Types of Measures

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

1. Programs that rely solely on race- and gender-neutral measures. Government organizations that operate business programs that rely solely on race- and gender-neutral measures must show a *rational basis* for their programs. Courts typically apply the rational basis test to programs that do not potentially affect any fundamental rights or discriminate on the basis of race, gender, sexual orientation, or other suspect factors. Examples of such programs include ones designed to encourage the participation of SDV- or disability-owned owned businesses in organization work. Showing a rational basis requires organizations to demonstrate that their contracting and procurement programs are

¹ By definition, program measures designed to encourage the participation of SDV-, disabled, and LGBTQ+-owned businesses in government work are race- and gender-neutral, because eligibility to participate in such measures is based on the veteran and disability statuses of business owners and not on their races or genders.

rationally related to legitimate government interests (e.g., increasing the participation of local small businesses in their work). It is the least-rigorous standard for evaluating the constitutionality of business programs.

2. Programs that include race- and gender-conscious measures. Contracting programs that include race-conscious and gender-conscious measures must meet the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

a. Strict scrutiny. The strict scrutiny standard represents the highest threshold for evaluating the legality of race-conscious contracting programs, short of prohibiting them altogether. Under the strict scrutiny standard, government organizations must show a *compelling governmental interest* in using race-conscious measures and ensure that their use is *narrowly tailored*. (In June 2023, the United States Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* reaffirmed the strict scrutiny test for race-based classifications.²)

i. Compelling governmental interest. Government organizations using race-conscious measures have the initial burden of showing evidence of discrimination within their own *relevant geographic market areas* (RGMA)s—including statistical and anecdotal evidence—that supports the use of such measures.³ Although organizations can draw on national statistics relevant to marketplace conditions within their own regions, they cannot rely solely on such information to demonstrate a compelling governmental interest for their programs. They must also present evidence tailored specifically to the marketplaces in which they operate.

It is not necessary for organizations themselves to have discriminated against POC-owned businesses for them to demonstrate a compelling governmental interest and take remedial action. They could act if evidence indicates they are *passive participants* in race-based discrimination that exists in their RGMA.s.⁴ Passive participation in discrimination refers to government organizations perpetuating discrimination in their contract and procurement processes indirectly (e.g., by requiring stringent insurance requirements in a marketplace where disparate outcomes exist for POC- and woman-owned businesses). One of the primary objectives of the disparity study is to determine if there is evidence of race-based discrimination in the Pennsylvania marketplace—that is, the RGMA—that would potentially indicate the Commonwealth’s passive participation in that discrimination and help establish a compelling governmental interest for it to use race-conscious measures as part of its contracting and procurement.

ii. Narrow tailoring. In addition to demonstrating a compelling governmental interest, government organizations must demonstrate that their use of race-conscious measures is narrowly tailored to meet program objectives. There are a number of factors courts consider when determining whether the use of race-conscious measures is narrowly tailored:

² *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

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

⁴ See e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1048 (Federal Cir. 2008).

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

b. Intermediate scrutiny. In 1976, the United States Supreme Court ruled that gender-conscious programs must adhere to the requirements of the intermediate scrutiny standard, which is less rigorous than the strict scrutiny standard but more rigorous than the rational basis standard.⁵

In order for a gender-conscious program to meet intermediate scrutiny, it must:

- Serve an important government objective, and
- Be substantially related to achieving the objective.

B. Seminal Court Decisions

Two Supreme Court cases established the strict scrutiny standard as the appropriate standard for evaluating the constitutionality of contracting and procurement programs that use race-conscious measures:

- *City of Richmond v. J.A. Croson Company (Croson)*;⁶ and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.⁷

Many subsequent decisions in federal courts have refined the requirements for the use of race- and gender-conscious measures as part of diverse business programs, including several cases in the Third Circuit, the jurisdiction in which the Commonwealth operates. BBC Research & Consulting (BBC) briefly summarizes the United States Supreme Court’s decisions in *Croson* and *Adarand* as well as two key decisions in the Third Circuit related to contracting equity programs: *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al. (CAEP v. City of Philadelphia)* and *Geod Corporation v. New Jersey Transit Corporation (Geod v. NJ Transit)*.^{8,9}

1. *Croson* and *Adarand*. The United States Supreme Court’s landmark decisions in *Croson* and *Adarand* are the most important court decisions to date in connection with the use of race-conscious measures in government contracting and procurement and disparity study methodology. In *Croson*, the Supreme Court struck down the City of Richmond’s race-based subcontracting program as

⁵ *Craig v. Boren*, 429 U.S. 190 (1976).

⁶ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁸ *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996).

⁹ *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010).

unconstitutional and, in doing so, established various requirements government organizations must meet when considering the use of such measures as part of their contracting and procurement:

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

The Supreme Court's decision in *Adarand* expanded its decision in *Croson* to include federal government programs that potentially include race-conscious measures, requiring that those programs must also adhere to the requirements of strict scrutiny [e.g., the Federal Disadvantaged Business Enterprise (DBE) Program].

2. CAEP v. Philadelphia. In *CAEP v. City of Philadelphia*, the Third Circuit Court of Appeals assessed the constitutionality of a race-conscious subcontracting goals program the City of Philadelphia used to encourage the participation of POC-owned businesses in its projects. The case centered on the organization's implementation of the program for Black American-owned businesses competing for construction work, which the Court found to be unconstitutional. Key aspects of the Court's ruling include the following:

- A government organization's use of race-conscious measures must meet the requirements of strict scrutiny to be considered constitutional and that the City of Philadelphia's use of such measures did not meet the narrow tailoring prong of strict scrutiny, both because it amounted to a set aside for Black American-owned businesses and because it encouraged subcontract participation for Black American-owned businesses despite the City only providing evidence of discrimination against Black American-owned businesses in the prime contracting market.
- Organizations cannot justify their use of race-conscious measures solely by referencing past societal discrimination in which the municipality played no material role. Instead, they must demonstrate a "strong basis in evidence" to do so.
- Plaintiffs challenging an organization's race-conscious program have the ultimate burden of persuading the courts that a violation of the Equal Protection Clause has occurred.
- If an organization could show it had essentially become a passive participant in a system of racial exclusion in relevant contracting industries, then it could take affirmative steps to dismantle such a system if the organization can demonstrate that it has participated in or supported such exclusion in some way.
- Statistical disparities between the participation and availability of POC-owned businesses for organizations' projects can justify the use of race-conscious program measures.

- Government organizations must genuinely consider the use of race-neutral program measures before considering the use of race-conscious measures in attempting to address any discrimination that exists against POC-owned businesses.

3. *Geod v. NJ Transit.* In *Geod v. NJ Transit*, the United States District Court of New Jersey assessed the constitutionality of NJ Transit's implementation of the Federal DBE Program, which the organization is required to implement as a recipient of United States Department of Transportation (USDOT) funds. The case centered on the methodology NJ Transit used to set its overall goal for the participation of DBEs in its USDOT-funded projects. The Court found that NJ Transit's approach to doing so was based on appropriate estimates of the availability of those businesses for the organization's work and sufficient evidence of past race- and gender-based discrimination in the RGMA and within the organization's contracting and procurement processes. Key aspects of the Court's ruling include the following:

- The Court accepted results from econometric analyses of potential barriers in the marketplace for POCs, women, and POC- and woman-owned businesses as persuasive evidence of discrimination against those individuals and businesses, which affected their ability to participate in NJ Transit work.
- Although the initial burden of proof falls on government organizations to demonstrate their implementations of race- and gender-based programs are constitutional, plaintiffs challenging those implementations have the ultimate burden of persuading courts that violations of the Equal Protection Clause have occurred.
- The combination of a custom census approach, Dun & Bradstreet business listings, and organizations' business listings is an acceptable methodology to estimate the availability of DBEs for organization work.
- The plaintiff's argued that NJ Transit's implementation of the Federal DBE Program was not narrowly tailored because the organization focused its efforts on subcontracting despite the fact that the evidence of discrimination it provided was most related to prime contracting. The Court rejected that argument.
- Narrow tailoring does not require organizations to exhaust every conceivable race- or gender-neutral program measure before it considers using race- or gender-conscious measures as part of their contracting and procurement programs.

C. Addressing Legal Requirements with the Disparity Study

Many government organizations have used information from disparity studies to:

- Determine whether their contract and procurement practices are affected by race-based, gender-based, veteran-based, or other types of discrimination;
- Design efforts to encourage the participation of diverse businesses in their work; and
- Ensure that their use of any race- or gender-conscious measures meet the requirements of the strict scrutiny and intermediate scrutiny standards, respectively.

Various aspects of the 2024 Commonwealth of Pennsylvania Disparity Study specifically address requirements the United States Supreme Court and other courts have established around diverse business programs and the use of race- and gender-conscious measures:

- The disparity study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for diverse individuals and the businesses they own in the RGMA and whether the Commonwealth is actively or passively participating in that discrimination.
- BBC accounts for various characteristics of the relevant contracts and procurements the Commonwealth awards—such as work type, role, size, and location—as well as the specific characteristics of businesses working in the RGMA—such as primary lines of work, roles, bid capacities, and interest in government work—resulting in precise estimates of the degree to which diverse businesses are ready, willing, and able to perform that work.
- The study includes assessments of whether relevant groups of diverse businesses exhibit substantial, statistical disparities between their participation in and availability for relevant Commonwealth contracts and procurements, indicating whether any inferences of discrimination exist for specific business groups.
- The study includes various recommendations to help the Commonwealth consider whether using race- and gender-conscious programs is appropriate as part of its contracting and procurement and how to do so effectively and in a legally defensible manner.

CHAPTER 3.

Marketplace Conditions

Historically, there have been many legal, economic, and social obstacles that have impeded people of color (POCs) and women from starting and operating successful businesses. Barriers including slavery, racial oppression, segregation, displacement, labor market discrimination, family responsibilities, and discriminatory government policies have produced substantial disparities for POCs and women, the effects of which still impact them today. Those barriers have limited opportunities for POCs in terms of education, workplace experience, and building wealth.^{1, 2, 3, 4, 5} Similarly, many women have been restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement. They have also faced barriers related to education, workplace experience, and building wealth.^{6, 7, 8} POCs and women in Pennsylvania have faced barriers similar to the ones nationwide. Black Americans were forced to live in racially-segregated neighborhoods, send their children to segregated schools, and use separate facilities at area restaurants and cultural institutions. Disparate treatment also extended into the labor market. Although opportunities in the workplace attracted people to Pennsylvania, unemployment rates for Black Americans exceeded those for white Americans. Moreover, Black Americans were concentrated in low-wage work in domestic services and general labor with few opportunities for advancement.^{9, 10}

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

Federal courts have considered barriers POCs, women, and POC- and woman-owned businesses face in a marketplace as evidence for race- and gender-based discrimination in that marketplace.^{20, 21, 22} The United States Supreme Court and other federal courts have held that analyses of conditions in a marketplace for POCs, women, and POC- and woman-owned businesses are instructive in determining whether agencies' implementations of POC- and woman-owned business programs are appropriate and justified as part of their contracting and procurement processes. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for POC- or woman-owned businesses to successfully compete for government contracts and procurements. Passive participation in discrimination refers to agencies unintentionally perpetuating race- or gender-based discrimination simply by operating within marketplaces where such discrimination exists. Many courts have held that passive participation in any race- or gender-based discrimination can help to establish a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{23, 24, 25}

BBC Research & Consulting (BBC) conducted analyses to assess whether POCs, women, and POC- and woman-owned businesses face any barriers in the Pennsylvania construction, professional services, and non-professional services and goods industries. We also examined the potential effects any such barriers have on the formation and success of businesses as well as their participation in and availability for contracts and procurements the Commonwealth of Pennsylvania’s Department of General Services (DGS) awards. Where data were available, we also assessed those effects for veterans; people with disabilities; people who identify as lesbian, gay, bisexual, transgender, queer, or other sexual or gender orientations (LGBTQ+); and the businesses they own. We examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs, women, veterans, and people with disabilities face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs, women, veterans, people with disabilities, and members of the LGBTQ+ community face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether POCs, women, veterans, and people with disabilities own businesses at rates comparable to that of white men, non-veterans, and people without disabilities, respectively; and
- **Business success**, to assess whether POC-, woman-, veteran-, disabled-, and LGBTQ+-owned businesses have outcomes similar to those of other businesses.

A. Human Capital

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

1. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as in professional services—require at least a four-year college degree. In addition, education is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{30, 31, 32} Nationally, POCs lag behind white Americans in terms of both educational attainment and the quality of education they receive.^{33, 34, 35} POCs are more likely than white Americans to attend schools that do not provide access to core classes in science and math.³⁶ In addition, Black American students are more likely than white American students to be expelled or suspended from high school.³⁷ For those and other reasons, POCs are far less likely than white Americans to attend college, enroll at selective four-year college institutions, and earn college degrees.³⁸

Educational outcomes for POCs in Pennsylvania are similar to those for POCs nationwide. BBC’s analyses of the Pennsylvania labor force indicate that people who identify with certain POC groups are less likely than white Americans to earn college degrees. Figure 3-1 presents the percentage of workers in Pennsylvania who have earned four-year college degrees. As shown in Figure 3-1, Black American (27.5%), Hispanic American (23.5%), and Native American (31.7%) workers are substantially less likely than white American workers (41.2%) to have four-year college degrees. In addition, workers with

disabilities (23.1%) are substantially less likely than workers without disabilities (40.8%) and veteran workers (28.0%) are substantially less likely than non-veteran workers (40.2%) to have four-year college degrees. We also conducted regression analyses to assess whether race-, gender-, or veteran status-related barriers in obtaining college degrees exist even after accounting for various personal factors, such as age and family status. Those analyses indicated that, even after accounting for such factors, Black Americans, Hispanic Americans, and Native Americans are less likely to obtain college degrees compared to white Americans (see Appendix C, Figure C-2 for more details).

Figure 3-1.
Percentage of all workers aged 25 and older with at least a four-year degree, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Percentage
Race/ethnicity	
Asian Pacific American	54.8 % **
Black American	27.5 **
Hispanic American	23.5 **
Native American	31.7 **
Subcontinent Asian American	77.9 **
Other race POCs	42.1
White American	41.2
Gender	
Women	42.3 % **
Men	37.1
Disability Status	
People with disabilities	23.1 % **
All others	40.8
Veteran Status	
Veteran	28.0 % **
Non-veteran	40.2

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

a. Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, POCs and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{39, 40, 41} When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of POCs and women.^{42, 43, 44, 45, 46, 47} In addition, Black Americans, Hispanic Americans, and Native Americans are incarcerated at greater rates than white Americans in Pennsylvania and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and slow wage growth.^{48, 49, 50, 51, 52, 53, 54} BBC assessed the representation of POC, woman, and veteran workers in the Pennsylvania construction, professional services, and non-professional services and goods industries compared to their representation in all Pennsylvania industries considered together. We present the results of that analysis in Figure 3-2. Compared to their representation in all industries considered together:

- Smaller percentages of Asian Pacific Americans (0.8%), Black Americans (5.2%), Subcontinent Asian Americans (0.2%), and women (9.1%) work in the construction industry. A greater percentage of veterans (6.4%) work in the construction industry.
- Smaller percentages of Black Americans (8.7%), Hispanic Americans (5.2%), Native Americans (0.2%), women (42.9%), and people with disabilities (5.4%) work in professional services. In contrast, greater percentages of Asian Pacific Americans (3.2%), Subcontinent Asian Americans (4.4%), and people without disabilities (94.6%) work in the professional services industry.
- Smaller percentages of Asian Pacific Americans (1.6%), Subcontinent Asian Americans (0.5%), and women (29.3%) work in the non-professional services and goods industry. In contrast, greater percentages of Black Americans (14.0%), Hispanic Americans (10.3%), people with disabilities (8.7%), and veterans (6.5%) work in the non-professional services and goods industry.

Figure 3-2.
Demographic characteristics of workers in study-related industries and all industries, 2017-2021

Group	All Industries (n=317,917)	Construction (n=20,371)	Professional Services (n=20,049)	Non-professional Services and Goods (n=12,969)
Race/ethnicity				
Asian Pacific American	2.6 %	0.8 % **	3.2 % **	1.6 % **
Black American	10.7 %	5.2 % **	8.7 % **	14.0 % **
Hispanic American	7.0 %	6.9 %	5.2 % **	10.3 % **
Native American	0.4 %	0.4 %	0.2 % **	0.4 %
Subcontinent Asian American	1.4 %	0.2 % **	4.4 % **	0.5 % **
Other race POCs	0.6 %	0.6 %	0.7 %	0.7 %
Total POC	22.8 %	14.1 %	22.4 %	27.4 %
White American	77.2 %	85.9 % **	77.6 %	72.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.7 %	9.1 % **	42.9 % **	29.3 % **
Men	52.3 %	90.9 %	57.1 %	70.7 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Disability Status				
People with disabilities	7.0 %	6.9 %	5.4 % **	8.7 % **
All others	93.0 %	93.1 %	94.6 % **	91.3 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	4.5 %	6.4 % **	4.5 %	6.5 % **
Non-veteran	95.5 %	93.6 %	95.5 %	93.5 %
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also examined the relationships between race, gender, veteran status, and unemployment. Figure 3-3 presents unemployment rates among POCs, women, people with disabilities, and veterans compared to those of white Americans, men, people without disabilities, and non-veterans, respectively. Compared

to white American workers (4.6%), Black American (11.1%), Hispanic American (8.5%), Native American (9.2%), and other race POC (7.6%) workers are substantially more likely to be unemployed in Pennsylvania. In addition, compared to all other workers (5.1%), workers with disabilities (12.3%) are substantially more likely to be unemployed in Pennsylvania. We also conducted regression analyses to assess whether there are relationships between race, gender, veteran status, and unemployment even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for such factors, Black Americans, Hispanic Americans, Native Americans, and other race POCs are more likely to be unemployed compared to white Americans. In addition, women are more likely to be unemployed compared to men (see Appendix C, Figure C-5 for more details).

Figure 3-3.
Unemployment rates, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Rate
Race/ethnicity	
Asian Pacific American	5.1 %
Black American	11.1 **
Hispanic American	8.5 **
Native American	9.2 **
Subcontinent Asian American	3.6 **
Other race POCs	7.6 **
White American	4.6
Gender	
Women	5.4 % **
Men	5.9
Disability Status	
People with disabilities	12.3 % **
All others	5.1
Veteran Status	
Veteran	4.9 % **
Non-veteran	5.7

b. Management experience. Managerial experience is an important predictor of business ownership and success, but discrimination remains an obstacle to greater diversity in management positions.^{55, 56, 57, 58} Nationally, POCs and women are far less likely than white men to work in management positions.^{59, 60, 61} Similar outcomes exist for POCs and women in Pennsylvania. BBC examined the representation of POCs and women in management positions in the Pennsylvania construction, professional services, and non-professional services and goods industries. As shown in Figure 3-4:

- Smaller percentages of Asian Pacific Americans (2.8%) and Hispanic Americans (3.4%) than white Americans (7.4%) work as managers in the Pennsylvania construction industry.
- Smaller percentages of Black Americans (2.0%) and Hispanic Americans (2.8%) than white Americans (5.0%) work as managers in the Pennsylvania professional services industry. In addition, smaller percentages of women (2.7%) than men (6.1%) and smaller percentages of people with disabilities (3.5%) than all others (4.7%) work as managers in the Pennsylvania professional services industry.

- Smaller percentages of Black Americans (1.3%) than white Americans (3.7%) work as managers in the Pennsylvania non-professional services and goods industry. Smaller percentages of women (2.4%) than men (3.5%) work as managers in the Pennsylvania non-professional services and goods industry. In addition, smaller percentages of veterans (2.3%) than non-veterans (3.3%) and smaller percentages of people with disabilities (1.0%) than all others (3.4%) work as managers in the Pennsylvania non-professional services and goods industry.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{62, 63, 64} Individuals can acquire financial capital through many sources, including wages, personal wealth, homeownership, and loans. If barriers exist in financial markets, POCs and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between POCs and white Americans and between women and men exist nationwide, even when researchers have accounted for various personal factors.^{65, 66, 67, 68} For example, nationally, on average, Black Americans and Hispanic Americans have household incomes less than two-thirds and three-fourths, respectively, those of white Americans.⁶⁹ Women have also faced wage and income gaps relative to men. Nationally, the median hourly wage of women is only 84 percent that of men, even after accounting for various personal factors.⁷⁰ Such disparities make it difficult for POCs and women to use wages as a source of business capital.

Figure 3-4.
Percentage of non-owner workers who worked as a manager in each study-related industry, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

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

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Construction	Professional Services	Non-professional Services and Goods
Race/ethnicity			
Asian Pacific American	2.8 % **	5.2 %	3.5 %
Black American	5.2 %	2.0 % **	1.3 % **
Hispanic American	3.4 % **	2.8 % **	2.6 %
Native American	7.7 %	10.5 %	5.1 %
Subcontinent Asian American	24.0 % †	5.2 %	3.0 %
Other race POCs	9.7 %	6.9 %	0.0 %
White American	7.4 %	5.0 %	3.7 %
Gender			
Women	6.5 %	2.7 % **	2.4 % **
Men	7.0 %	6.1 %	3.5 %
Disability Status			
People with disabilities	5.9 %	3.5 % *	1.0 % **
All others	7.0 %	4.7 %	3.4 %
Veteran Status			
Veteran	7.4 %	7.4 % **	2.3 % *
Non-veteran	6.9 %	4.5 %	3.3 %
All individuals	7.0 %	4.6 %	3.2 %

BBC observed wage disparities in Pennsylvania consistent with those observed nationally. Figure 3-5 presents mean annual wages for Pennsylvania workers by race and gender. Black Americans (\$48,675), Hispanic Americans (\$48,827), and Native Americans (\$55,602) earn less than white Americans

(\$67,241). In addition, women (\$53,145) earn less than men (\$75,590) and people with disabilities (\$46,286) earn less than all others (\$65,911). We also conducted regression analyses to assess whether wage gaps for POCs, women, and veterans exist even after accounting for various personal factors such as age and family status. Those analyses indicated that Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans earn less than white Americans, and women earn less than men (see Appendix C, Figure C-11 for more details).

2. Personal wealth. Another source of business capital is personal wealth, and there are substantial disparities between POCs and white Americans and between women and men in personal wealth, even after accounting for various personal characteristics.^{71, 72, 73, 74} For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent, respectively, that of white Americans.⁷⁵ In addition, approximately 22 percent of Black Americans and 18 percent of Hispanic Americans in the United States are living in poverty compared to less than 10 percent of white Americans. In Pennsylvania, 24 percent of Black Americans, 23 percent of Hispanic Americans, and 11 percent of Native Americans are living in poverty compared to 9 percent of white Americans.⁷⁶ In addition, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁷⁷

3. Homeownership. Home equity has also been shown to be a key source of business capital, but POCs appear to face substantial barriers nationwide in owning homes, and those disparities appear to be at least partly due to discrimination.^{78, 79, 80} Research indicates that POCs continue to be given less information on prospective homes and have their purchase offers rejected because of their races.^{81, 82} In addition, POC homeowners tend to own homes worth less than those of white Americans and tend to accrue less equity.^{83, 84, 85} Differences in home values and equity can be attributed—at least, in part—to the depressed property values that tend to exist in racially segregated neighborhoods.^{86, 87, 88}

Figure 3-5.
Mean annual wages,
2017-2021

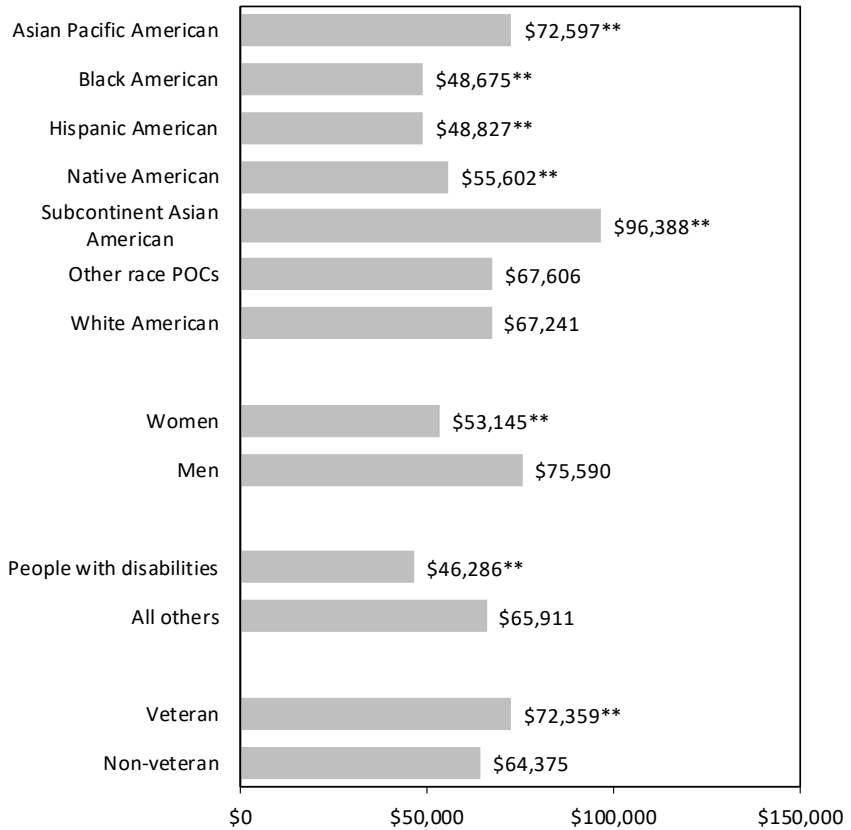
Note:

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

*, ** Denotes that the difference in mean between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



POCs appear to face homeownership barriers in Pennsylvania similar to those observed nationally. As shown in Figure 3-6, Asian Pacific Americans (62%), Black Americans (43%), Hispanic Americans (43%), Native Americans (60%), Subcontinent Asian Americans (55%), and other race POCs (66%) own homes at rates that are less than that of white Americans (75%).

Figure 3-6.
Homeownership rates,
2017-2021

Note:

The sample universe is all households.

** Denotes statistically significant differences from white Americans at the 95% confidence level.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

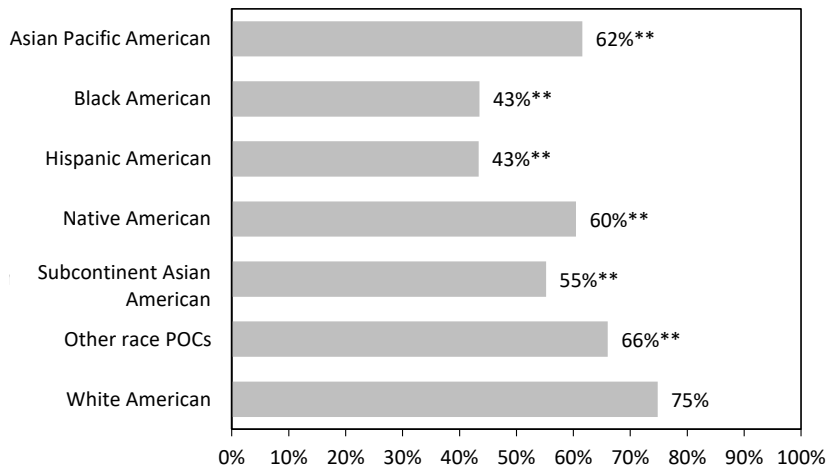


Figure 3-7 presents median home values among POC homeowners in Pennsylvania. Those data indicate that Black Americans (\$140,000), Hispanic Americans (\$151,000), and Native Americans (\$180,000), own homes that, on average, are worth less than those of white Americans (\$200,000).

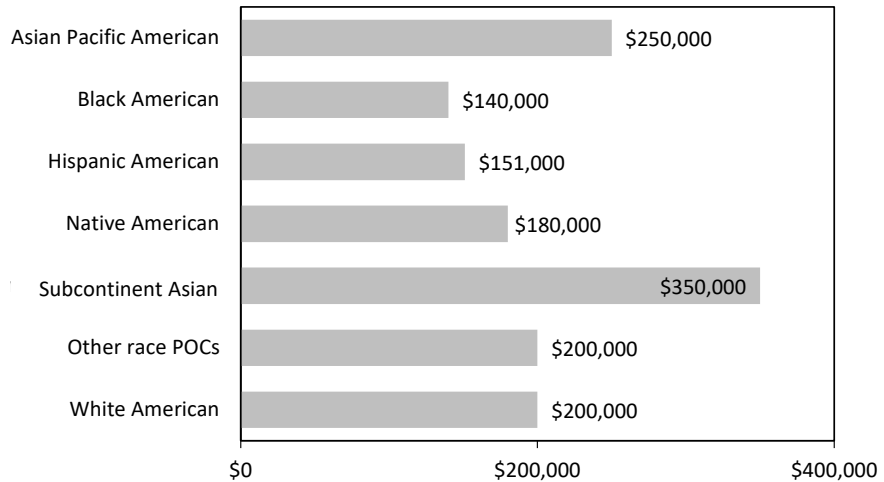
**Figure 3-7.
Median home values,
2017-2021**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



4. Access to financing. POCs and women face many barriers in trying to access credit and financing, both for home and business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{89, 90, 91, 92, 93, 94} BBC assessed difficulties POCs and women face in home and business credit markets.

a. Home credit. POCs and women continue to face barriers when trying to access credit to purchase homes. Examples include discriminatory treatment of POCs and women during pre-application processes and less favorable loan terms when POC and woman borrowers are approved for home loans.^{95, 96} Disparities in home loan denial rates and in mortgage costs may prevent POCs and women from accessing the wealth-building potential of homeownership.^{97, 98, 99, 100, 101} To examine how POCs fare in the home credit market relative to white Americans in Pennsylvania, we analyzed home loan denial rates for high-income households by race in Pennsylvania. As shown in Figure 3-8, Asian Americans, Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Pacific Islander Americans in Pennsylvania are denied home loans at greater rates than white Americans (4%).

b. Business credit. POC- and woman-owned businesses also face difficulties accessing business credit. For example, during pre-application meetings, POC-owned businesses are given less information about loans, are subjected to more information requests, and are offered less support than businesses owned by white Americans.¹⁰² In addition, POC- and woman-owned businesses are more likely to forego submitting business loan applications because of fears of denial.^{103, 104, 105} They are also more likely to be denied business credit when they do seek loans and are less likely to receive all the financing they originally sought if their loans are approved.^{106, 107, 108, 109, 110, 111} Finally, POC and women business owners face worse loan outcomes even after accounting for creditworthiness.^{112, 113, 114} Without equal access to capital, POC- and woman-owned businesses must operate with less capital than businesses owned by white Americans and men, respectively, and must rely more on personal finances.^{115, 116, 117, 118}

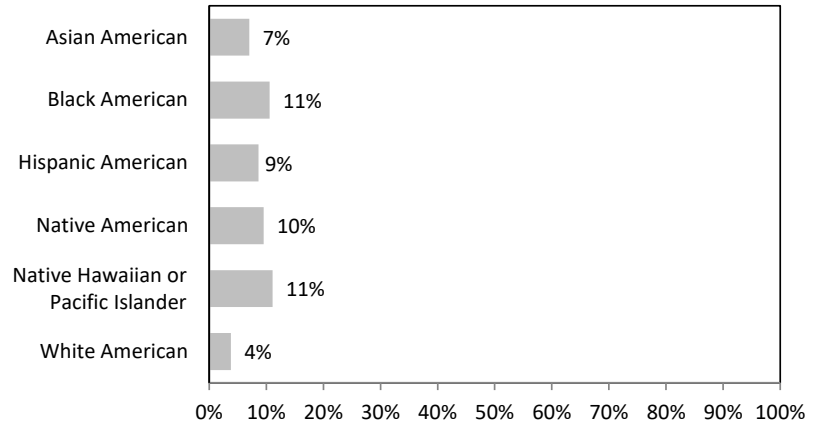
Figure 3-8.
Denial rates of conventional purchase loans for high-income households, 2022

Note:

High-income borrowers are those households with 120% or more of the U.S. Department of Housing and Urban Development/Federal Financial Institutions Examination Council (FFIEC) area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2022. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

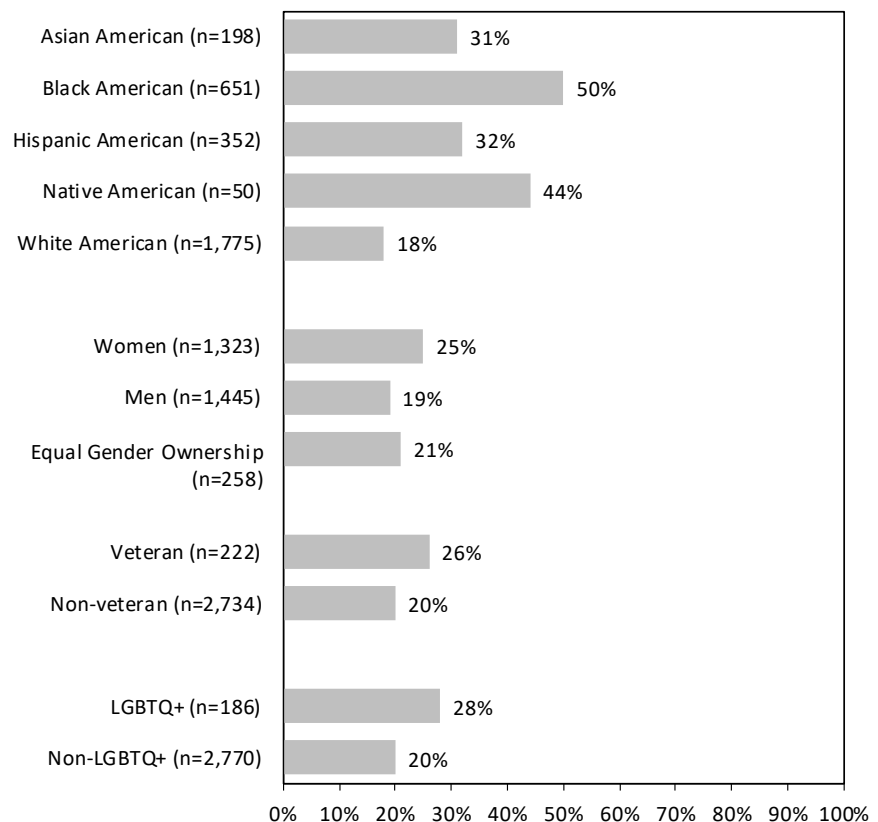


BBC analyzed denial rates for loans, lines of credit, and cash advances for POCs and women relative to white Americans and men, respectively, at a national level. As shown in Figure 3-9, all relevant groups of POC-owned businesses are denied loans at greater rates than businesses owned by white Americans and woman-owned businesses are denied loans at greater rates than businesses owned by men. In addition, veteran-owned businesses are denied loans at greater rates than businesses owned by non-veterans and LGBTQ+-owned businesses are denied loans at greater rates than non-LGBTQ+-owned businesses.

Figure 3-9.
Loan, line of credit, and cash advance denial rates, United States, 2022

Source:

BBC from 2022 Small Business Credit Survey.

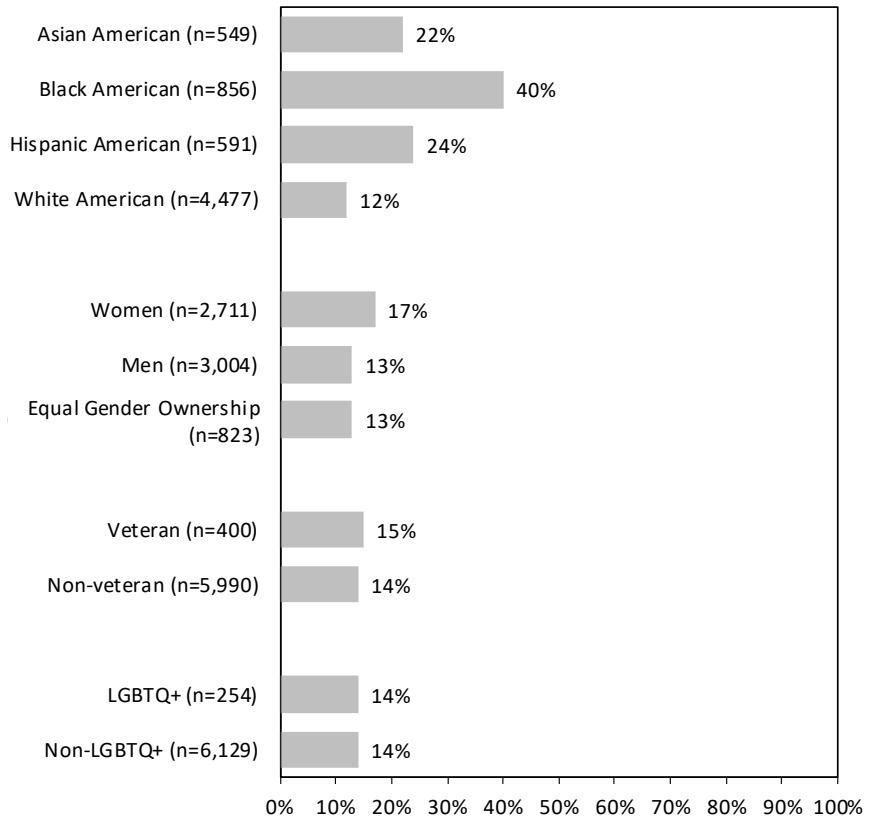


We also analyzed the degree to which POC-, woman-, veteran-, and LGBTQ+-owned businesses do not apply for loans due to a fear of denial at a national level. Figure 3-10 presents the rates at which those businesses forego loan applications due to fears of denial relative to businesses owned by white

Americans, men, non-veterans, and non-members of the LGBTQ+ community. Nationally, POC-owned businesses are more likely than businesses owned by white Americans, woman-owned businesses are more likely than businesses owned by men, and veteran-owned businesses are more likely than businesses owned by non-veterans to not apply for loans due to a fear of denial.

Figure 3-10.
Businesses that did not apply for loans due to fear of denial, United States, 2021

Source:
 BBC from 2021 Small Business Credit Survey.



C. Business Ownership

Nationally, there has recently been substantial growth in the number of POC- and woman-owned businesses. For example, from 2017 to 2020, the number of woman-owned businesses with employees increased by 9 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 17 percent.^{119, 120} However, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than white American men.^{121, 122, 123, 124, 125} In addition, POCs and women have not been able to penetrate all industries equally. They disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of POCs and women.^{126, 127, 128} BBC examined rates of self-employment (i.e., business ownership) in Pennsylvania for each relevant industry by race, gender, and veteran status. As shown in Figure 3-11:

- Black Americans (16.6%) and Hispanic Americans (19.4%) own construction businesses at rates less than that of white Americans (23.3%), and women (12.8%) own construction businesses at a rate less than that of men (23.7%).
- Asian Pacific Americans (8.8%), Black Americans (8.8%), Hispanic Americans (9.9%), and Subcontinent Asian Americans (7.1%) own professional services businesses at rates less than that

of white Americans (14.9%), and women (11.5%) own such businesses at a rate less than that of men (15.3%).

- Black Americans (6.8%) and Hispanic Americans (6.8%) own non-professional services and goods businesses at a rate less than that of white Americans (9.7%).

Figure 3-11.
Ownership rates in study-related industries, 2017-2021

Group	Construction	Professional Services	Non-professional Services and Goods
Race/ethnicity			
Asian Pacific American	27.3 %	8.8 % **	9.5 %
Black American	16.6 % **	8.8 % **	6.8 % **
Hispanic American	19.4 % **	9.9 % **	6.8 % **
Native American	22.7 %	23.7 %	20.6 %
Subcontinent Asian American	1.4 % †	7.1 % **	13.7 %
Other race POC	26.9 %	21.5 %	17.4 %
White American	23.3 %	14.9 %	9.7 %
Gender			
Women	12.8 % **	11.5 % **	12.1 % **
Men	23.7 %	15.3 %	7.9 %
Disability Status			
People with disabilities	28.1 % **	17.0 % **	10.8 %
All others	22.3 %	13.5 %	9.0 %
Veteran Status			
Veteran	26.5 % **	17.5 % **	8.4 %
Non-veteran	22.4 %	13.5 %	9.2 %
All individuals	22.7 %	13.7 %	9.1 %

Note: *, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

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

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also conducted regression analyses to determine whether differences in business ownership rates in Pennsylvania exist based on race and gender even after statistically controlling for various personal factors such as income, education, and familial status. Even after accounting for various personal factors:

- Subcontinent Asian Americans are less likely to own construction businesses relative to white Americans and women are less likely to own construction businesses than men (see Appendix C, Figure C-20 for more details).
- Asian Pacific Americans and Subcontinent Asian Americans are less likely to own professional services businesses relative to white Americans and women are also less likely to own professional services businesses than men. Additionally, veterans are less likely to own professional services businesses than non-veterans (see Appendix C, Figure C-21 for more details).

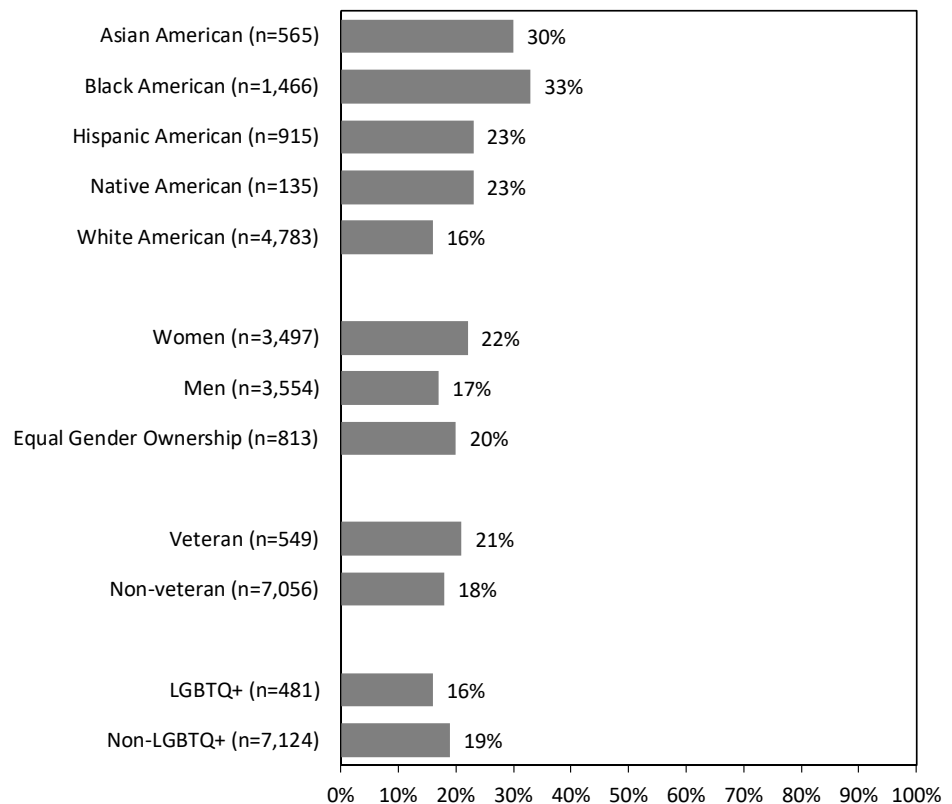
D. Business Success

Research indicates that, nationally, POC- and woman-owned businesses fare worse than businesses owned by white American men. For example, POC- and woman-owned businesses are more likely to experience financial challenges relative to those owned by white Americans and men, respectively.^{129, 130} In addition, POC- and woman-owned businesses have been shown to be less successful than those owned by white Americans and men, respectively, based on a number of different indicators such as profits and business size.^{131, 132, 133, 134} BBC examined data on business financial conditions, business receipts, and business owner earnings to further explore business success in Pennsylvania.

1. Financial condition. BBC examined the reported *financial condition* of businesses in the United States by the race and gender of their owners at the national level according to the Small Business Credit Survey. Financial condition refers to a business' increase or decrease in revenue and number of employees in the past 12 months as well as anticipated increase in revenue and number of employees over the next 12 months. Financial condition also assesses financial challenges a business may have experienced in the past 12 months including weak sales, difficulty paying expenses, uneven cash flow, and credit availability. As shown in Figure 3-12, Asian American- (30%), Black American- (33%), Hispanic American- (23%), and Native American-owned businesses (23%) are more likely than white American-owned businesses (16%) to report being in poor financial condition. In addition, woman-owned businesses (22%) are more likely than businesses owned by men (17%) to report being in poor financial condition, and veteran-owned businesses (21%) are more likely than non veteran-owned businesses (18%) to report being in poor financial condition.

Figure 3-12.
Businesses in poor financial condition, United States, 2022

Source:
BBC from 2022 Small Business Credit Survey.



2. Business receipts. BBC also examined data on business receipts to assess whether POC- and woman-owned businesses in Pennsylvania earn as much as those owned by white Americans and men, respectively. Figure 3-13 indicates that Asian American- (\$1.2 million), Black American- (\$967,000), Hispanic American- (\$1.2 million), and Native Hawaiian and other Pacific Islander-owned (\$821,000) businesses have mean annual business receipts less than those owned by white Americans (\$2.7 million). Woman-owned businesses (\$1.3 million) have mean annual business receipts less than those owned by men (\$3.0 million). In addition, veteran-owned businesses (\$2.0 million) have mean annual business receipts less than those owned by non-veterans (\$2.6 million).

Figure 3-13.
Mean annual business receipts
(in thousands)

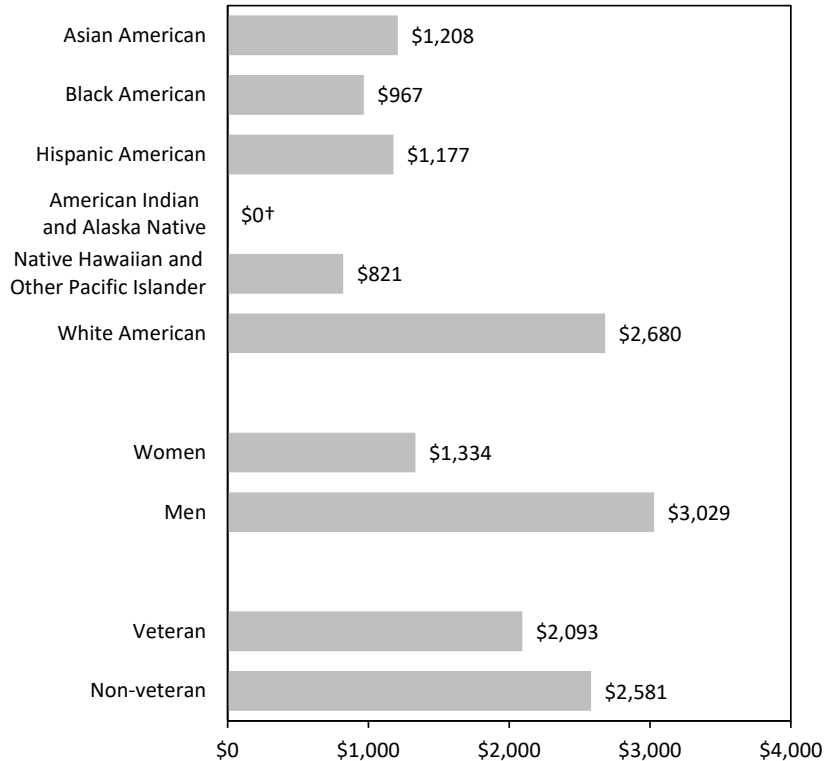
Note:

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

† Mean not reported because data did not meet US Census publication standards.

Source:

BBC from 2017 Annual Business Survey.



3. Business owner earnings. BBC also analyzed the earnings of business owners to assess whether owners who are POCs and women in Pennsylvania earn as much as business owners who are white Americans and men, respectively. As shown in Figure 3-14:

- Asian Pacific American (\$35,775), Black American (\$32,012), Hispanic American (\$35,854), and other race POCs (\$34,643) business owners earned less on average than white American business owners (\$50,559);
- Women business owners (\$31,592) earned less on average than men business owners (\$57,703); and
- Business owners with disabilities (\$33,753) earned less on average than all other business owners (\$49,691).

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

indicated that, compared to white American business owners, Asian Pacific American business owners earn substantially less. Similarly, compared to male business owners, woman business owners earn substantially less.

Figure 3-14.
Mean annual business owner earnings, 2017-2021

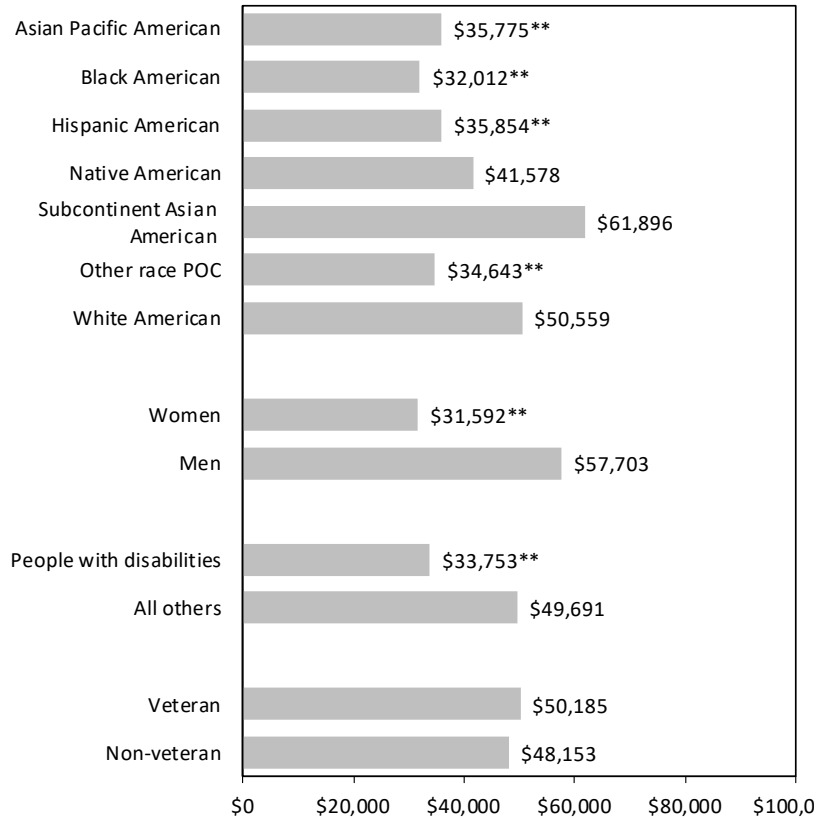
Note:

The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2021 dollars.

*, ** Denotes that the difference in mean between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



E. Summary

BBC’s analyses of marketplace conditions indicate that POCs, women, people with disabilities, veterans, and members of the LGBTQ+ community face barriers in industries relevant to DGS’ contracting and procurement. Both existing and primary research we conducted indicate that disparities exist in acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various personal factors. There is also evidence many disparities are due—at least, in part—to race- and gender-based discrimination. Barriers in the marketplace likely have important effects on the ability of POCs and women to start businesses in relevant industries—construction, professional services, and non-professional services and goods—and to operate those businesses successfully. Any difficulties those individuals face in starting or operating businesses may reduce their availability for government work and the degree to which they are able to successfully perform such work.

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- ²¹ *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; see *DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, appeal pending; *Geyer Signal*, 2014 WL 130909297 at *14].
- ²² *Adarand VII* at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at *14.
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CHAPTER 4.

Qualitative Evidence

As part of the disparity studies BBC Research & Consulting (BBC) conducted for the Commonwealth of Pennsylvania (the Commonwealth) Department of General Services (DGS) and the Pennsylvania Department of Transportation (PennDOT), business owners, trade association representatives, and other stakeholders had the opportunity to share personal insights about their experiences working in Pennsylvania as well as with DGS, PennDOT, and other state agencies. BBC documented those insights and identified key themes about conditions in Pennsylvania for person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses as well as other businesses. We used that information to augment many of the quantitative analyses we conducted as part of the disparity study to provide context for study results and provide explanations for various barriers POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses potentially face as part of state contracting and procurement.

A. Data Collection

The study team collected personal insights about marketplace conditions, experiences working with the Commonwealth, and recommendations for program implementation. We made various efforts between June 2023 and April 2024 to collect that information:

- **Public forums:** BBC solicited stakeholders to provide written and verbal insights at four public forums we facilitated virtually on July 12 and 20, 2023 for the DGS Disparity Study. We also facilitated five public meetings for the PennDOT Disparity Study on December 7 and 12, 2023 and February 15, 2024.
- **In-depth interviews:** The study team conducted 80 in-depth interviews with owners and other representatives of local construction, professional services, and non-professional services and goods businesses to collect interviewees' perceptions of, and experiences with, the local contracting industry, working or attempting to work with government organizations in Pennsylvania, DGS' and PennDOT's implementation of its business assistance programs, and other relevant topics. BBC identified interview participants primarily from a random sample of businesses the study team contacted during the availability survey process, stratified by business type, location, and the race/ethnicity and gender of business owners. The study team conducted most of the interviews with the owner or another high-level representative of each business.
- **Availability surveys:** As part of the availability analysis, BBC conducted surveys with 2,054 businesses located and operating in the Pennsylvania marketplace. The survey included an opportunity for participants to share qualitative insights about whether they have experienced barriers starting or expanding businesses in their industries, obtaining work in Pennsylvania, or working with government organizations in Pennsylvania. A total of 1,155 survey participants shared such information.

- **Focus groups:** BBC conducted four focus groups with representatives of business organizations, such as chambers of commerce, business assistance organizations, and other business groups in addition to representatives of certified Disadvantaged Business Enterprises (DBEs). We conducted the focus groups on March 6, 7, 8, and 11, 2024 with a total of 28 participants across the four focus groups. During each group, participants engaged in discussions and shared insights about working in Pennsylvania with public and private sector organizations.
- **Written comments:** Throughout the study, stakeholders and community members had the opportunity to submit written comments directly to BBC regarding their experiences working in Pennsylvania. A total of eight stakeholders and community members shared such comments.

B. Key Themes

Various themes emerged from the personal insights BBC collected as part of the disparity study. We summarize those themes by relevant topic area and present illustrative quotations for each one:

1. Marketplace conditions;
2. Potential barriers to business success;
3. Working in the private and public sectors;
4. Prime contract and subcontract work;
5. Doing business with public agencies;
6. Certification;
7. Barriers related to race and gender;
8. Experiences with Commonwealth business programs; and
9. Recommendations.

In an effort to protect the anonymity of individuals and businesses, we coded the source of each quotation with a random number and prefix that represents the individual who submitted the comment and the data collection method:

- “AV” indicates availability survey comments;
- “FG” indicates focus group comments;
- “PT” indicates public forum comments;
- “WT” indicates written comments; and
- In-depth interview comments do not have a prefix.

We also preface each quotation with a brief description of the ownership characteristics of the business and the business’ line of work. In addition, we indicate whether each participant represents a certified DBE, a certified Minority Business Enterprise (MBE), a certified Woman Business Enterprise (WBE), a certified Disabled-Owned Business Enterprise (DOBE), a certified Veteran Business Enterprise (VBE), a certified Small Business Enterprise (SBE) a certified Service-Disabled Veteran Business Enterprise (SDVBE), a certified LGBTQ+ Business Enterprise (LGBTBE), a certified Small Diverse Business (SDB), a

certified SDV-owned Small Business (SDVOSB), a certified Small Woman-owned Business Enterprise (WOSB), or other relevant certification.

1. Marketplace conditions. Business owners shared their thoughts about recent trends they have experienced or observed in the Pennsylvania marketplace.

a. COVID-19 effects on business. Some interviewees indicated that their businesses struggled as a result of the COVID-19 pandemic. However, others pointed to relief programs stemming from the pandemic as an overall benefit for businesses.

A representative of a woman-owned goods and services company stated, "My biggest complaint would be the inspections and fees I have as a car dealer. As an example, I deal with [the Pennsylvania] Department of Banking. They did an audit and charged me a \$1,700 fee for the audit when they did not even come in because of COVID. I feel like I am struggling to be successful because of where the car industry is now. Pre-COVID, I was able to acquire cars for \$1,500, but now I am spending about \$4,000. I love this business but, since COVID happened, I feel like I am struggling to stay afloat." [#AV407]

A representative of a trade organization stated, "We had, after COVID, a grant program called the Wilkes-Barre Spark program that helped pay for rent or the mortgage on commercial property within Wilkes-Barre City limits. It was done with the American Rescue Act funds, [in] partnership with the chamber and the county up here. ... We saw a lot of new businesses start based on that because people didn't have to worry about making the money for rent for the first year. ... It's been helpful for a lot of businesses. ... I think overall it's been a positive and really helped get some activity going in downtown Wilkes-Barre again." [#FG4]

Interviewees also discussed various impacts the pandemic had on their respective industries. Some shared that, after COVID-19, hiring has become more difficult and others pointed to financing challenges following the pandemic.

A representative of a WBE-certified woman-owned professional services company stated, "A lot of what we've noticed is, obviously with the COVID pandemic and after the fact, a lot of people either struggling to get back to work or, frankly, struggling to want to work. And that is something that we see heavily, being a staffing agency, that a lot of people [are] struggling to find that right fit for them." [#17]

The owner of a majority-owned goods and services company stated, "I will tell you pre-COVID, it was a lot simpler. Just about anybody would loan money, but it seems like after COVID, it's a lot more difficult to get small financing." [#38]

Interviewees in industries unable to support the increased demand for remote work from prospective employees noted the shift has created a barrier to finding new personnel.

A representative of a DBE- and MBE-certified construction company stated, "I think earlier on, maybe last year, people were looking for remote work, and [for] a lot of our field, remote work is not possible. Lately, this year and later last year, people were looking for a

higher salary, better benefits, and in some cases, an easier workday than we were able to provide." [#FG2]

b. Geographic challenges. Business owners and representatives discussed challenges related to obtaining work and employees as a result of their geographic locations, specifically in economically depressed areas following the COVID-19 pandemic.

A representative of a WBE-certified professional services company stated, "The fact that [our] business is located in this depressed section kind of limits the amount of people who will come to the business. And post-COVID, things are different, things are done a lot more remotely. But before COVID when everyone expected to come to the business and show up when they found out where the business was located, that was a big barrier to people even arriving at the office. We were told, 'I'm not coming to that neighborhood. No way. You must come out and join me.' We've had problems recruiting talent because people won't come to the neighborhood and work there. It is not an unsafe place, just to make it clear. But that being said, the perception of the neighborhood alone is its own barrier and it's something that we have to push past." [#34]

c. Keys to success. Business owners and representatives shared what they believe to be keys to success in their industries. Many interviewees stressed the importance of networking and building relationships with other businesses and establishing a good reputation in the marketplace. Additionally, some business owners stressed the importance of having a strong financial base and technological aptitude to remain competitive.

The Black American owner of a professional services company stated, "The obvious one is access to capital. ... [If] you don't have access to capital, you're not going to get too far. But also, I think what's really important and becoming more and more important is your ability to access and utilize technology. That is kind of like a bell curve or some kind of scale that every day gets more and more important, and I think that people are separating [themselves] from their competition through the utilization of technology effectively." [#FG2]

A representative of a trade organization stated, "I think it's ... the understanding of their finances and how to manage the employee size and the contracts going forward. ... I think so many times in the Hispanic community, I see that the books aren't on point. They can't make those financial projections and then adding teams, when you're looking at these contracts, it just gets more complicated. And if that's not all already in place, it kind of snowballs." [#FG3]

A representative of a trade organization stated, "Definitely access to capital, but first and foremost, access to information. I think all the businesses need to know what is available to them and what they can access. ... That is a main component of their success and I think they go hand in hand." [#FG3]

A representative of a majority-owned professional services company stated, "I'd say with any business in any industry, the hardest part of getting started is word of mouth. It's trying to get your name recognized and to have a network established that will put their faith in you. Having a business with less than zero years' experience, even though the individual may have been in the industry for 50 years or what have you, is very hard. ... What I think has been most helpful are those individuals who start a

business after they have already built a name for themselves within a certain region." [#10] Some interviewees said a strong revenue base and having the right number of employees were especially important for running a successful business.

A representative of a trade organization stated, "I'm just going to say I think revenues and employee size as well are really the key and important for companies whenever they're looking for contracting opportunities." [#FG3]

2. Potential barriers to business success. Businesses may face various barriers in entering the marketplace or trying to expand, particularly in relation to trying to work with public agencies in Pennsylvania. Interviewees shared their experiences with several of these challenges and identified areas in which the Commonwealth could implement or improve measures to help ease them.

a. Bid process and criteria. Generally, business owners who shared their personal insights found the bid process in the public sector to be time-consuming, costly, and burdensome.

The Asian Pacific American owner of a professional services company stated, "I think the requirements that they ask for is, a lot of times, unreasonable. It doesn't cater to a small business and most government stuff is challenging. Just to even put up a bid, you got to fill out so much stuff and you got to submit a full package and [it is] very time-consuming. You don't have time to do that, because you're trying to bid on other business and you're trying to play some sort of numbers game." [#6]

A representative of a majority-owned goods and services company stated, "The whole bidding process is generally a long, drawn-out process. ... No particular item comes to my mind other than just the drawn-out process for something that just takes so long. When I quote stuff for the state, I might be quoting it for now for at the end of the year. And there's so much time in between that things change. So generally, when you quote something for the state, you inflate your numbers because everything just takes damn long to get done. And so, me, as a taxpayer, I end up paying more from all these contractors that are charging more to the state because it's not as streamlined as it can be or should be." [#62]

A representative of a trade organization stated, "Well, I could say as a small business owner, I know I've applied for two ... I did two RFPs [requests for proposals] for the city and I didn't get out of one of them. One, I actually requested to do, and you don't get them and then you don't know why you didn't get them. So RFPs for me are a very foreign thing. So if I'm going to apply to do this work and I get absolutely no feedback as far as why I wasn't selected, it's just as a disincentive to even bother." [#FG3]

Multiple interviewees said the bid process for Commonwealth agencies, such as DGS and PennDOT, was particularly challenging, citing difficulties navigating Commonwealth websites, unfair scoring criteria, and the burdensome process for bidding on state agency projects.

The owner of a DBE- and WBE-certified professional services company stated, "The only other thing that's a significant barrier for us, especially working with PennDOT, is their ECMS [Engineering and Construction Management System]. Then I don't remember what is on the other side, the reporting system. It's similar, but it's not that exact same acronym. My prime [contractors] literally have had to walk me through step-by-step because it's so

convoluted and so complicated to get somebody submitted, to get somebody approved, to get them added to a contract. The state really is dropping the ball when it comes to that system." [#79]

A representative of a majority-owned construction company stated, "We have found it to be difficult to obtain the contract or pre-qualify for DGS contracts. Access to DGS websites and the ability to bid on DGS [contracts] has been difficult. We don't know how to register as a business to bid." [#AV83]

A representative of a veteran-owned professional services company stated, "It was expensive and time-consuming to put together proposals. I was also an employee of PennDOT for 17 years. It was difficult to get proposals in, and the process of getting short-listed and being able to get projects. ... Generally, it would be nice to be able to do PennDOT or other government work, but you need to have a lot of overhead to do that kind of work. The soft costs of being able to put together the proposals and do the background work just aren't really worth it." [#AV522]

b. Access to bonding and bonding requirements. Many public sector agencies, including state agencies, require bid bonds, payment bonds, or other forms of bid security for construction projects. Some interviewees described these bonding requirements as a barrier, as small or disadvantaged businesses often cannot obtain large enough bonds for such projects. They may also be limited in their ability to get better bonding rates, because they sometimes do not have access to the types of collateral bonding agencies require.

The owner of a majority-owned SDV-certified construction company stated, "Bonding's another issue. It's a catch-22. 'We'll bond you if you show us some work.' 'Well, I can't get to work. I need to be bonded.' 'Well, we're not taking a chance on a company that's not proven themselves.' 'Well, you're taking a chance on the company or the person?' 'We're taking a chance on the person.' 'All right, well, here's all the previous work I did in the military. Here's the previous work my construction supervisor did.' 'Yeah, but you didn't do that under the name [of your business].' 'You just said it was the person, not the company.' 'Well, it's got to be by the company.' 'Okay, you just said it follows the person, not the company.' So, we're running into that issue right now. And the thing that I've just recently found out that hinders us is DGS actually has a law on the books, 9605, [regarding] bonding and progress payments. They could put that on the contracts stating that except as provided the purchasing agency may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from veteran-owned small businesses. And I've yet to see that on a DGS contract anywhere, even though it's written [in the law]." [#1]

A representative of a majority-owned construction company stated, "It is difficult to get my trade partners to work with me if they have to [get] bonded. Getting bonded is a long-drawn-out process with lots of paperwork. I am happy to work any jobs if I don't have to be bonded." [#AV303]

c. Delayed payment. Most of the businesses interviewed experienced delayed payments at some point. Businesses particularly emphasized the need for prompt payment rules to be enforced and noted that failure to do so adversely affects their ability to do business.

A representative of a woman-owned professional services company stated, "Prompt payment is a big one, especially as a subconsultant, as we have limited control as when the primes submit their invoice and when they pay us." [#AV142]

A representative of a Black American-owned goods and services company stated, "The process of payment when working for government municipalities is not prompt which puts small businesses in jeopardy." [#AV504]

A representative of a majority-owned construction company stated, "[Because of delayed payment,] you're unable to pay vendors, you're unable to pay your loans, you're unable to pay your lines of credit, you're unable to bid additional work. It is a nasty slide." [#27]

Interviewees said it often takes months to receive payment, which they indicated can impair a business' ability to pay its employees, cover operating costs, and pay suppliers and subcontractors.

A representative of an SDV- and SDVOSB-certified professional services company stated, "Yes [I've experienced delays in payment], especially on state contracts. The way this works is that if you are a sub[contractor], a lot of the contracts are written so that you don't get paid until the prime gets paid." [#2]

A representative of a Black American woman-owned professional services company stated, "It is very hard to have to wait to get funds. As a small business it is difficult not to get paid more promptly." [#AV16]

A representative of a majority-owned construction company stated, "When money doesn't come in, it makes it hard for money to go out. But yet my payroll has to go out every week. My AP [accounts payable] has to go out every week. Even when accounts receivable is slow, that really cuts into our operating cash, our cash streams. In my industry we're material driven; we have to buy material to complete jobs. As payments come in slow, payments go out slow, which might mean we have to delay ordering material, which [de]lays another job, which delays another payment. That's how it affects us." [#54]

Some interviewees have had to obtain loans or lines of credit for their businesses to survive while waiting for payment. Doing so can be costly, which can result in some business owners losing money when trying to recover their payments from customers or clients. Some interviewees also said litigation does not always get them the money they are owed despite the effort put into pursuing legal action.

The Black American owner of an SDB- and MBE-certified goods and services company stated, "That has been very challenging because the prime is paying late. ... It's very hard to keep the individuals ... hired. Because if they're not getting paid on time, they can't meet their bills. If we're not getting paid on time, we can't pay them on time. We have to go through loan after loan after loan after loan to get them to pay three months in arrears. ... You have to basically borrow [money], get a loan to meet your basic obligations." [#14]

A representative of a majority-owned goods and services company stated, "[Slow payment] affects cashflow where we have to sometimes pay bills from the line of credit as opposed to money that we have in the bank account." [#25]

A representative of a majority-owned professional services company stated, "The nonpayment. Yes. I've had three [incidents], and I had to go to small claims [court] for one

of them and one of them just disappeared. I went to court, and it was pointless. I won in both cases, but the court did nothing to help [me] get paid. The burden on it was ... on me to get paid in both cases, and I found that ridiculous." [#50]

Some interviewees shared recommendations for other business owners regarding how to ensure timely payment of the funds they are owed, with the primary recommendation being pursuing payment from delinquent clients. However, some interviewees pointed out that chasing after money they are owed can be time consuming.

A representative of an LGBTBE-certified professional services company stated, "I think if you're persistent enough, you could recoup your money that you've invoiced and if you've performed your services." [#16]

d. Electronic bidding and online registration with public agencies. Interviewees find the Commonwealth's online procurement systems, such as PennDOT's Engineering and Construction Management System (ECMS), to be difficult to navigate when submitting bids or looking for information about solicitations. They also indicated these systems are lacking effective communication regarding upcoming bidding opportunities.

The owner of a majority-owned goods and services company stated, "I will say, anytime we have to deal with the Commonwealth, we're on [eMarketplace]. We find it kind of cumbersome to use it. A lot of times we just get spun around in a circle trying to use their website and stuff for information. Some things are easy, other things are not very clear." [#23]

A representative of a majority-owned goods and services company stated, "The first thought is the process of the system. It is very hard to navigate to become a vendor." [#AV164]

A representative of a woman-owned professional services company stated, "Yes there are barriers. ECMS is a huge barrier and completely convoluted. If it wasn't for the prime contractor, we could not navigate the system." [#AV246]

A representative of a veteran-owned goods and services company stated, "Pennsylvania eMarketplace is a barrier ... the portal [is] more difficult than it used to be." [#AV266]

A representative of a majority-owned construction company stated, "I'd like PennDOT to alert us better, because that would be helpful when projects come up. They have an online system called ECMS which does not alert us of upcoming solicitations." [#AV550]

A representative of a majority-owned construction company stated, "The PennDOT website is terrible to use. It is not very user-friendly, the updated version they did about five years ago actually made it worse." [#AV551]

Some business owners noted the bidding and contract administration process can also involve navigating more than one online system, creating a barrier for businesses seeking a streamlined process for working with public agencies.

The owner of a majority-owned construction company stated, "It's not a simple process, I'll tell you that right now, and it hasn't gotten any easier through the jobs we've done."

Because they're evolving and things are changing as the jobs are changing, and it's tough, it's hard to do. There are multiple things you have to do. ... One thing goes through the ECMS website and then all your job paperwork goes through the PPCC [Pennsylvania Project Collaboration Center] website, so you're working in two different dimensions." [#40]

e. Experience and expertise to be competitive. Many business owners and representatives said gaining experience in their respective industries is key to succeeding in the marketplace. Some interviewees said working with a mentor was an ideal way for business owners to obtain the experience and skills needed to succeed in the marketplace.

The Black American owner of a professional services company stated, "You've got to become a part of the organization and learn and identify a mentor that will guide you and help you. They're not going to give you the business, but they're going to help you to position yourself for the business. And I think that's what's crucial." [#9]

The Black American owner of an MBE-certified goods and services company stated, "[Having a mentor] gave me a lot of knowledge to work with. I say that because I used to walk with the contractors that came into the building. I would learn certain things from them, and I was able to use that to expand my business more. Also, going over the invoicing and stuff, it gave me a blueprint as far as my pricing and stuff goes. So, it molded and shaped me a lot." [#55]

Although some interviewees stressed the importance of mentor-protégé relationships for gaining experience and knowledge as a business owner, several business owners and representatives said there are often barriers for businesses seeking mentorship.

The owner of a majority-owned goods and services company stated, "Some of the stuff that's out there as far as a third-party assisting, the prices are just outrageous. Luckily, I came into this business with a little bit of previous business knowledge, but as far as any kind of programs to help, I couldn't really find any." [#38]

The Black American owner of an MBE-certified goods and services company stated, "It's all about knowing what's going on. And a lot of us come into this [and it is] our first time doing business, and we don't have family members or friends that have been running businesses. So, we don't have the people that we can go reach out for the help that, 'Hey, what did you do for this?' It's a lot of searching and it seems like it's a lot of closed doors and people don't share information as freely as you would hope." [#55]

The Hispanic American woman owner of a WBE-certified professional services company stated, "I feel like it's very, very, very hard to find somebody that will take the time to guide you or help you out." [#72]

f. Factors public agencies consider when awarding contracts. Interviewees shared their view that newer businesses often face an uphill battle against established or larger businesses during the bid process. Some interviewees viewed public agencies as having a bias against working with new businesses and their bid opportunity requirements as having minimal influence on a firm's ability to win public agency projects.

A representative of a woman-owned professional services company stated, "Most of the contracts go to the larger companies and we haven't received any traction. For the past 20 years, all bigger projects go to the bigger companies, it seems like the bigger companies have connections and get all the work." [#AV222]

A representative of a Black American-owned goods and services company stated, "I think that sometimes work goes out for bid, but they already have chosen the company they want to work with and other businesses are not even looked at. They only go out to bid because they are required to." [#AV438]

A representative of a Black American woman-owned professional services company stated, "I can't get any contracts because I haven't been in the business long enough, or because they are already doing business with others...I don't believe [DGS] caters to small businesses that are minority owned, as much as they say they do, and it's not because I don't know the work. I have been turned down several times for work without receiving any substantial input as to why." [#AV545]

A representative of a majority-owned professional services company stated, "Yes, we've had difficulties in obtaining opportunities with PennDOT, due to repetitive selection of consultants. They seem to pick the same handful of consultants for each project." [#AV742]

For many work types, public agencies award work to the lowest responsive bidders. Several interviewees considered this practice a barrier to success, as they have a difficult time staying profitable if they must submit low bids to be competitive.

A representative of an Asian Pacific American-, LGBTQ+-, and woman-owned goods and services company stated, "[There is a] significant barrier due to lowest bidder. I am unable to compete with costs." [#AV16]

A representative of a majority-owned construction company stated, "The most important thing I can share is pricing. When it comes to marketplace conditions in PA, they are always looking for the lowest bidder for a job." [#AV660]

g. Access to financing. Interviewees who have sought financing to start or expand their businesses emphasized the challenges associated with obtaining loans, lines of credit, and working capital. Interviewees emphasized the strain placed on them by high interest rates and resistance from financial institutions to support small businesses.

The Subcontinent Asian American owner of a goods and services company stated, "I don't think there is any bank which [wants to] help or support a new business. They all want to have some businesses two years old at the least, and then they have some reputation, then only you will be able to get a line of credit or finance from them. But what a business needs the most when they're starting [is financing], [and] I don't think there is any bank who's supporting new businesses." [#46]

A representative of a Black American woman-owned goods and services company stated, "I feel that there are a lot of gatekeepers, and they do business with who they want to business with. I would be doing a lot better if I could obtain working capital." [#AV86]

A representative of a veteran-owned construction company stated, "Interest rates are killing everybody, [it is] hard to borrow money." [#AV393]

h. Access to insurance and insurance requirements. Multiple business owners discussed the burden of meeting public agencies' insurance requirements, noting that the costs of obtaining the necessary coverage can be prohibitive for small businesses in particular.

A representative of an MBE- and SDB- certified Subcontinent Asian American-owned goods and services company stated, "That's actually tough sometimes, because if you're a small business, you can get insurance, but the costs are high." [#11]

A representative of an LGBTBE-certified professional services company stated, "We've had clients that have asked for the moon, and we say, 'Hey, just like I described to you, we're nine people here. We're a very small organization.' Sometimes the coverage they ask for isn't even available." [#16]

Many businesses highlighted the varying types of insurance required in the marketplace for different kinds of work and the high costs that can be associated with the various types of coverage an agency may require for a project.

The Hispanic American owner of an MBE-certified goods and services company stated, "We do require lots of insurance. The barrier to that is the price. It can be very expensive to acquire the insurance before you get a contract and you're expected to get everything from limited liability, professional liability, crime insurance, cyber insurance. Currently [we] have about 11 different insurances. The policies range from \$250,000 to \$2 million each. So, on an annual basis we're spending close to, it's almost \$30,000 in insurance. Which is a huge barrier for any business because that's just a lot of capital outlay and you're not really getting anything back from that, it just goes. Ninety-nine percent of the time you're not going to use it. And I think a lot of businesses are scared to go out for big contracts because they know [they're] going to have to lay out \$30,000 or so, because when you have to pay these premiums, some of them you can pay monthly, but at the higher level, they expect your annual premium to be paid upfront. ... And that's just so that you can demonstrate that you have the insurance when you deliver an RFP, and that is no guarantee that you're going to get a contract. So once you get one, it's a lot easier because you have the insurance in place. But once, if you don't have one yet, it is a big risk for a business to have to lay out that much insurance cost. And you have a 10 percent chance of maybe getting any RFPs and that's not so great. If you don't win it and you don't win a few, then you're just laying out a whole lot of money for nothing. ... It's a system that I think really benefits businesses with existing long-term contracts." [#36]

A Black American representative of a trade organization stated, "The level of insurance that needs to be carried for a job is sometimes cost prohibitive because the maximums are based on the job." [#FG2]

The owner of a majority-owned professional services company stated, "It costs a lot. ... The liability insurance is kind of one that, it's a special market, professional liability insurance. It's not like every insurance carrier can handle that type of thing." [#31]

A representative of a majority-owned construction company stated, "Even now, cyber insurance is becoming normally written into contracts." [#29]

i. Networking and relationship building. Several business owners and representatives commented that networking through trade organizations and industry-specific groups helped them find mentors and obtain the skills needed to be successful in the marketplace.

A representative of a WBE-certified woman-owned goods and services company stated, "I was fortunate to get thrown into situations I probably had no right being in. Like, I was on a national board for one of my manufacturers, so I learned a lot. A lot of them were probably my father's age. They took me under their wing, and it created a network of people that I could call and ask for advice or help from. So, I was fortunate in that respect." [#5]

The Black American owner of a professional services company stated, "I belonged to the various clinical research, various regulatory affairs organizations and that's how I learned. I attended their meetings, and that's how I acquired my skills. ... I joined various IT, say software user groups, professional societies. And would go attend their meetings and learn from their meetings about the software and the product so that if I interviewed you, I would know it better than you. ... I belonged to the various groups and that's how I was able to network and interact with the various professionals in the industry, but also had them as mentors, professional mentors to help me acquire and be able to circumnavigate that industry." [#9]

Some interviewees shared their experiences attending conferences and job fairs to network with other businesses and learn more about bidding opportunities. However, several of them highlighted the difficulty of forming meaningful connections with attendees and obtaining work as a result. Some interviewees suggested these events be more curated towards specific industries and opportunities.

A representative of an Asian Pacific American-owned professional services company stated, "With DGS and PennDOT, we are chasing the jobs. The main problem is trying to network our business and connections with prime consultants and that's not that easy to do." [#AV54]

A representative of a woman-owned construction company stated, "I've gone to so many procurement fairs, which is a great networking opportunity to work with different government agencies, but I have never been able to do work in the public market. There's no real connections at these fairs and maybe it's because ... I'm a woman-owned business and have been for 20 years, [but] I am not a certified woman-owned business. ... [I] don't understand why the certification is necessary forever." [#AV450]

The Black American owner of a professional services company stated, "I'm very much an in-person networking kind of person. ... So, what if they had industry-specific events around specific opportunities? Allow these small diverse businesses to meet each other, possibly form collaborations amongst them and get them opportunities for them to meet the large primes. Opportunities to meet large primes have never worked, to be perfectly honest. I've never had a networking event with a large prime and then walked away with a relationship. The relationship we have with large prime is because we had the

relationship with the end client, and they wanted to come to us. So yes, there's utility in the large primes knowing what the landscape is, but get all the small diverse businesses around a particular capability ... in the room together around particular opportunities. Make specifically targeted networking events around billion-dollar opportunities." [#FG4]

j. Personnel and labor. Many business owners described challenges they faced in trying to find and hire personnel and labor, citing a dearth of interested applicants. Interviewees cited a shifting mentality in the workforce following the COVID-19 pandemic and an overall smaller pool of potential workers in the marketplace.

A representative of an MBE-certified Black American-owned professional services company stated, "[Finding talent] is extremely difficult, being a small business. And then on top of that, being a minority-owned business. And so often people feel a little bit more secure with a larger firm. Well, it's just difficult to find the people that you need when you need them. And I think everyone is experiencing that." [#18]

The owner of a majority-owned goods and services company stated, "There's major issues. Honestly, it's kind of upsetting to say, but it's all stemming from after COVID. It seems like the workforce really changed to where they don't need employers anymore. They feel like they can go anywhere. There's no real sense of dedication to a company anymore." [#38]

A representative of a veteran-owned construction company stated, "It would be wildly helpful if we could find [skilled] steel people. We hire people and they don't show up. Or we hire people who can't score high enough on a remedial math test. We cannot find people who are skilled and not ready for retirement in a couple of years." [#AV53]

A representative of a woman-owned professional services company stated, "Right now there is a workers shortage. We could use more people that are available and willing to work. We hear this from a lot of our clients also." [#AV77]

A representative of a woman-owned construction company stated, "[We are] having a hard time finding employees. We can get work, but finding employees is the problem. Some don't even show up for the interviews or [they] work a couple of days and quit. Many have bad work ethics." [#AV735]

When business owners do find potential employees, they report that the cost of benefits for employees represents a financial burden for businesses. Furthermore, these interviewees noted that wage expectations have risen in recent years, placing a strain on company operating costs.

A representative of a majority-owned goods and services company stated, "We are in a very niche industry here, and sewing hasn't been a thing in Pennsylvania in a long time. So, people think, 'Oh yeah, I can sew.' Then they come here, and a day or two later they say, 'You know what? No, I can't.' So that, and then just finding workforce [is difficult]. In talks with other companies around us here, they're facing the same struggle of not being able to find people. So we, as a solution, have kept raising our pay rate, which makes us less and less and less profitable, much less profitable." [#25]

A representative of a majority-owned construction company stated, "I think as he [the owner] got bigger and bigger, health insurance is a concern, along with hiring and

retaining employees. Once you get over 50 employees, your health insurance requirements change and that was a big step for us." [#27]

The owner of a majority-owned construction company stated, "The biggest downfall I have is the younger generation now, they want top dollar. They don't understand the responsibilities of earning that dollar. They're never on time. They're always worried about their phone and when quitting time is. Their desire, their mindset is more about what they can get out of you, not what you can get out of them. They don't show up on time to go to work on time. That delays other people, that costs the company money. So the younger generation, there are fewer far out there that want to work and be on time and do the right thing, but what I've been seeing in the construction industry, it's hard to find qualified workers that will show up on time with their tools, with their knowledge in their head, they're ready to go to work versus the other workforce out there that shows up when they want how they want and what they want to do." [#32]

A representative of a woman-owned goods and services company stated, "[It is] really hard to find employees. People come in for an interview, they want to be paid in cash so they don't lose their benefits: food stamps, welfare check. Or want to be paid \$28 an hour to get off benefits; [a] small business cannot support that." [#AV814]

Businesses across multiple industries shared that the skill requirements to perform their work are changing over time as new technologies are introduced, and many business owners reported that finding employees with sufficient skills is becoming increasingly difficult and training them presents a barrier in terms of cost and time spent.

A representative of an SDV- and SDVOSB-certified professional services company stated, "The biggest challenge is, again, back to that bench strength. Most bigger companies have a dedicated trainer, a dedicated recruiter and all that. We do have a recruiter, part-time recruiter, but we don't have a dedicated trainer. We can't afford to keep a dedicated trainer. All our people have to be working." [#2]

A representative of a majority-owned professional services company stated, "I have a huge problem finding qualified personnel. I have no problem retaining them, but I'm a small business. I only have two full-time and a few part-time people. But I cannot find candidates that are qualified for this type of smaller business. Mostly they want salaries of major corporations. So it doesn't make sense. There's just never a good fit." [#50]

Some interviewees shared their on-the-job training recommendations and best practices, with some emphasizing the need for mentor-protégé opportunities and others highlighting the benefits of training programs they have encountered in the past.

A representative of a majority-owned professional services company stated, "For our industry, yes. There's actually lots of programs [for apprenticeship and on-the-job training] that are in place. PennDOT's actually been very good about starting a mentor-mentee program that our firm actually participates on the mentor side in different ... districts. ... They do have opportunities such as that." [#10]

The owner of a majority-owned construction company stated, "It was mostly on-the-job training, and then right around 2018, 2019, we were doing some work for PennDOT, and

they offered a class that we could pay for to train the finishers to get certified, but there wasn't anything that I was aware of up until that time." [#40]

A representative of a majority-owned professional services company stated, "We asked the last two interns that we hired permanently to agree to a three-year contract too, in order to make sure that a year or so into our training they didn't leave. But to be honest with you, they're both very dedicated. I'm not so sure that they would [leave] because we offer an environment that allows you to grow and become a professional at your own pace. And we do everything we can to help them." [#51]

Several interviewees highlighted unions as a barrier to business success, stating that being a non-union company presented a barrier for small businesses in terms of obtaining work, gaining experience, and retaining employees.

The Black American owner of an MBE-, VBE-, DBE-, and SDV-certified construction company stated, "The unions [are a barrier for obtaining industry experience] ... The unions, they're their own network. They have their own friends and buddies and stuff that they work with. ... In terms of getting people in the unions, it's a challenge. ... On the other hand, the quality of people that they're sending out, because essentially, they're a glorified staffing service, ... are not the quality necessarily that they should be. And the people that they sent me, they didn't do me any favors in that respect at all. In fact, I think they sent me a lot of the bottom of the barrel [workers] ... the solid workers went to the people they were friends with." [#30]

A representative of a woman-owned construction company stated, "The only thing that holds us back from government work is we are a non-union company." [#AV267]

k. Restrictive contract specifications. Some interviewees reported that solicitation requirements and contract specifications are often very narrow and sometimes appear to favor established firms rather than small or diverse businesses. Interviewees specifically focused on the burden certifications and regulations place on their businesses' ability to be competitive and the complicated and sometimes convoluted instructions in the solicitation.

A representative of a Subcontinent Asian American-owned construction company stated, "Yes, the certification requirements are very difficult as opposed to legacy firms that are already established. It takes a long time for new diverse firms to get through the process. PennDOT hinders subcontractors getting work as opposed to prime contractors. Very difficult to get a foot in the door due to certification requirements." [#AV119]

A representative of a majority-owned goods and services company stated, "I think it would be a lot easier if we didn't have so many regulations or certifications, they ask for so many certificates and extra levels to get any job." [#AV206]

A representative of a majority-owned professional services company stated, "We do get bids. However, the people who write the bids complicate it rather than make it simple. As a result, I don't bid on projects because it's so convoluted. It's written where it's 20 pages long for something that's just one simple thing." [#AV620]

3. Working in the private and public sectors. Interviewees discussed the differences between working in the private and public sectors and identified challenges they face when trying to obtain work in the public sector.

a. Differences between sectors. Business owners said one of the biggest differences between the public and private sectors in acquiring and performing work is the amount of bureaucracy required to win projects in the public sector.

A representative of a majority-owned construction company stated, "Gaining that initial approval for work to actually commence is easier [in the] private [sector] than it's [in the] public [sector]. The reason for that is because on one side, you're dealing with, at the most, a corporate board who's making an approval. A lot of times it's a single entity, single person within a company who makes those approvals. When you're dealing with something public, you often have to deal with a bureaucracy and that is sometimes a nightmare." [#54]

The Black American owner of an MBE-certified goods and services company stated, "Yeah, sometimes with the bonding, like I said, sometimes with the certain certifications and stuff, this is all stuff that private industry [clients] don't too much hang their hat on." [#55]

Businesses that work in the private sector noted that the public sector can be difficult in which to operate given the slow pace of the work due to overwhelming bureaucratic processes.

The owner of a majority owned construction company stated, "The private sector, people are easier to get along with and there's less paperwork, so the jobs are less ... what's the word I want to say? Less hectic, you know what I mean? Well, in the public sector there's paperwork, constant meetings. If they would just let us go out and do our job and get the job done versus having a meeting every week on this date to discuss items on about the project or a phone call every week, that could solve the problems, it'd be a lot easier." [#32]

Some business owners praised the public sector for its comparatively high transparency and clear cost stipulations when submitting the scope of work for a project.

A representative of a majority-owned professional services company stated, "In the public sector, I think there is a lot more transparency. I like that aspect of contract administration. Everything in the public sector, agencies are actually required to meet a goal and the consultant, or in the contract, they are held accountable for meeting that DBE goal, small business goal, showing actual real documentation. So, there is actual value added to having these DBEs and SBEs on their project team. I don't necessarily think that happens so much in the private sector. There doesn't seem to be any repercussions if it's like, 'Oh yes, we have this DBE. They're on the org chart, but you've never used them. You've never had them build them out for anything.' So, I guess transparency [is key]." [#10]

The owner of a majority-owned construction company stated, "Actually, I would rather work with the Commonwealth than a lot of private bid work, only because they're very open as to what you can and can't do in the bid. ... I'll give you a perfect example. In a private bid, if I have to put an aerial piece, I'm bidding a 60-foot boom, and I'm bidding it

privately and there's a number. I have to figure that cost in. With the Commonwealth, I just put a line item in as to, "This is what it takes to do it, and if you don't want me to do it, you can hire somebody else to do it. Here's my cost. And you can agree or disagree, but you [are] paying a fixed price." [#35]

b. Challenges getting public sector work. Business owners and representatives discussed the challenges they face when trying to obtain or perform public sector work. Some interviewees said the public sector's bidding and vendor registration process was complicated and burdensome.

A representative of a DOBE- and SDV-owned construction company stated, "DGS and PennDOT needs a middleman to explain the process in bidding for jobs. Overall, they need to smooth out the process of becoming a vendor and retaining vendors." [#AV23]

A representative of a majority-owned goods and services company stated, "Their purchasing process or procurement process does not make it cohesive for private businesses to deal with the state; we find it complicated." [#AV26]

Business owners emphasized the lack of communication from agencies regarding their bidding processes and the substantial amount of paperwork involved in obtaining and performing the work.

A representative of a majority-owned professional services company stated, "I have been trying to get a government job for 14 years to no avail. I have no idea where to get a state job. I bid on jobs, and I never get an answer." [#AV44]

A representative of a majority-owned professional services company stated, "I have had a couple of contracts with state and federal agencies. The processing of all the paperwork is not in a timely manner. So, starting and planning projects, and some state certified licenses, and have experienced some issues with issuing these licenses. It can be a nightmare. I think it comes down to how many desks the paperwork has to hit." [#AV138]

Businesses that have worked with DGS or PennDOT cited barriers specific to the agencies' bidding processes that make it difficult to obtain projects and perform the work scoped in the projects.

A representative of a Subcontinent Asian American woman-owned professional services company stated, "It's been difficult to put in bids. I have a small company and it is really hard." [#AV134]

A representative of a woman-owned professional services company stated, "Because of our size, the paperwork required to be a PennDOT consultant is extreme, particularly the annual bar audits. At one time we did lots of work for PennDOT but now we specialize in working with private clients." [#AV135]

A representative of a majority-owned professional services company stated, "We have no problem working with PennDOT. We have problems working with DGS because on every job you lose \$150,000. What they require is ridiculous and they are not willing to pay for it." [#AV145]

A representative of a veteran-owned construction company stated, "It is extremely difficult to locate contacts within the state, to be able to provide our services. ... We find it's near impossible to work for the state." [#AV268]

A representative of a majority-owned professional services company stated, "DGS been difficult, because of paperwork, to keep the project moving. It tends to take a long time to complete. There's a bureaucracy that has to approve or disapprove of various aspects of the project. It took us two and a half years to build a toilet room and shower room." [#AV273]

4. Prime contract and subcontract work. Businesses discussed how they assemble project teams and the factors that influence their decisions to work with other businesses.

a. Finding and selecting subcontractors. Prime contractors interviewed for the study shared a few different tools they use to develop their pool of subcontractors and potential project partners. Some prime contractors shared that they actively conduct outreach with subcontractors, consult business lists, or rely on previous partners and word of mouth to find potential project partners. Other prime contractors rely on referrals from other businesses and customers to find potential subcontractors.

A representative of an MBE- and SDB-certified Subcontinent Asian American-owned goods and services company stated, "[We find project partners] through Pennsylvania's site." [#11]

A representative of an LGBTBE-certified professional services company stated, "We've had existing relationships with a couple [subcontractors], and then the owner is also a member of the Independence Business Alliance (IBA), which is a gay and lesbian business association." [#16]

A representative of an MBE-certified Black American-owned professional services company stated, "Most times just through network[ing], through experience of having worked with the clients before. Or them approaching us or them hearing about us through another client. So more or less word of mouth, and just the reputation that we've gained by being in the industry for over 27 years and having been a minority-owned business. There aren't that many minority-owned engineering firms in Pittsburgh." [#18]

A representative of majority-owned professional services company stated, "Well, mostly it's based on experience, we've just been doing this for a long time. On that same platform, for instance, the PennDOT, they have a list of business partners. Again, that just ... facilitates the process by which you can assemble a team, communicate with whoever from that firm, and then it provides information relative to their size, to the services they provide, whether they're DBE, WBE, the small business. But since we've been doing this for so long, we know that we have a pretty solid understanding of who's out there, what they provide, their reputation and their ability to deliver. It's a bunch of things, but primarily it's just our experience in the industry that supports how we assemble a team." [#19]

The owner of a majority-owned construction company stated, "It's like I said, verbal communication with face-to-face conversations with our customers [is how we find project team members]." [#21]

The owner of a majority-owned professional services company stated, "Pick up the phone, call the people you know, send an e-mail. I try to work with people that I know and trust, and we try to do most everything that we can in-house." [#31]

Most prime contractors and consultants said they choose project partners based on their work experience and qualifications. Additionally, some prime contractors emphasized their efforts to work specifically with small and disadvantaged businesses, whereas others said ownership does not factor into their decision.

A representative of an MBE- and SDB-certified Subcontinent Asian American-owned goods and services company stated, "We do try [to utilize small and disadvantaged firms], but we typically tell the small business that they would have to do work, because one of the things that ... most of the small businesses in Pennsylvania just expect you to do a pass through and give work, and that's not good, because you don't grow then. You have to do your own work and don't expect that I will find the work for you and just give you the work." [#11]

A representative of a majority-owned construction company stated, "We solicit whatever subcontractors we feel to get the job done. Who owns or operates that business doesn't come into play at all, honestly, in our selection process. It's more if they can put out quality and they get us and they could communicate with us properly, that's what we're looking for." [#54]

Although price is a key factor for many prime contractors and consultants when selecting subcontractors, previous positive experiences with subcontractors or good reputations in the marketplace can trump low bids.

The owner of a woman-owned construction company stated, "In this area that we're in right now, and because of the size of our business, it is word of mouth. Obviously, if we were the primary, we would want to make sure that the subs that we have underneath us are reputable and are performing at the same level of work that we are." [#26]

A representative of a majority-owned construction company stated, "Well, we solicit quotes from subcontractors. And the person with the most experience and the lowest price would gain our subcontract work." [#27]

b. Finding prime contractors. Subcontractors interviewed for the study shared how they find project partners, largely mirroring the tools and methods prime contractors use to find subcontractors. Some subcontractors said they preferred to work as subcontractors for financial reasons and the relative ease of performing the work for prime contractors instead of directly with government agencies.

A representative of a majority-owned goods and services company stated, "I prefer to do business with a prime contractor instead of the state. I don't say that in a mean way, but if the state called me on line one and wanted to rent a trailer, but then line two was a contractor saying, 'Hey, the state wants me to rent it for them,' I'd be renting it to the contractor. It's just easier to do it. The state makes it complicated, back to the whole, jump through all these hoops and so forth, and then the qualifications." [#62]

The owner of an SDV-, VBE-, and MBE-certified construction company stated, "I don't have the pockets to be a prime contractor like that. I don't have any help there. I see anybody that would want to help, wants to dive into my pockets and I can't. I'm not charging the kind of percentage. Everybody thinks ... we're unions, so we're paying the prevailing rate every day." [#69]

Some interviewees said prime contractors were more likely to seek out subcontractors with disadvantaged business certifications, making it difficult for businesses without those certifications to join project teams.

A representative of a majority-owned professional services company stated, "The difficulty small firms experience is with not having any of the prior noted business type, such as disabled veteran owned business, etc. Larger firms hire consultants that have these classifications and push [other] small firms out." [#AV720]

5. Doing business with public agencies. Business owners and representatives discussed their experiences obtaining and doing work with public agencies, including state agencies, and shared some barriers and challenges they face when working in the public sector.

a. Getting paid in the public sector. Multiple interviewees shared that payment in the public sector is slow. Other interviewees cited agencies' internal policies and budgetary delays as reasons for slow payment.

The owner of a majority-owned goods and services company stated, "[Slow payment is] pretty crippling at times, especially when it's the money you need to maintain your business, it happens quite a bit." [#23]

A participant in a public meeting stated, "Another payment issue that we have experienced is the inability to be paid (through DGS) when the Commonwealth budget was not passed prior to July 1. Several years ago, we were expected to continue to provide services even though it took over six months for the state to pass a budget and even longer for us to be paid." [#WT3]

Some business owners who have worked with state agencies, such as PennDOT, praised their reliable and quick payment practices. Additionally, some interviewees said state agencies have been helpful in ensuring project team members receive payment for work they have performed.

A representative of a WBE-certified woman-owned goods and services company stated, "However [the Bureau of Diversity, Inclusion & Small Business Opportunities] reaches out, [they confirm] 'You have been paid this amount of money, is this correct?' Or 'You have not been paid this amount of money, is that correct?' And I think that helps speed up the process. It puts the electrical contractor, the GC [general contractor] on notice, like, 'You're not going to get away with this, because it's state money.' That's a huge change that I've seen. ... I have to go to my billing department and say, 'How do I respond to this? Yes, no? Did we get our money? Did we do a billing?' So that's pretty accurate now." [#5]

A representative of a majority-owned construction company stated, "I love them. PennDOT is the easiest to get paid from." [#AV605]

b. Experiences learning about and performing work for state agencies. Multiple business owners discussed the difficulties they experience trying to learn about upcoming opportunities to work with state agencies. Many shared the administrative burden associated with the paperwork required for agency bids and a lack of information creating substantial barriers for small businesses in the

marketplace. However, some interviewees said learning about project opportunities with state agencies was straightforward and easy to plan around.

A representative of a majority-owned professional services company stated, "I think PennDOT's platform, their site is about as easy as it can get. Everything's there, including project information, due dates. They actually put it ... a couple categories they go plan, which means, 'this is coming up, it's not advertised yet, but more information's coming,' so it's abundantly clear not only what's advertised, but what's even coming up. I'd say they couldn't get any clearer as far as their plan is concerned." [#19]

The owner of a majority-owned construction company stated, "First of all, say it's your first PennDOT job, so the process of getting qualified from PennDOT in the first place is a hard process in itself to be able to even bid the work. That's a whole other obstacle to tackle. And then once you're bidding on the work, you have to go through the paperwork on the ECMS website because that's where the jobs bid, and then do all the paperwork and submittal work on the PPCC website. It's almost like, if you're a small contractor, it's really hard to do, unless you have someone in your office that is just going to do that all day. So it eliminates a small businessperson, maybe a guy that only has a three- or four-man crew that's doing work in the field himself, that's where I could see that he has a disadvantage with PennDOT." [#40]

The Asian Pacific American owner of an MBE- and SBE-certified goods and services company stated, "I try to do business with [Penn]DOT, but it's very difficult to get information from them." [#58]

A representative of a majority-owned construction company stated, "It is just too complicated. The paperwork is too complicated." [#AV34]

A representative of a majority-owned construction company stated, "We just don't have any information on DGS and PennDOT. You also have to qualify for each individual contract item. There's a lot of bureaucratic red tape involved in the bidding process." [#AV671]

Some interviewees noted that when performing work for state agencies, challenges such as the complicated online system and poor communication from agency staff made performing work for them an overall negative experience.

A representative of a majority-owned professional services company stated, "We did one or two or three projects directly for DGS, and I thought they were very difficult to deal with, in terms of the contracting procedures [and] their contract management procedures, and in terms of getting paid by them, to the point where we kind of avoid DGS work completely at the moment." [#48]

A representative of a majority-owned construction company stated, "It is complicated to do work for DGS and difficult because of the online system between registr[ation] system and project system. Very complicated and difficult." [#AV80]

A representative of a veteran-owned professional services company stated, "PennDOT's lack of response to questions and information [is a challenge]. We were trying to obtain traffic light permits from District 6, and [our contact] never returned my call." [#AV131]

Interviewees said that, during contract negotiations, state agencies are aggressive in their pricing and often inflexible when it comes to regulatory requirements.

A representative of a majority-owned professional services company stated, "I think I mentioned contracting procedures. [Representatives at DGS] very aggressive negotiators. I'll put it as politely as I can. They'll start with what we feel is a reasonable proposal and basically announce they're not going to pay that much and here's what they're willing to pay. The contracting procedures, the project that I'm thinking of had a couple of iterations, because the original design was more than they wanted to spend on the construction. So, it came back to us for redesign, but they disallowed any additional compensation. I think that might've happened twice. And to add insult to injury, they were slow to pay the bill." [#48]

A representative of a WBE-certified professional services company stated, "I think for Pennsylvania and government contracting in general, a lot of times there's less flexibility in what they can agree to. And I get that that has to be from a regulatory perspective. Whereas, if I'm working with a private company, the owner can decide they don't care about insurance. That's the one I keep going to. Because it's their risk to take, and so they can say, 'You know what? I had that in my initial specifications, but at the end of the day, I don't care about it as much as I care about these other things.' So, dealing with private is easier from that regard, most of the time, not always. Sometimes they're anal too. But folks in government have more rules to follow, so they don't have the flexibility sometimes." [#76]

Some interviewees said their experiences performing work for state agencies were positive overall.

A representative of a woman-owned professional services company stated, "Working with DGS is very rewarding the people have been very friendly and the same goes for PennDOT." [#AV711]

c. Best contract administration and procurement policies. Interviewees were asked to share the best contract administration and procurement policies and practices they have encountered while working with public agencies. Overall, business owners appreciate fairness in bid evaluation, clear communication regarding the scope of work, and a streamlined bidding process with minimal time commitment.

A representative of a majority-owned professional services company stated, "Well, over the years, [the Commonwealth agencies have] made it even more efficient by limiting the number of sheets [you need to submit]. When they advertise a project, they tell you how many pages are available to submit your proposal. In the past, there were no limits, and we ended up spending weeks on these proposals. Well, now, it's pretty streamlined, which at first was challenging, but once you figure it out, then it's actually, again, a pretty efficient process. I can't imagine it being any more efficient." [#19]

The Hispanic American owner of an MBE-certified goods and services company stated, "I prefer the City of Philadelphia. And the reason is that I know the process so well that it's easy for me to apply. ... It's almost like the more you apply, the easier it is. So, all contracts go to my inbox every morning. It's like, 'These are the opportunities,' every single morning.

If there's nothing good, I love how they give you a one-paragraph summary of what it is. There's the amount when it's due. [If] nothing looks good, I delete it and I move on." [#36]

The woman owner of a goods and services company stated, "I think just the whole nature of sending things out electronically and doing business over the internet with e-mail or whatever, text puts up a certain anonymity when it comes to seeing who's on the other end. I don't know if there's anything that can be done to enhance that any further, probably not, because it seems to already be in place pretty much that way. And as long as questions aren't asked about race, ethnicity, disadvantage, orientations, or anything like that, which were illegal to ask, then you just don't know, and so that makes the whole process fair." [#52]

Several interviewees cited challenges related to PennDOT's prequalification process as an area of particular frustration when attempting to obtain or perform work for the agency.

The owner of a majority-owned construction company stated, "[Prequalification is] the biggest thing, getting set up and getting started, and then you've got to start at the bottom and work your way up basically, unless you have a lot of money. But other than that, you've got to learn everything, and nobody offers information. You either have to go look it up or find it on your own. You have to look through the internet or look through all PennDOT's websites and navigate through all that to learn everything." [#40]

A representative of a majority-owned construction company stated, "The biggest barrier is the prequalification process. I think it is very intense and to be qualified is costly and time consuming." [#AV4]

A representative of a majority-owned construction company stated, "PennDOT has prequalification requirements [that] limit us because of experience requirements. The problem for small structures, for bridges, [is that] we need to get prequalified and to get prequalified I have to show work history within last five years." [#AV65]

A representative of a Black American woman-owned construction company stated, "The prequalification process has a lot of moving pieces and parts. And as a business owner, I understand that you have to put the time in to prequalify. But this process is not an easy, hands-on process. You have to go to several different websites." [#AV465]

d. Worst contract administration and procurement policies. Business owners shared the worst contract administration and procurement policies and practices they have encountered while working with public agencies. Overall, interviewees critiqued agencies that had bidding systems that were difficult to navigate, those that did not provide feedback regarding rejections, and those that paid slowly.

A representative of a woman-owned construction company stated, "I don't care for the system used by PennDOT. It is definitely not user-friendly." [#AV330]

A representative of a majority-owned construction company stated, "The bidding is horrific, ... and payment is usually 90 days which is also bad." [#AV459]

6. Certification. Interviewees shared their experiences with various certification processes, including the Pennsylvania Unified Certification Program (UCP) and the benefits and disadvantages of being certified.

a. Advantages to certification. Multiple interviewees emphasized the benefits of obtaining various certifications and the opportunities obtaining certification offers to business owners. Some of these benefits included being recruited for work to fulfill contract goals and helping businesses obtain networking opportunities in the marketplace.

A representative of a WBE-certified goods and services company stated, "The benefits are, I mean, as long as the state or the federal government requires certifications, then that promotes people looking for your business and people to fulfill those requirements. So it is an advantage. ... If they don't like my price, they got to go find another woman-owned business, or a minority- or veteran-owned [business] to do the work. So I mean, that's where that relationship building [happens], so they keep coming back to you. ... It helps tremendously." [#5]

The Black American owner of a professional services company stated, "In working with certain companies, the MB[E] minority certification is a big plus, because in order for companies to justify and fall in line with, let's say if they're doing business with the federal government, they have to be able to show that they're dealing with a number of certified business[es] to keep that federal contract. And I believe that might be the same with the state." [#9]

The owner of a professional services company stated, "I feel that the DBE certification helped me get noticed through contractors and consultant engineering. They've been reaching out, but if I didn't have the DBE or the MBE or the SBE [certifications], I don't think I'd be able to be found, so it gives it a directory to find me, that I'm central, I'm in that area. It's definitely been helpful for my business just for the ability of people to access us and find us more easily." [#FG2]

b. Disadvantages to certification. Certified businesses also reported some disadvantages to certification. Multiple business owners said certification can dissuade some prime contractors from giving subcontracting opportunities to certified businesses, whereas others said the efforts to get certified did not always result in more work.

A representative of a WBE-certified woman-owned professional services company stated, "I think that there could be some businesses out there that might see, 'Oh, small diverse business, or small disadvantaged business. Oh, woman-owned business. Maybe that's not what we want to be working with.' It's an unfortunate thing to say, but I think that that's just the reality of the world that we live in today sometimes. But that would be really the only disadvantage." [#17]

The owner of a woman-owned WBE-certified professional services company stated, "So, I got everything filed, paperwork-wise, we became a business. We got the DBE certification. But I think we thought, because people had said before to me when I worked at another company, 'Oh, if only you guys were a disadvantaged business, this would be a great fit.' Well, when we became a disadvantaged business, you call people up and people are

hesitant to use you because you're new. So that was where I felt like we struggled because we were reaching out to these firms and saying, 'Hey, we're here and we can do this.' And we didn't get the response that we were hoping to get." [#28]

c. Experiences with the certification process. Many businesses certified with the Commonwealth expressed a desire for a more streamlined certification process with a fast-track application review or parallel certification option for firms already certified with third-party certifying organizations as well as a simpler overall process for firms unfamiliar with the steps to become certified.

A representative of a trade organization stated, "I mean, if you're going to get a SDB certification, you have to get it by a third party. The third-party agencies actually charge [for] the DBE. PA UCP is free. Eastern Minority National Minority Supplier Diversity Council, the women's, the Hispanic Chamber, and the Three Rivers Business Alliance, in my opinion, if you pay those entities to get that certification and you have that certification and you go self-certify, you're certified as an SDB, but you're still not certified as PA UCP. Why? It's the same information. PA UCP and the SDB should look at a parallel [certification]. If one of those other third-party [agencies] certify and they pay somebody and they're looking at the same thing as the certifying units, why do I have to go through another certification process, which is basically the same information that you're going to need?" [#FG3]

A participant in a focus group stated, "I know ... the Hispanic Development Corporation does it. The SBDC [Small Business Development Center] is supposed to do it. And there's an office at the county that's supposed to help you with that, too. But we're talking, like, if you can find the right person ... and some of these people do need to really literally be walked through it. They're capable drywallers, they're capable contractors, they're not capable ... this is a very extensive process. And then after you complete your DBE, you have to go on the PA UCP and you have to sign up there and then you have to use the proper NAICS [North American Industry Classification System] codes. If you don't have the proper NAICS codes, that's how they pull the contracts and that's how they send out the notices about what's going on. And some people don't have the right NAICS codes in and they don't even know what a NAICS code is or where to get it." [#FG3]

Additionally, some business owners said certification processes other than those handled by the Pennsylvania UCP can vary in their levels of administrative burden and create a barrier for businesses seeking certification.

A representative of a woman-owned construction company stated, "It is difficult to get certified for a woman[-owned business], you have to go through a different process." [#AV87]

A representative of a veteran-owned construction company stated, "I would say the small veteran certification process through the [Department of Veterans Affairs] portal or organization known as VetBiz is extremely cumbersome. It requires a registration with SAM.gov for federal contracting." [#AV539]

Some interviewees highlighted the difficulties associated with maintaining multiple certifications, particularly for small and disadvantaged businesses.

The Black American owner of a professional services company stated, "I think they're not just alluding to the DBE certification, but some of the other certifications that are in the landscape, as well. I think that that's where it really gets tricky to navigate, because we're not just talking about the DBE certification in every state. You could have four certifications in Pennsylvania that you're trying to make. You have your WBENC, your EMSDC [Eastern Minority Supplier Development Council], your DBE, your VetCert. Juggling these certifications can be extremely burdensome for diverse businesses. They're supposed to have to do less because they're disadvantaged, but now they're actually doing more administrative work due to their disadvantage, so we really need to look at that and how that could be more effectively streamlined. I think that's something that the state is actually looking at now." [#FG2]

7. Barriers related to race and gender. Interviewees discussed additional barriers related to the race or gender of business owners, beyond those that other businesses might face in the Pennsylvania marketplace.

a. Discrimination based on gender. Woman business owners shared multiple instances where they experienced sexism. For example, interviewees representing woman-owned businesses reported that they are seen as less competent or knowledgeable than men and in need of extra support or oversight.

A representative of a WBE-certified woman-owned goods and services company stated, "I've overcome those over the years, but I could tell you I've gone to some business meetings and being a ... at that time young, I'm not young anymore. But a young female and it's like, 'Oh, you listen little girl.' I got comments like that. 'You listen little girl, you're not...' And it's like, okay. So I'm sure that still happens. It has to happen. I mean, it happened 20 years ago to me. And that just means that they don't respect your age. They don't respect that you're a female, and I'm working in a man's world in technology or electrical world. And they just don't know what my knowledge or experience was. So yeah, they didn't respect me." [#5]

The owner of a woman-owned WBE-certified professional services company stated, "From a woman's point of view, it's amazing to see how many times people still assume that it can't be my business. That it's my dad's business or my husband's business, things like that. That's obviously quite frustrating. And when someone will say that, 'Not only are they small, but it's not even her business.' When I was younger, people would make comments about, 'What if you decide to have kids?' And I said, 'Well, I already have two. And I'm not the one supporting you.' So, comments like that. But I mean, in the 36 years that I've had businesses, I've just come across so many things like that, whether it's from competitors and even the government. And I'm sure this, I mentioned last time too, I wasn't able to get disability when I was pregnant. And after I had my first child, the person actually said to me, 'Well, how do we know that you're really working and you're not just coming into your husband's business and polishing your nails?'" [#24]

The Hispanic American woman owner of a WBE-certified professional services company stated, "I mean, the main challenge is as a woman in construction is for people to believe that you know what you're doing. For example, just this past weekend I was meeting on site with the client and a counsel person from the city, and then we were talking about the

project and talking about the project and then he said, 'Well, what time is the architect showing up?' I had to say, 'Well, I'm the architect. That's why I'm here.' And then he apologized. He said, 'I'm sorry, I was expecting a guy to show up.' He apologized when he done, but it's not the first time that this has happened where people are expecting not a woman on a job site, especially being an architect and in charge." [#72]

The woman owner of a WBE-, SBE-, and WOSB-certified goods and services company stated, "[A customer] said he didn't like to admit, but he did discriminate against me. And not only because I was a woman, but because I'm [short] in stature. I'm five foot one and thin. I'm not a guy. I couldn't possibly do anything anyway." [#75]

Some interviewees shared that they are treated differently by other business owners when networking and establishing project teams because of their race or gender.

A representative of a WBE-certified professional services company stated, "There's not as many social opportunities that are offered to women that are more offered to men, and it's more about who knows who, which puts people in a more favorable position, not just in a law firm situation, but as for getting clients. If you tend to know somebody or you have this historical connection with them or social network connection, you're definitely more likely to get that client's business than some woman that they've never socialized with outside of work. So, it has been more difficult to break into the more, which most corporations are more male owned, to break into those historically stable, well-financed situations. But, like I said, we represent nonprofits, which thankfully has a lot of women in. We have just embraced our women networking power and just use that to our advantage." [#34]

A representative of a woman-owned professional services company stated, "We do quite a bit of work with PennDOT as a subcontractor. Getting on a project team is the only issue I have experienced. The process to getting the work is challenging. I feel there is a disadvantage to a woman-owned business[es]. I feel that I give more time into get[ting] the job [than] getting it done." [#AV537]

Other interviewees shared that they feel excluded from work opportunities and professional spaces by the "good ol' boys club."

The Black American woman owner of a WBE-certified construction company stated, "Some people don't have the philosophy that we can all move forward. They have a philosophy of, 'you can't take everybody with you, so I'm going to save myself and look out for those who have looked out for me.' Sometimes the philosophies don't align with the gatekeeper and the opportunity that's at hand." [#7]

A representative of a majority-owned professional services company stated, "Yes ... I think that the entire architectural engineering field across the country is a good ol' boy network, as well as construction. I mean, predominantly, it's a male-dominant profession, and whether it is a female, a minority, a small business, I definitely do think there is a good ol' boy network [keeping others out]." [#10]

Several interviewees indicated that fraudulent, woman-owned businesses are an issue in the marketplace.

The owner of a majority-owned professional services company stated, "What I do know is that oftentimes the company would be put in the wife's name, to get the woman disadvantaged status. I can't really name any names. I don't think I want to name any." [#31]

A representative of a Black American DOBE- and SDV-owned construction company stated, "My competitors name their wives as majority owner, however white males run the company in reality." [#AV536]

Woman business owners also reported that they experienced price discrimination, with other businesses offering inventory, supplies, or loans at different rates or prices than what is offered men.

The woman owner of a professional services company stated, "So what we've experienced, to this question, is that if we send [our male employee] to close a deal, so to speak, because he's a man, he's more likely to get a higher price point than what we can get as females." [#33]

b. Discrimination on the basis of race or ethnicity. POC business owners shared that they felt it was difficult to obtain work as a prime contractor because of their race and ethnicity, and some interviewees that had not personally experienced race-based discrimination said they had witnessed it in the marketplace.

A representative of a WBE-certified professional services company stated, "I've seen race-based [discrimination], and in some ways it's very subtle. And not inside my firm and not with the Commonwealth, but you have somebody that you can tell is just trying to find reasons not to use somebody. So, I've seen it. Our firm is dead set against it, but I have seen it." [#76]

A representative of a Black American-owned construction company stated, "It's been extremely hard, as a minority I cannot get work unless I am a third party." [#AV544]

The Black American owner of a professional services company stated, "Respectfully, capital, bonding, payroll, all those insurance, all those things are not the problem, in my opinion. They are the symptom of the problem. The problem is that white majority companies [are] not wanting to do business with Black companies. That is the biggest hurdle." [#FG4]

Some interviewees shared that financial and bonding institutions appear to be less supportive of, or less willing to lend to and work with, POC-owned businesses.

A representative of a Black American woman-owned MBE-, WBE-, and SBE-certified professional services company stated, "It depends on what industry you're in [for bonding]. As far as construction, yes, absolutely. African Americans, minority-owned businesses, women-owned businesses, again, get the short end of the stick because there's limitations. You have to have an amount of criteria with this, that, and the other. So, yes. I mean, we can go on for days. We're always going to find something that's going to be limited to small businesses, minorities being able to access things. But again, we still have to hustle, grind, because you can let one door close and just walk away. ... Regardless of what color

or creed you are, there's always going to be some type of disadvantage. I would say that it's more limited to African Americans because when you do try to reach out to get funding or insight on certain things, there's a lot of pushback from companies that you're told should be able to help you, but then you find out that they really can't help. But that can happen to all minorities, not just African Americans. But as an African American woman, I have come across a lot of pushback, which deters me from even reaching out to any of them and I just grind to get my own." [#43]

Interviewees said the “good ol’ boys” club is present in Pennsylvania and entry is often limited to businesses owned by white men or those enmeshed in the local business marketplace. Some POC and other disadvantaged business owners said they have been passed over for work that went to those businesses. Some interviewees noted that the “good ol’ boys” club is not always dominated by white men but can be created by established POC business owners that gatekeep opportunities for other businesses.

The owner of an SDV-owned professional services company stated, "The one thing I found about ... Northwest Pennsylvania, was that if you didn't have a secret handshake and somebody didn't know you, it didn't matter who you knew, you weren't getting the contracts. You had to fight tooth and nail for everything that you had. Just that outsider mentality around this area is just horrid. If they don't know who you are or what you can do, they don't even want to pay attention to you." [#4]

The Black American woman owner of a WBE-certified construction company stated, "I do believe the good ol' boy network exists. I also believe that sometimes it's us. One of us will get in and get a seat at the table. And I think that people just intentionally shut other people out. It's not equal. It's not equitable. It's not equal opportunity. It's who's in your favor and who's in favor with you." [#7]

The Black American owner of a professional services company stated, "It's real. They're spending millions of dollars to maintain that relationship, and basically as a minority, I may not be able to get access to that person, because I'm not going to take him to the hockey game. I'm not going to be at his country club. I'm not going to be at maybe his various associations or various activities because of the level of money, the level of wealth they are. And also, it's the same thing with the state or federal. You have to be able to take them out and do what you have to do. We call it, they say shmooze them, and that's basically how you guys spend that money and make that money, in order to get good with them to show them what you can do." [#9]

Multiple interviewees shared that there is a perception among prime contractors that Hispanic Americans are either lazy or abnormally hard working, resulting in discrimination either against hiring Hispanic Americans or seeking them out specifically at the expense of those with different ethnic backgrounds.

A representative of a WBE-certified woman-owned goods and services company stated, "Yeah, unfortunately they're all prevailing in society. Yeah. I mean in our area, I'll just say it's mostly rural white, but you have certain pockets where Spanish-speaking people have moved into, and people talk discriminating about them, 'Oh, I would never hire one.' Or, 'Why wouldn't you? Like, I'm going to go find me some Mexicans because they work really

hard.' So yeah, that's still prevailing. Some people actually ... say that 'I'm going to go find me some Mexicans because they work really hard.' Okay, so does everybody, they want to work." [#5]

Some business owners said state agencies have not given POC- and woman-owned businesses adequate opportunities to compete on equal footing with businesses owned by non-Hispanic white men.

The Black American owner of a professional services company stated, "These minority organizations set up to promote and help minority businesses are a joke. Every single one of them. You can't get money from all these companies, ... all these people, and not advocate for Black and Brown people that you can't be on their payroll and profess that you're advocating. So, you name the organization that is receiving monies from all these other entities, from PennDOT to do business with them to keep them quiet. PennDOT is about ready to get the largest block of money in the next six months in the history of Pennsylvania. At the end of the day, they're going to have less than 0.01% of Black and Brown business doing business with them." [#FG4]

A participant in a public meeting stated, "It's been hard to try to get into a male-dominated industry and being a black woman, I'm in the right of way consultant space. It's like they cornered the market and you're trying to get on teams, you're reaching out to these people, and we're getting stonewalled. So now we have to go to the smaller projects to try to scale. But at this point, I think we've been in five years now, and we're looking to relocate to either New York, New Jersey, or somewhere along that side, because Pennsylvania is not giving us a seat at the table, at this point." [#PT1]

POC- and woman-owned businesses also said their ability to access institutional knowledge and experience through mentorship opportunities has been stunted by discrimination.

The Black American woman owner of a WBE-certified construction company stated, "Mentors, white men who are in this industry who have knowledge and connections and influence pretty much just laugh in my face and tell me that I can't do what I'm doing, and just tell me I need to 'go learn how to run a real business' is what one guy said. And then, actually, he set up a meeting with me and another Black executive. It was a male executive. So, I come to this meeting, and I'm looking forward to getting a nice introduction, and learning how we could work together. Well, he spent most of the meeting criticizing me and asking me questions that I knew he knew the answer to. And in the end, he told me I need to go and learn how to run a real business. And it was completely unwarranted. I was invited there. I wasn't doing it to compete. ... And it sucks because in this community, all of us brown-skinned people, we know each other. I'm friends with this guy's wife. So, it was a really weird situation. ... It was obvious that they were not going to be the type of resource to help me overcome what I was challenged with." [#7]

The Black American owner of a DBE-, MBE-, and SDV-certified professional services company stated, "Well, yeah, there's always challenges. When I think we were mentioning about on the job training and apprenticeships. With that, whenever you are a guy out in the field, you're looking up to the next person, you know what I mean, to give you information and to show you what needs to be done. And a lot of that, when I was coming up, and not a lot of people wanted to give a new young black male a lot of information. A

lot of those guys were older white men, and they didn't want to offer the training that they were supposed to be giving. PennDOT wants you to train the people, but those guys were like, 'Oh, you're taking my job.' ... When you're in the field dealing with your mutual counterpart or your team player, some of those guys didn't want to divulge a lot of the necessary information that they learned over time to help me better myself and my position. So, I've seen that early in my career." [#45]

8. Experiences with Commonwealth business programs. Interviewees discussed their experiences with the Commonwealth's business assistance programs. Business owners shared both praise and criticism for the Commonwealth's *race- and gender-conscious* and *race- and gender-neutral* business programs, with several interviewees saying the race- and gender-neutral programs managed by the Commonwealth and those managed by other agencies such as the Small Business Administration (SBA) were burdened by administrative delays and complicated processes. Some interviewees also said the resources for disadvantaged businesses are far more extensive than those for small businesses, and that some race- and gender-neutral programs favored certain industries over others.

A representative of a majority-owned construction company stated, "There's very little out there that's just for small business. I'm not going to say there's none, but most of what we have come across is that there's special things for disadvantaged business enterprises other than small business enterprises. ... I do think that they have small business programs for getting started or for, if you have a small business and you need a tax break for a small business. But it's not for getting work, it's not for construction work. It might be that you could be in a development that they have, like a tax-free [business location]. You can go in this development, industrial park tax-free for the next 10 years because you're a small business. Those programs do exist. However, in construction, they're very few and far between." [#27]

The Subcontinent Asian American owner of a goods and services company stated, "[I know about the] SBA loans, which are for the new small business. Also, that you have to [be] at least 18 months to 24 months old in business and you must have your credit, all these things. And they are slow. They take a long time." [#46]

The Hispanic American owner of a professional services company stated, "Looking for the information is hard. You don't know where to find it, where to click, it is all over the place. That could be simplified. That would definitely help in the process. Also, due to the fact that I stated that working with the government is very document intensive, [there is] a lot of paperwork. Also the legality, the language itself in general, small businesses are small businesses, they are not used to the language that has been used, for example, in some documentation for the government itself. I could see that being a boundary, a restrictive way to basically prevent people to just applying because the language is completely different. It's more legal language in that sense." [#57]

When programs do exist to support POC- or woman-owned businesses, interviewees shared their dissatisfaction with the administration of such programs. Some said the initiatives do little to actually help disadvantaged businesses get work, and some prime contractors said DBE participation requirements create a barrier when no DBE businesses can adequately fulfill the scope of work.

A representative of a majority-owned construction company stated, "Sometimes when there's a goal to meet, it could be unobtainable because we have to search for minority companies who may not have done work for DGS before and are not familiar with their requirements, and they do not have the quality that we need." [#AV161]

The woman owner of a professional services company stated, "In Philly some of the leading institutions have been trying to drive procurement to really target opportunities for Black-owned businesses and veteran-owned businesses, and disabled-owned business, and women-owned businesses, they're beginning to say, 'I'd rather have a PO [purchase order] than a program.'" [#FG1]

Many white business owners shared that they perceived business programs targeting POC- and woman-owned businesses to be unfair to their businesses.

A representative of a majority-owned professional services company stated, "Because of the size of my business it is difficult to get contracts, because I am not a minority or fit into a specific category. It is difficult to get contracts, so I have stopped trying. I am very successful in the private sector, but not in the public sector. This is due to social restrictions and required thresholds." [#AV85]

A representative of a majority-owned construction company stated, "I have a real problem with bidding due to the fact that you have to commit to minorities and have to seek them out. We have enough problems trying to get a job rolling without worrying about hiring minorities." [#AV237]

A representative of a majority-owned professional services company stated, "We are not a DBE company so [we] lose consistent work because of that." [#AV422]

A representative of a woman-, LGBTQ+-, and veteran-owned professional services company stated, "Not being a minority, not a person of color [is our], biggest downfall. Nobody gives you a chance." [#AV503]

A representative of a majority-owned goods and services company stated, "I would say I shy away from government jobs, because I am not a minority. I do not check any of the boxes they are looking for. It seems the government has a priority in hiring minority businesses." [#AV532]

A representative of a majority-owned construction company stated, "We've tried to do business with the DGS and PennDOT, but we don't meet any of the qualifications you read to me earlier, such as being a woman- or a veteran-owned business. There's a certain percentage of work which goes to special categories." [#AV766]

The owner of a professional services company stated, "On all projects that are advertised by DGS, there are very high minimum participation levels for diverse and minority businesses. The impact of this is that the prime firm (architects) NEVER have to be a minority or disadvantaged to meet those goals. All they must do is add minority engineers to the team to meet the limit and they themselves are never excluded from submitting on any projects. The result of this is that the civil and structural engineers like my firm who are qualified to do the work and are a small business (but not diverse) are black balled from pursuing DGS solicitations. Because the civil/structural engineering usually ranges

between 20 and 25 percent of the total fees, we are cut out from pursuing traditional DGS building projects. I have been told directly by architectural clients hundreds of times over the years in writing and verbally that if my firm wants to pursue DGS work that I should get a sex change or declare myself to be a woman or gay. I guess that people can do this if they want, but I have not. Overall, I feel that the system of setting minimum thresholds for participation is wrong and unfair to businesses like mine when there are minority[-owned] firms and woman-owned firms that we compete with in the regular marketplace that are much larger than we are and they also get the benefit of garnering all of the statewide work because of these thresholds and reduced competition. Such firms also have the ability to set their fees at much higher levels because there is less competition for the work."
[#WT5]

9. Recommendations. Many interviewees shared recommendations on how the Commonwealth could better support businesses operating in the marketplace, particularly regarding small and disadvantaged businesses. Multiple interviewees offered recommendations to improve bidding processes, including setting aside bid opportunities exclusively for small business competition, providing guidance to navigate the process, and monitoring prime contractors' administration of subcontracts more closely.

The Black American owner of an SDB- and MBE-certified goods and services company stated, "There's some things that the Commonwealth could do, but the communication part, I think they've done a good job in. But I think that the Commonwealth should actually take a look at the contracts that the primes do with the sub[contractors], because the primes have a[n] attitude of, 'It's our way or the highway' once you get in a relationship with them. It's very, very unfair." [#14]

The Asian Pacific American owner of an MBE- and SBE-certified goods and services company stated, "When I'm talking with the state government, if they have a program where they can identify and segregate these bids that can be bid only by small minority businesses, that will help. ... I spend time to get the bid prepared and [I am a] small minority business. And then the other big companies provide the same bid. So, I'm the loser." [#58]

A representative of a woman-owned goods and services company stated, "They make it very difficult trying to find opportunities and trying to bid is very difficult. I am a member of COSTARS [the Commonwealth's cooperative purchasing program]. But it is very hard to market and bid for someone who is resource challenged. It hasn't been good. There are probably many opportunities for what I do. It is just very difficult finding opportunities. It would be helpful to have a coach to guide you through this." [#AV456]

Several business owners and representatives also offered suggestions for how public agencies could improve their bidding processes, such as simplifying the language in contracts, improving social media outreach for bidding opportunities, and consolidating bidding platforms into a single online space.

A representative of a majority-owned goods and services company stated, "Sometimes wording is fairly ambiguous and written in very legal terms. So if they could, for lack of better terms, dumb it down a little bit sometimes." [#25]

The owner of a majority-owned construction company stated, "I think you should just have everything on the one platform. They should all come together and say, okay. ... Because the one thing we didn't talk about was DGS uses e-Builder, so everything has to be done on e-Builder for DGS. The bid goes in on e-Builder. The submittals go in, all the contracts go in. They track it, everything goes in there to schedule. Now PennDOT uses ECMS and a combination of the PPCC, so why can't they just put all the state jobs on one platform? Then a small contractor with a lot of people in his office has to learn ECMS, has to learn e-Builder and has to learn PPCC. It just doesn't make sense to me." [#40]

The Black American owner of an MBE-certified goods and services company stated, "Start putting links to it on the social media when the bids open up. Post it. Put a link to it. Most people are on social media all day every day. The contractors I know are advertising their businesses and stuff on there, and I follow a lot of the Commonwealth stuff and I got them doing that as well because it definitely helps because every now and then a public official was put up there, something about a grant or something. And if they can do the same thing with the upcoming contracts, I think it'll be a big help."[#55]

Several business owners shared recommendations they had for improving the Commonwealth's administration of race- and gender-neutral programs. These recommendations emphasized the need for increased technical assistance, information to help business owners navigate the bidding process, and financial assistance for small business owners.

The owner of a majority-owned goods and services company stated, "[I would recommend] providing assistance to new business owners, and even existing business, as far as financial assistance. Even additional education would be a significant improvement in getting any of the small businesses around here going. Obviously, money flow is always a big issue and without access to good capital, there's no expansion, there's no more jobs for more employees. So, if they could figure out a way to make it a little bit more accessible. And I go back, a lot of people that are starting small businesses now, are people that are tired of working for other people, but they don't have the capital or the credit to do what they have to do to get the business open. Even if they could figure out a program for people with challenged credit to help them open businesses, that would be a significant start. I'll be honest, when I got into this in 2018, I didn't have any credit. I had bad credit, I should say. And it's only now that I'm at the point where I could go to the bank and get financing because my credit is decent. But if it wasn't for the previous owner trusting me, I wouldn't be where I am today." [#38]

The owner of a majority-owned professional services company stated, "One thing I would like to see, for what it's worth, you're in a small business and we can justify, and I'm a banker by trade, and we can verify that you're operating five days a week, 50-some-odd weeks a year, and your income level is at this level. And therefore, we're going to give you a tax advantage, give you a tax break, a tax credit as it were. Not money, just a tax credit. That would be nice for a small business owner." [#60]

A representative of a woman-owned construction company stated, "We do not pursue [support from race- and gender-neutral programs] because of paperwork that may hinder us. We are trying to grow our business and concentrating on [a] smaller sector of business

we can capture. If [I could] obtain information about where we could go to see what we could bid on, it would be helpful." [#AV28]

The Black American woman representative of a professional services company stated, "I have noticed that there is an awful lot of workforce development programs throughout the state, but if I could offer one challenge to that, I see a lot of workforce development in terms of helping people get into the unions, or helping people get into construction. I don't necessarily see helping them to get into more of the skills, into the robotics, into the engineering, into the technical skills. And I think that's a critical element that's missing and a weakness. I'm not saying that there aren't any, but I am saying that overall, I think we could trip over the amount of support for construction. Not a bad thing, but again, there is the other side of the aisle." [#FG1]

Interviewees also shared suggestions on how state agencies could help increase business' access to capital and urged agencies to provide more favorable contract terms to help small and diverse businesses operating with limited funds.

The owner of a majority-owned professional services company stated, "One [recommendation] would be some kind of pool of startup capital that would both be patient and inexpensive for startups. I think that would be very helpful. I think that our corporate tax in Pennsylvania is too high, and we need to lower it or maybe have a tiered structure where people below a certain income level, maybe pay taxes slightly different at different rates. So maybe we could engineer something like that across the state." [#66]

A participant in a public meeting stated, "Virtually it's very challenging for small, diverse and disadvantaged businesses to engage with the Commonwealth, in general, I think is the payment terms seem to be set up in a way that it would actually kill a lot of businesses. Because payment terms can sometimes be 180 days, and for the volume of work that some of these contracts are desiring, a lot of people don't have the runway to be able to run their business and do the work without getting into a special financial engagement with a bank or whatever as a line of credit to pull it off. And I think better payment terms for these projects, especially for diverse and disadvantaged businesses would make it much more reasonable, and it would just be more mutually advantageous. Because the way the payments are set up now, it is slanted towards large businesses that have big coffers that they can take the slow payment process and run basically their own line of credit with their internal money to be able to do these projects. But most small and diverse and disadvantaged businesses can't even touch that with a 10-foot pole." [#PT3]

Business owners and representatives that were interviewed also offered recommendations to other businesses, emphasizing the necessity of strong back-of-office skills, such as bookkeeping and invoicing, in addition to the need for specialized training in technical fields. Some interviewees said mentorship was a need area the Commonwealth could help address.

The owner of a majority-owned construction company stated, "That would be something, I think, that the Commonwealth could really help with, [is] having mentor programs for people like tradesmen or any business, really, for that matter." [#41]

The woman owner of a goods and services company stated, "Honestly, I would like to see a lot more done to support technical training. And that's from a personal standpoint, not just business. Our youngest son went through Penn Tech College up in Williamsport. And there is very, very little support for technical colleges in the way of scholarships and internships and all the things that you associate with a big university that's training people to go out in the world and become a businessperson or whatever. That does not exist for technical colleges. And I think we would've had an easier time getting employees if that was the case for technical colleges and training programs. It wouldn't have to be a college, just any kind of training program that gets state support, I would think that would make things much easier for us." [#52]

The owner of a majority-owned professional services company stated, "Is there a more effective way that I can bring clients in the door? That'd be great to have. Would it be possible to sit back and have somebody who would be available to me on a reduced or no fee, based upon almost like someone who was working on a grant from the state, that they could help me out through and I could show them how to do research on prospective customers and how we can then go back and say, 'Hey, here's the person's name, this is what they do. Give them a call.' The back-office part of it. That would be fantastic." [#60]

CHAPTER 5.

Data Collection and Analysis

Chapter 5 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the 2024 Commonwealth of Pennsylvania (Commonwealth) Disparity Study and the processes we used to collect relevant prime contract, subcontract, and vendor data from the Department of General Services (DGS) and other sources. Chapter 5 is organized in five parts:

- A. Contract and procurement data;
- B. Vendor data;
- C. Relevant geographic market area (RGMA);
- D. Subindustry classifications; and
- E. Review process.

A. Contract and Procurement Data

BBC collected data related to the construction, professional services, and non-professional services and goods contracts and procurements state agencies awarded between July 1, 2017, and June 30, 2022 (the *study period*) from DGS' SAP system. We also collected information on state-funded contracts and procurements that the Pennsylvania Department of Transportation (PennDOT) awarded during the study period from PennDOT's Engineering and Construction Management System (ECMS). Those data served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses. BBC collected the most comprehensive data available on the projects DGS awarded during the study period. We sought those data regardless of the business' statuses as person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; or lesbian, gay, bisexual, transgender, queer, or other sexual or gender orientations (LGBTQ+)-owned businesses.

1. Prime contract data. DGS and PennDOT provided BBC with data from its SAP and ECMS systems, respectively, on relevant prime contracts and procurements the agencies awarded during the study period. We requested the following information about each relevant prime contract or procurement:

- Contract or purchase order number;
- State agency that initiated the purchase (for SAP system data);
- Prime contractor name;
- Prime contractor identification number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments) and amount paid-to-date; and
- Location of work.

DGS and PennDOT advised BBC on how to interpret the data they provided, including how to best identify unique bid opportunities and how to aggregate award or payment amounts, where possible.

2. Subcontract data. DGS does not collect data on the subcontracts associated with the projects it awards. To gather information on subcontracts, BBC conducted surveys with prime contractors to collect data on the subcontracts associated with the projects DGS awarded to them during the study period and that we deemed to have likely included subcontract opportunities. We made those determinations based on involved work types involved and project sizes, primarily including relatively large construction and professional services projects. We requested the following information from prime contractors about each subcontract associated with each relevant project DGS awarded to them:

- Associated prime contract number;
- Award amount for the project;
- Amount paid-to-date for the project;
- Commitment amount for each subcontract and amount paid-to-date;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

BBC requested subcontract data associated with 578 prime contracts DGS awarded during the study period. Through our survey and numerous follow-up efforts, we collected information on subcontractor participation for more than 44 percent of the dollars associated with those projects.

3. Prime contract and subcontract amounts. For each prime contract and subcontract (i.e., *contract element*) included in our analyses, BBC examined the dollars DGS awarded to each prime contractor and the dollars each prime contractor committed to any subcontractors. If a project did not include any subcontracts, we attributed the contract’s or procurement’s entire award amount to the prime contractor. If a contract or procurement included subcontracts, we calculated the prime contract amount as the total project award amount less the sum of dollars committed to all subcontractors.

4. Contracts and procurements included in study analyses. Figure 5-1 presents the number of contract elements and associated dollars BBC included in our analyses.

Figure 5-1.
Contract elements and associated dollars included in the disparity study

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

Source:
 SAP and ECMS data.

Contract type	Number	Dollars
Construction	20,500	\$6,127,059,155
Professional services	3,848	\$6,366,042,478
Non-professional services and goods	15,114	\$1,467,700,331
Total	39,462	\$13,960,801,963

B. Vendor Data

BBC also compiled information on the businesses that participated in relevant prime contracts and subcontracts DGS and PennDOT awarded during the study period, including:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was POC-, woman-, veteran-, SDV-, disabled-, or LGBTQ+-owned);
- Race of owners (if POC-owned);
- Status as certified Minority Business Enterprises, Woman Business Enterprises, Veteran Business Enterprises, SDV Business Enterprises, Disabled Business Enterprises, and LGBTQ+ Business Enterprises;
- Primary lines of work;
- Business size; and
- Year of establishment.

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

- DGS and PennDOT contract and vendor data;
- Surveys the study team conducted with business owners and managers;
- The Pennsylvania Unified Certification Program directory;
- Dun & Bradstreet (D&B) business listings and other business information sources; and
- Business websites and other secondary research.

C. RGMA

BBC used DGS and PennDOT data to determine the RGMA—the geographical area in which Commonwealth agencies spend the substantial majority of their project dollars—for the disparity study. DGS and PennDOT awarded approximately 86 percent of relevant contract and procurement dollars to businesses located in Pennsylvania. Accordingly, our analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on the entire state of Pennsylvania.

D. Subindustry Classifications

For each prime contract and subcontract included in our analyses, BBC determined the *subindustry* that best characterized the vendor’s primary line of work (e.g., concrete work). We determined subindustries based on DGS and PennDOT contract, procurement, and vendor data; surveys the study team conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. Figure 5-2 presents subindustry classifications for the construction, professional services, and non-professional services and goods contracts and procurements BBC included in our analyses as well as the dollars DGS awarded related to each subindustry during the study period.

BBC combined related subindustries that accounted for relatively small percentages of total contract and procurement dollars into five “other” subindustries: other construction services, other construction materials, other professional services, other goods, and other services. For example, the dollars DGS awarded to contractors for surveying and mapmaking represented less than 1 percent of the total dollars we examined as part of the study. So, we combined surveying and mapmaking with professional services that also accounted for relatively small percentages of total dollars into the “other professional services” subindustry. There were also various contracts and procurements we classified into subindustries that we did not ultimately include in our analyses:

- Purchases and grants DGS and PennDOT made with or awarded to government agencies, utility providers, hospitals, or nonprofit organizations (\$1.7 billion);
- Contracts and procurements that reflected “national markets”—that is, subindustries dominated by large national or international businesses—or subindustries where DGS and PennDOT awarded most of the dollars to businesses located outside the RGMA (\$2.1 billion);¹
- Purchases that often include property purchases, leases, or other pass-through dollars (\$182.0 million);² or
- Types of work not typically included in disparity studies and that account for relatively small percentages of DGS’ and PennDOT’s contract and procurement dollars (\$804.4 million).³

E. Review Process

DGS and PennDOT reviewed contract, procurement, and vendor data throughout the study process. BBC consulted with them to discuss the data collection process, review information the study team gathered, and present summary results. We incorporated that feedback in the final contract, procurement, and vendor data we used for our analyses.

¹ Examples of such work include computer manufacturing and proprietary software.

² An example of such work is real estate consulting.

³ Examples of industries not typically included in disparity studies include legal services and gambling services.

Figure 5-2.
Contract and procurement
dollars by subindustry

Note:

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

Source:

SAP and ECMS data.

Industry	Total
Construction	
Highway, street, and bridge construction	\$2,517,353,617
Building construction	\$765,257,478
Concrete, asphalt, sand, and gravel products	\$736,223,383
Plumbing and HVAC	\$372,545,812
Electrical work	\$265,542,231
Excavation, drilling, wrecking, and demolition	\$251,005,932
Landscape services	\$160,659,330
Fencing, guardrails, barriers, and signs	\$136,883,057
Water, sewer, and utility lines	\$125,764,375
Heavy construction equipment rental	\$112,797,056
Painting, striping, and marking	\$85,136,637
Traffic control and safety	\$54,915,407
Concrete work	\$38,717,861
Rebar and reinforcing steel	\$7,176,101
Other construction services	\$299,774,996
Other construction materials	\$197,305,881
Total construction	\$6,127,059,155
Professional services	
IT and data services	\$3,021,896,960
Human resources and job training services	\$913,406,426
Engineering	\$858,524,534
Advertising, marketing and public relations	\$429,358,416
Finance and accounting	\$417,044,845
Business services and consulting	\$299,001,645
Testing and inspection	\$80,064,934
Architectural and design services	\$74,053,219
Environmental services	\$70,444,776
Medical testing, laboratories and pharmaceutical services	\$58,763,923
Construction management	\$52,705,105
Other professional services	\$90,777,696
Total professional services	\$6,366,042,478
Non-professional services and goods	
Automobiles	\$356,606,138
Communications equipment	\$353,077,545
Office equipment, supplies, and furniture	\$162,236,837
Petroleum and petroleum products	\$79,664,902
Food products, wholesale	\$62,497,437
Safety equipment	\$55,878,958
Security guard services	\$54,096,702
Industrial equipment and machinery	\$27,857,480
Printing, copying, and mailing	\$23,080,893
Cleaning and janitorial services	\$19,304,808
Vehicle repair services	\$14,094,707
Cleaning and janitorial supplies	\$12,336,385
Other goods	\$142,878,807
Other services	\$104,088,730
Total non-professional services and goods	\$1,467,700,331
GRAND TOTAL	\$13,960,801,963

BBC combined related subindustries that accounted for relatively small percentages of total contract and procurement dollars into five “other” subindustries: other construction services, other construction materials, other professional services, other goods, and other services. For example, the dollars DGS awarded to contractors for surveying and mapmaking work represented less than 1 percent of the total dollars we examined as part of the study. So, we combined surveying and mapmaking work with professional services projects that also accounted for relatively small percentages of total dollars into the “other professional services” subindustry. There were also various contracts and procurements we classified into subindustries that we did not ultimately include in our analyses:

- Purchases and grants DGS and PennDOT made with or awarded to government agencies, utility providers, hospitals, or nonprofit organizations (\$1.7 billion);
- Contracts and procurements that reflected “national markets”—that is, subindustries dominated by large national or international businesses—or subindustries where DGS and PennDOT awarded most of the dollars to businesses located outside the RGMA (\$2.1 billion);⁴
- Purchases that often include property purchases, leases, or other pass-through dollars (\$182.0 million);⁵ or
- Types of work not typically included in disparity studies and that account for relatively small percentages of DGS’ and PennDOT’s contract and procurement dollars (\$804.4 million).⁶

E. Review Process

DGS and PennDOT reviewed contract, procurement, and vendor data throughout the study process. BBC consulted with them to discuss the data collection process, review information the study team gathered, and present summary results. We incorporated that feedback in the final contract, procurement, and vendor data we used for our analyses.

⁴ Examples of such work include computer manufacturing and proprietary software.

⁵ An example of such work is real estate consulting.

⁶ Examples of industries not typically included in disparity studies include legal services and gambling services.

CHAPTER 6.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses *ready, willing, and able* to perform work on the construction, professional services, and non-professional services and goods contracts and procurements Commonwealth of Pennsylvania (Commonwealth) agencies awards.^{1,2} Chapter 6 describes the analysis in five parts:

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

Appendix D provides more information about the availability analysis and how we conducted it.

A. Purpose of the Availability Analysis

BBC examined the availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency prime contracts and subcontracts to use as benchmarks against which to compare the actual participation of those businesses in that work to subsequently assess whether any disparities exist between participation and availability. Assessing disparities between the participation and availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses allowed us to determine whether certain business groups were substantially underutilized during the study period, which is crucial in determining whether the use of *race- or gender-conscious measures* is appropriate and, if so, ensuring their use meets the *strict scrutiny* and *intermediate scrutiny standards* of constitutional review, respectively (for details, see Chapter 2). In addition, estimating availability is useful to DGS in setting overall aspirational goals for the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in the projects state agencies award as well as setting race- or gender-based contracting goals for the participation of those businesses in agency work, if the Department of General Services (DGS) determines the continued use of such measures is appropriate.

BBC's availability analysis focused on specific areas of work, or *subindustries*, associated with the contracts and procurements state agencies awarded between July 1, 2017, and June 30, 2022 (*study period*), which serves as a proxy for the work they might award in the future. We began the

¹ "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

² DGS projects comprise all relevant state-funded projects state agencies awarded during the study period, including the Pennsylvania Department of Transportation (PennDOT).

analysis by identifying the specific subindustries in which state agencies spend most of their contracting dollars as well as the geographic area in which most of the businesses with which they spend those dollars are located (i.e., the *relevant geographic market area*, or *RGMA*). Our analyses showed that state agencies awarded approximately 86 percent of relevant contract and procurement dollars to businesses located in Pennsylvania, which indicates that the RGMA for the study should be Pennsylvania.

After identifying the RGMA, BBC conducted extensive surveys with more than 2,000 businesses in the marketplace to develop a representative and unbiased database of businesses located in the RGMA that perform types of work relevant to DGS projects. The objective of the survey process was not to collect information from every relevant business located in the RGMA, but rather, to collect information from an unbiased subset of the relevant business population that appropriately represents the entire relevant business population.

1. Overview of availability surveys. BBC worked with our survey fieldwork partner, Davis Research, to conduct telephone and online surveys with business owners and managers to identify local businesses potentially available for DGS prime contracts and subcontracts. We began the process by compiling a *phone book* of all types of businesses—regardless of ownership characteristics—that perform work relevant to stage agency projects and are located in Pennsylvania, based primarily on information from Dun & Bradstreet (D&B) Marketplace. We compiled information about businesses based on 8-digit work specialization codes most related to the contracts and procurements state agencies awarded during the study period. We obtained listings on 17,372 local businesses that perform work related to those work specializations. We did not have working phone numbers for 2,250 of those businesses, but we attempted surveys with the remaining 15,122 businesses.

2. Survey information. The study team conducted availability surveys with businesses listed in the phone book to collect various pieces of information about each one, including:

- Status as a private sector business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for government organizations;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract the business is able to perform;
- Whether the business is able to work or serve customers in various regions of Pennsylvania;
- Business size in terms of revenue and number of employees;
- Race of the owner(s);
- Gender of the owner(s);
- Whether the owner(s) is a veteran;
- Whether the owner(s) is an SDV;
- Whether the owner(s) is disabled; and
- Whether the owner(s) identifies as LGBTQ+.

B. Availability Database

After conducting availability surveys, BBC compiled an availability database that included information about businesses potentially available for relevant DGS contracts and procurements. We included businesses in the availability database if they reported possessing all the following characteristics:

- Being a private sector business that is active and operational;
- Having primary lines of work relevant to DGS projects;
- Being able to perform work in Pennsylvania; and
- Being interested in working for government organizations.

Figure 6-1 presents the percentage of businesses in the availability database that were POC-, woman-, veteran-, SDV-, disabled-, or LGBTQ+-owned. The database included information on the 1,692 businesses with which Davis Research completed availability surveys and that met the above criteria. As shown in Figure 6-1, 25.4 percent of the businesses in the database were POC- or woman-owned, 7.6 percent were veteran-owned, 2.0 percent were SDV-owned, 1.8 percent were disabled-owned, and 1.2 percent were LGBTQ+-owned.

Figure 6-1.
Percent of businesses in the availability database by relevant business group

Note:

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

There is overlap between POC- and woman-owned businesses veteran-, SDV-, disabled-, and LGBTQ+-owned businesses, so it is inappropriate to sum the corresponding percentages.

Source:

BBC availability analysis.

Business group	Representation
White woman-owned	13.2 %
Asian Pacific American-owned	0.7 %
Black American-owned	6.7 %
Hispanic American-owned	2.9 %
Native American-owned	0.4 %
Subcontinent Asian American-owned	1.5 %
Total POC-owned	12.2 %
Total POC- and woman-owned	25.4 %
Veteran-owned	7.6 %
SDV-owned	2.0 %
Disabled-owned	1.8 %
LGBTQ+-owned	1.2 %

C. Availability Calculations

BBC used a *custom census* approach—which accounts for specific business and project characteristics such as work type, role, size, capacity, and interest—to estimate the availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for DGS work. We analyzed information from the availability database to develop dollar-weighted estimates of the degree to which those businesses are ready, willing, and able to perform work on the projects state agencies award. Those estimates represent the percentage of project dollars one would expect them to award to POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses based on their availability for the specific types and sizes of the contracts and procurements included in the analysis. BBC only considered a portion of the businesses in the availability database as potentially available for any given prime contract or subcontract. We first identified the characteristics of each prime contract or subcontract (referred to

generally as a *contract element*), including type of work, contract size, and contract role, and then took the following steps to estimate the availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for each one:

1. We identified businesses in the availability database that reported they:
 - Perform work in that particular role (i.e., as a prime contractor or a subcontractor);
 - Perform that type of work;
 - Can perform work of that size or larger.
2. We then counted the number of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses, and all other businesses that met the criteria in step 1.
3. We translated the counts of businesses in step 2 into percentages.

We repeated the above steps for each contract element included in the analysis and then multiplied the percent availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for each contract element by the dollars associated with it. We then added results across all contract elements and divided by the total corresponding dollars. The result was weighted estimates of the percentage of relevant project dollars one would expect DGS to award to POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses based on their availability for specific types and sizes of the work state agencies award. Figure 6-2 provides an example of how we estimated the availability of POC- and woman-owned businesses for a subcontract associated with a project a state agency awarded during the study period.

Figure 6-2.
Example of estimating availability for a state agency subcontract

On a contract a state agency awarded during the study period, the prime contractor awarded a subcontract worth \$63,743 for architectural and design services work. To determine the overall availability of POC- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that indicated they:

- a. Perform architectural and design services work;
- b. Perform work as subcontractors; and
- c. Are able to perform work of equal size or larger than the size of contract element.

We found 27 businesses in the availability database that met those criteria, 12 of which were POC- or woman-owned. Thus, the availability of POC- and woman-owned businesses for the subcontract was 44.9 percent (i.e., $12/27 \times 100 = 44.9$).

D. Availability Results

BBC estimated the overall availability of POC- and woman-owned businesses for the construction, professional services, and non-professional services and goods work state agencies award as well as separately for various subsets of that work. For each set of projects, we present availability estimates for all POC- and woman-owned businesses considered together and separately for each relevant business group: white woman-owned businesses, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and Subcontinent Asian American-owned businesses. We also present availability for veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for all relevant state agency projects considered together.

1. Overall. Figure 6-3 presents dollar-weighted estimates of the overall availability of POC- and woman-owned businesses for state agency work. As shown in Figure 6-3, the availability of POC- and woman-owned businesses for all state agency work considered together is 27.0 percent, indicating that one might expect state agencies to award approximately 27.0 percent of their project dollars to POC-

and woman-owned businesses based on their availability for that work. The business groups that exhibit the greatest availability for that work are white woman-owned businesses (15.5%), Subcontinent Asian American-owned businesses (5.7%), and Black American-owned businesses (3.6%).

In addition, BBC examined the overall availability of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work, the results for which are not shown in Figure 6-3. Those analyses indicated that the availability of veteran-owned businesses for state agency work is 2.6 percent, the availability of SDV-owned businesses is 3.8 percent, the availability of disabled-owned businesses is 0.6 percent, and the availability of LGBTQ+-owned businesses is 0.03 percent.³

Figure 6-3.
Availability estimates for state agency work

Note:

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

Source:

BBC availability analysis.

Business group	Availability
White woman-owned	15.5 %
Asian Pacific American-owned	0.6 %
Black American-owned	3.6 %
Hispanic American-owned	1.5 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	5.7 %
Total POC-owned	11.5 %
Total POC- and woman-owned	27.0 %

2. Industry. BBC also examined the availability of POC- and woman-owned businesses separately for construction, professional services, and non-professional services and goods work to assess whether the availability of those businesses for state agency projects differs by industry. As shown in Figure 6-4, POC- and woman-owned businesses exhibit greater availability for state agencies' professional services projects (34.4%) than for non-professional services and goods (29.3%) or construction projects (18.7%). Availability for individual business groups differs across industries:

- The groups that exhibit the greatest availability for construction work are white woman-owned businesses (13.7%), Hispanic American-owned businesses (2.1%), and Black American-owned businesses (1.6%).
- The groups that exhibit the greatest availability for professional services work are white woman-owned businesses (15.2%), Subcontinent Asian American-owned businesses (12.1%), and Black American-owned businesses (5.6%).
- The groups that exhibit the greatest availability for non-professional services and goods work are white woman-owned businesses (24.2%), Black American-owned businesses (3.2%), and Subcontinent Asian American-owned businesses (1.3%).

³ Results for veteran-, SDV-, disabled, and LGBTQ+-owned businesses do not include veteran-, SDV-, disabled, and LGBTQ+-owned businesses that are also POC- and woman-owned. Those results are included with results for the corresponding race and gender groups.

Figure 6-4.
Availability estimates for state agency work by industry

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

Business group	Industry		
	Construction	Professional services	Non-professional services and goods
White woman-owned	13.7 %	15.2 %	24.2 %
Asian Pacific American-owned	0.9 %	0.5 %	0.0 %
Black American-owned	1.6 %	5.6 %	3.2 %
Hispanic American-owned	2.1 %	1.1 %	0.6 %
Native American-owned	0.2 %	0.0 %	0.0 %
Subcontinent Asian American-owned	0.1 %	12.1 %	1.3 %
Total POC-owned	5.0 %	19.3 %	5.1 %
Total POC- and woman-owned	18.7 %	34.4 %	29.3 %

3. Contract role. Many POC- and woman-owned businesses are small businesses, and thus, often work as subcontractors, so it is instructive to examine availability estimates separately for state agency prime contracts and subcontracts. In addition, prime contracts are usually bigger in size than subcontracts, and project size is typically inversely related to the availability of POC- and woman-owned businesses for agency work (i.e., the larger the project, the less the availability of POC- and woman-owned businesses). As shown in Figure 6-5, the availability of POC- and woman-owned businesses for DGS subcontracts (40.7%) is greater than for DGS prime contracts (23.3%). The groups that exhibit the greatest levels of availability for prime contracts and subcontracts are the same: white woman-owned businesses (prime contracts = 15.8%; subcontracts = 14.0%), Subcontinent Asian American-owned businesses (prime contracts = 3.0%; subcontracts = 15.6%), and Black American-owned businesses (prime contracts = 2.6%; subcontracts = 7.2%).

Figure 6-5.
Availability estimates for state agency prime contracts and subcontracts

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

Business group	Role	
	Prime contracts	Subcontracts
White woman-owned	15.8 %	14.0 %
Asian Pacific American-owned	0.5 %	1.0 %
Black American-owned	2.6 %	7.2 %
Hispanic American-owned	1.2 %	2.5 %
Native American-owned	0.0 %	0.4 %
Subcontinent Asian American-owned	3.0 %	15.6 %
Total POC-owned	7.4 %	26.7 %
Total POC- and woman-owned	23.3 %	40.7 %

4. Prime contract size. BBC estimated the availability of POC- and woman-owned businesses separately for *large* prime contracts—construction and professional services contracts worth more than \$400,000 and non-professional services and goods contracts worth more than \$250,000—and *small* prime contracts—construction and professional services contracts worth \$400,000 or less and non-professional services and goods contracts worth \$250,000 or less—state agencies awarded during the study period. That analysis helped assess whether prime contract size was related to the availability of POC- and woman-owned businesses for state agency work. As shown in Figure 6-6, the availability of POC- and woman-owned businesses is slightly greater for small prime contracts (24.0%) than for large prime contracts (23.2%). Availability for individual business groups differs by contract size:

- The groups that exhibit the greatest levels of availability for small prime contracts are white woman-owned businesses (15.6%), Hispanic American-owned businesses (3.2%), and Black American-owned businesses (2.6%).
- The groups that exhibit the greatest levels of availability for large prime contracts are white woman-owned businesses (15.9%), Subcontinent Asian American-owned businesses (3.2%), and Black American-owned businesses (2.6%).

Figure 6-6.
Availability estimates for large and small prime contracts

Note:

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

Source:

BBC availability analysis.

Business group	Size	
	Small	Large
White woman-owned	15.6 %	15.9 %
Asian Pacific American-owned	0.8 %	0.5 %
Black American-owned	2.6 %	2.6 %
Hispanic American-owned	3.2 %	1.1 %
Native American-owned	0.7 %	0.0 %
<u>Subcontinent Asian American-owned</u>	<u>1.0 %</u>	<u>3.2 %</u>
Total POC-owned	8.4 %	7.4 %
Total POC- and woman-owned	24.0 %	23.2 %

5. Goal status. DGS uses race- and gender-conscious contract goals to encourage the participation of POC- and woman-owned businesses in certain projects state agencies award. BBC assessed differences in the availability of POC- and woman-owned businesses for projects state agencies award with the use of SDB/VBE contract goals (*SDB/VBE goals projects*); state-funded projects PennDOT awards with the use of Diverse Business (DB) Program goals, which are race- and gender-neutral in nature (*DB goals projects*); and projects state agencies award without the use of any goals (*no goals projects*). As shown in Figure 6-7, POC- and woman-owned businesses exhibit greater availability for no goals projects (27.4%) than for DB goals projects (24.2%) or SDB/VBE goals projects (22.6%). The groups that exhibit the greatest levels of availability for SDB/VBE goals projects, DB goals projects, and no goals projects are the same: white woman-owned businesses (SDB/VBE goals projects = 14.4%; DB goal projects = 17.9%; no goals projects = 15.4%), Black American-owned businesses (SDB/VBE goals projects = 2.7%; DB goal projects = 3.1%; no goals projects = 3.7%), and Subcontinent Asian American-owned businesses (SDB/VBE goals projects = 2.8%; DB goal projects = 2.0%; no goals projects = 6.1%).

Figure 6-7.
Availability estimates for state agency work by goal status

Note:

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

Source:

BBC availability analysis.

Business group	Goal status		
	SDB/VBE	DB	No Goals
White woman-owned	14.4 %	17.9 %	15.4 %
Asian Pacific American-owned	0.3 %	0.2 %	0.7 %
Black American-owned	2.7 %	3.1 %	3.7 %
Hispanic American-owned	2.4 %	0.8 %	1.4 %
Native American-owned	0.0 %	0.3 %	0.1 %
<u>Subcontinent Asian American-owned</u>	<u>2.8 %</u>	<u>2.0 %</u>	<u>6.1 %</u>
Total POC-owned	8.2 %	6.4 %	12.0 %
Total POC- and woman-owned	22.6 %	24.2 %	27.4 %

6. Agency. BBC examined the availability of POC- and woman-owned businesses separately for state-funded projects PennDOT awards and projects all other state agencies award (referred to below as *DGS-only projects*). As shown in Figure 6-8, the availability of POC- and woman-owned businesses is greater for DGS-only projects (29.2%) than for PennDOT projects (21.5%). Availability for individual business groups differs by agency:

- The groups that exhibit the greatest levels of availability for DGS-only projects are white woman-owned businesses (15.4%), Subcontinent Asian American-owned businesses (7.9%), and Black American-owned businesses (4.2%).
- The groups that exhibit the greatest levels of availability for PennDOT projects are white woman-owned businesses (15.7%), Black American-owned businesses (2.1%), and Hispanic American-owned businesses (1.8%).

Figure 6-8.
Availability estimates for work by agency

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

Source:
BBC availability analysis.

Business group	Agency	
	DGS-only	PennDOT
White woman-owned	15.4 %	15.7 %
Asian Pacific American-owned	0.4 %	1.2 %
Black American-owned	4.2 %	2.1 %
Hispanic American-owned	1.3 %	1.8 %
Native American-owned	0.0 %	0.3 %
Subcontinent Asian American-owned	7.9 %	0.4 %
Total POC-owned	13.9 %	5.8 %
Total POC- and woman-owned	29.2 %	21.5 %

CHAPTER 7.

Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses in the state-funded construction, professional services, and non-professional services and goods contracts and procurements Commonwealth of Pennsylvania (Commonwealth) state agencies awarded between July 1, 2017 and June 30, 2022 (*study period*).¹ We measured participation in terms of *utilization*—the percentage of contract and procurement dollars state agencies awarded to those businesses during the study period. We measured the overall participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in all relevant contracts and procurements state agencies awarded during the study period as well as the overall participation of POC- and woman-owned businesses in various subsets of those projects. Chapter 7 presents the analysis in three parts:

- A. Purpose of the utilization analysis;
- B. Utilization analysis results; and
- C. Concentration of dollars.

A. Purpose of the Utilization Analysis

Calculating the percentage of dollars state agencies awarded to POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses during the study period is useful in determining whether certain business groups face barriers as it relates to the Commonwealth’s contracting and procurement processes. Moreover, assessing whether there are any substantial disparities between the participation and availability of those businesses for state agency work allows the Department of General Services (DGS) to determine whether the use of *race- or gender-conscious measures* is appropriate and ensure that its use of such measures is tailored to those business groups for which compelling evidence of such barriers exist.

B. Utilization Analysis Results

BBC calculated the overall participation of Pennsylvania-based POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in all the relevant projects state agencies awarded during the study period, considered together. For POC- and woman-owned businesses, we also present utilization analysis results separately for various subsets of state agency projects.

1. Overall. Figure 7-1 presents the overall participation of POC- and woman-owned businesses for DGS work. Overall, state agencies awarded 16.8 percent of relevant contract and procurement dollars to all POC- and woman-owned businesses considered together. The groups that exhibited the greatest levels

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

of participation in that work were white woman-owned businesses (9.9%), Subcontinent Asian American-owned businesses (4.2%), and Asian Pacific American-owned businesses (1.0%).

Figure 7-1.
Utilization analysis
results for state agency work

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

Source:
BBC utilization analysis.

Business group	Utilization
White woman-owned	9.9 %
Asian Pacific American-owned	1.0 %
Black American-owned	0.9 %
Hispanic American-owned	0.6 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	4.2 %
Total POC-owned	6.9 %
Total POC- and woman-owned	16.8 %

BBC also examined the overall participation of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for DGS work. During the study period, state agencies awarded 0.4 percent of relevant contract and procurement dollars to veteran-owned businesses, 0.3percent to SDV-owned businesses, 0.04 percent to disabled-owned businesses, and 0.04 percent to LGBTQ+-owned businesses.²

2. Industry. BBC also examined the participation of POC- and woman-owned businesses separately for state agency construction, professional services, and non-professional services and goods work to assess whether the participation of those businesses differed by industry. As shown in Figure 7-2, the participation of POC- and woman-owned businesses considered together was greater for professional services work (27.3%) than for construction (8.3%) or non-professional services and goods work (6.4%). Participation for relevant business groups differed across industries:

- The groups that exhibited the greatest levels of participation in construction work were white woman-owned businesses (6.6%), Black American-owned businesses (1.1%), and Hispanic American-owned businesses (0.2%).
- The groups that exhibited the greatest levels of participation in professional services work were white woman-owned businesses (14.4%), Subcontinent Asian American-owned businesses (9.0%), and Asian Pacific American-owned businesses (2.1%).
- The groups that exhibited the greatest levels of participation in non-professional services and goods work were white woman-owned businesses (3.9%), Hispanic American-owned businesses (1.1%), and Subcontinent Asian American-owned businesses (0.9%).

² Results for veteran-, SDV-, disabled, and LGBTQ+-owned businesses do not include veteran-, SDV-, disabled, and LGBTQ+-owned businesses that are also POC- and woman-owned. Those results are included with results for the corresponding race and gender groups.

Figure 7-2.
Utilization analysis
results for construction,
professional services,
and non-professional
services and goods work

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

Source:
BBC utilization analysis.

Business group	Industry		
	Construction	Professional services	Non-professional services and goods
White woman-owned	6.6 %	14.4 %	3.9 %
Asian Pacific American-owned	0.1 %	2.1 %	0.1 %
Black American-owned	1.1 %	0.8 %	0.5 %
Hispanic American-owned	0.2 %	0.9 %	1.1 %
Native American-owned	0.1 %	0.0 %	0.0 %
<u>Subcontinent Asian American-owned</u>	<u>0.1 %</u>	<u>9.0 %</u>	<u>0.9 %</u>
Total POC-owned	1.7 %	12.9 %	2.5 %
Total POC- and woman-owned	8.3 %	27.3 %	6.4 %

3. Contract role. Many POC- and woman-owned businesses are small businesses, and thus, often work as subcontractors. For that reason, it is useful to examine participation separately for the prime contracts and subcontracts state agencies awarded during the study period. As shown in Figure 7-3, the participation of POC- and woman-owned businesses considered together was greater for DGS subcontracts (51.4%) than for prime contracts (7.4%). Participation for individual business groups differed between prime contracts and subcontracts:

- The groups that exhibited the greatest levels of participation in prime contracts were white woman-owned businesses (5.9%) and Black American American-owned businesses (0.5).
- The groups that exhibited the greatest levels of participation in subcontracts were white woman-owned businesses (24.6%), Subcontinent Asian American-owned businesses (18.7%), and Asian Pacific American-owned businesses (3.8%).

Figure 7-3.
Utilization analysis results for
prime contracts and subcontracts

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

Source:
BBC utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
White woman-owned	5.9 %	24.6 %
Asian Pacific American-owned	0.3 %	3.8 %
Black American-owned	0.5 %	2.4 %
Hispanic American-owned	0.3 %	1.7 %
Native American-owned	0.0 %	0.2 %
<u>Subcontinent Asian American-owned</u>	<u>0.3 %</u>	<u>18.7 %</u>
Total POC-owned	1.5 %	26.7 %
Total POC- and woman-owned	7.4 %	51.4 %

4. Prime contract size. BBC examined the participation of POC- and woman-owned businesses separately for *large* prime contracts—construction and professional services contracts worth more than \$400,000 and non-professional services and goods contracts worth more than \$250,000—and *small* prime contracts—construction and professional services contracts worth \$400,000 or less and non-professional services and goods contracts worth \$250,000 or less—that state agencies awarded during the study period. That analysis helped assess whether prime contract size was related to the

participation of POC- and woman-owned businesses in DGS work. As shown in Figure 7-4, the participation of POC- and woman-owned businesses was greater for small prime contracts (10.7%) than large prime contracts (7.2%). Participation for individual business groups differed by contract size:

- The groups that exhibited the greatest levels of participation in small prime contracts were white woman-owned businesses (9.3%), Black American-owned businesses (0.7%), and Hispanic American-owned businesses (0.5%).
- The groups that exhibited the greatest levels of participation in large prime contracts were white woman-owned businesses (5.7%) and Black American-owned businesses (0.5%).

Figure 7-4.
Utilization analysis results for large and small prime contracts

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

Source:
BBC utilization analysis.

Business group	Contract size	
	Small	Large
White woman-owned	9.3 %	5.7 %
Asian Pacific American-owned	0.0 %	0.3 %
Black American-owned	0.7 %	0.5 %
Hispanic American-owned	0.5 %	0.3 %
Native American-owned	0.0 %	0.0 %
Subcontinent Asian American-owned	0.4 %	0.3 %
Total POC-owned	1.6 %	1.5 %
Total POC- and woman-owned	10.9 %	7.2 %

5. Goal status. DGS uses race- and gender-conscious contract goals to encourage the participation of POC- and woman-owned businesses in projects state agencies award. BBC assessed differences in the participation of POC- and woman-owned businesses for projects state agencies awarded during the study period with the use of SDB/VBE contract goals (*SDB/VBE goals projects*); state-funded projects the Pennsylvania Department of Transportation (PennDOT) awarded with the use of Diverse Business (DB) Program goals, which are race- and gender-neutral in nature (*DB goals projects*); and projects state agencies awarded without the use of any goals (*no goals projects*). As shown in Figure 7-5, POC- and woman-owned businesses exhibited greater levels of participation for DB program projects (20.2%) than for no goals projects (17.1%) and SDB/VBE goals projects (10.3%). Participation for individual business groups differed across goal status:

- The groups that exhibited the greatest levels of participation in SDB/VBE goals projects were white woman-owned businesses (7.2%), Black American-owned businesses (2.2%), and Hispanic American-owned businesses (0.7%).
- The groups that exhibited the greatest levels of participation in DB goals projects were white woman-owned businesses (11.0%), Subcontinent Asian American-owned businesses (5.4%), and Hispanic American-owned businesses (2.7%).
- The groups that exhibited the greatest levels of participation in no goals projects were white woman-owned businesses (10.0%), Subcontinent Asian American-owned businesses (4.5%), and Asian Pacific American-owned businesses (1.1%).

Figure 7-5.
Utilization analysis
results by goal status

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

Source:
BBC utilization analysis.

Business group	Contract goals		
	SDB/VBE	DB	No Goals
White woman-owned	7.2 %	11.0 %	10.0 %
Asian Pacific American-owned	0.0 %	0.0 %	1.1 %
Black American-owned	2.2 %	1.1 %	0.8 %
Hispanic American-owned	0.7 %	2.7 %	0.5 %
Native American-owned	0.0 %	0.0 %	0.1 %
Subcontinent Asian American-owned	0.2 %	5.4 %	4.5 %
Total POC-owned	3.1 %	9.2 %	7.0 %
Total POC- and woman-owned	10.3 %	20.2 %	17.1 %

6. Agency. BBC examined the participation of POC- and woman-owned businesses separately for state-funded projects awarded by PennDOT and projects awarded by all other state agencies (referred to below as *DGS-only projects*). As shown in Figure 7-6, the participation of POC- and woman-owned businesses was greater for DGS-only projects (19.4%) than PennDOT projects (10.3%). Participation for individual business groups differed by agency:

- The groups that exhibited the greatest levels of participation in DGS-only projects were white woman-owned businesses (10.9%), Subcontinent Asian American-owned businesses (5.6%), and Asian Pacific American-owned businesses (1.4%).
- The groups that exhibited the greatest levels of participation in state-funded PennDOT projects were white woman-owned businesses (7.3%), Black American-owned businesses (0.9%), and Subcontinent Asian American-owned businesses (0.9%).

Figure 7-6.
Utilization analysis
results by agency

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

Source:
BBC utilization analysis.

Business group	Agency	
	DGS-only	PennDOT
White woman-owned	10.9 %	7.3 %
Asian Pacific American-owned	1.4 %	0.2 %
Black American-owned	1.0 %	0.9 %
Hispanic American-owned	0.5 %	0.8 %
Native American-owned	0.0 %	0.2 %
Subcontinent Asian American-owned	5.6 %	0.9 %
Total POC-owned	8.5 %	2.9 %
Total POC- and woman-owned	19.4 %	10.3 %

C. Concentration of Dollars

BBC analyzed the degree to which relevant contract and procurement dollars state agencies awarded to POC- and woman-owned businesses during the study period were spread across different businesses. We used that analysis as an indication of whether many businesses share in the collective success of their respective groups or whether only a few businesses account for each group's aggregate participation in DGS work. We assessed that question by calculating:

- The number of businesses within each group to which state agencies awarded contract and procurement dollars during the study period; and
- The number of businesses within each group that accounted for at least 75 percent of the group's total contracting dollars during the study period after ordering them from most to least awarded dollars.

Figure 7-7 presents those results for each relevant group of POC- and woman-owned businesses. In total, state agencies awarded approximately \$1.7 billion to 434 different POC- and woman-owned businesses during the study period. However, only 67 of those businesses (15.4%) accounted for 75.0 percent of the corresponding contract and procurement dollars. Most notably, although state agencies awarded contract and procurement dollars to 12 different Asian Pacific American-owned businesses, a single firm accounted for 78.4 percent of those dollars by itself. Similarly, although state agencies awarded contract and procurement dollars to 285 different white woman-owned businesses, 36 of them accounted for 75.4 percent of those dollars by themselves. Those results indicate that a small number of POC- and woman-owned businesses accounted for most of the total contract and procurement dollars state agencies awarded to those businesses during the study period.

Figure 7-7.
Concentration of contract and procurement dollars state agencies awarded to POC- and woman-owned businesses

Source:
 BBC utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of contract dollars	
		Number	Percent
White woman-owned	285	36	75.4 %
Asian Pacific American-owned	12	1	78.4 %
Black American-owned	51	12	76.4 %
Hispanic American-owned	29	9	76.1 %
Native American-owned	2	1	84.5 %
Subcontinent Asian American-owned	55	14	75.8 %
Total POC-owned	149	32	75.2 %
Total POC- and woman-owned	434	67	75.0 %

CHAPTER 8.

Disparity Analysis

BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars Commonwealth of Pennsylvania state agencies awarded to person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses during the study period (i.e., *utilization or participation*) with the percentage of contract and procurement dollars one might expect state agencies to award to those businesses based on their availability for that work.¹ The analysis focused on state-funded construction, professional services, and non-professional services and goods work state agencies awarded between July 1, 2017 to June 30, 2022 (the *study period*).

A. Overview

BBC expressed utilization and availability as percentages of the total dollars associated with a particular set of projects and then used the following formula to calculate a *disparity index* to help compare utilization and availability for relevant business groups and different sets of projects:

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

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

B. Disparity Analysis Results

BBC measured overall disparities between the participation and availability of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for all relevant contracts and procurements considered together. For POC- and woman-owned businesses, we also measured disparities separately for various subsets of contracts and procurements state agencies awarded during the study period. We provide detailed disparity analysis results in Appendix E.

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

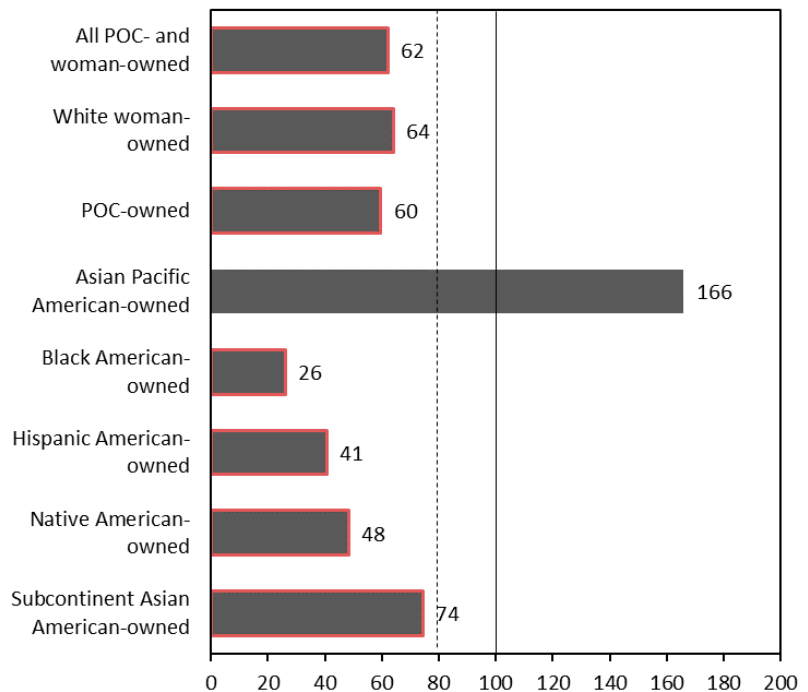
² For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513,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

1. Overall. Figure 8-1 presents disparity indices for POC- and woman-owned businesses for all relevant prime contracts and subcontracts state agencies awarded during the study period. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. The substantial disparities we observed are highlighted with red borders. As shown in Figure 8-1, POC- and woman-owned businesses considered together exhibited a disparity index of 62 for all relevant projects state agencies awarded during the study period, indicating a disparity where they awarded POC- and woman-owned businesses \$0.62 for every dollar one might expect them to award to them based on their availability for agency work. There were some differences in disparities when considering each relevant POC- and woman-owned business group separately:

- Black American-owned businesses (disparity index of 26), Hispanic American-owned businesses (disparity index of 41), Native American-owned businesses (disparity index of 48), Subcontinent Asian American-owned businesses (disparity index of 74), and white woman-owned businesses (disparity index of 64) exhibited substantial disparities for state agency work.
- In contrast, Asian Pacific American-owned businesses did not exhibit a disparity for state agency work (disparity index of 166).

Figure 8-1.
Overall disparity analysis
results for DGS work

Notes:
For more detail, see Figure E-1 in Appendix E.
Source:
BBC disparity analysis.



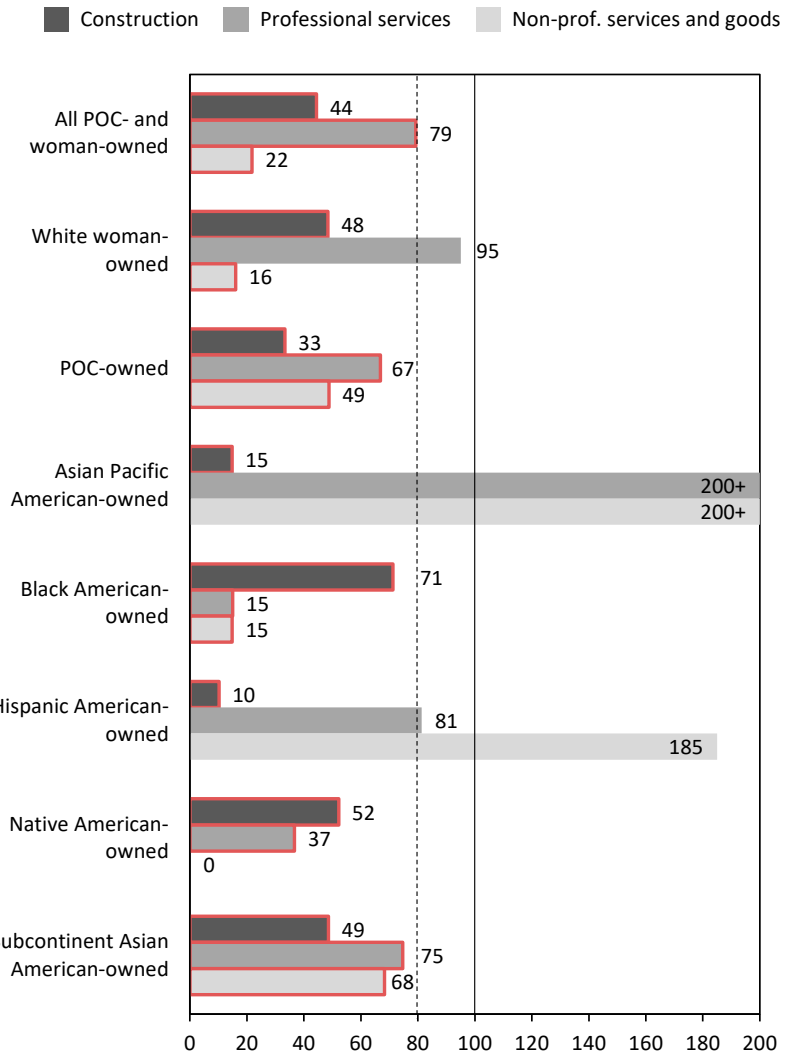
BBC also assessed whether veteran-, SDV-, disabled-, and LGBTQ+-owned businesses exhibited disparities between their participation and availability for DGS work, the results for which are not shown in Figure 8-1. Veteran-owned businesses (disparity index of 11), SDV-owned businesses (disparity index of 8), disabled-owned businesses (disparity index of 7), and LGBTQ+-owned businesses (disparity index of 8) all exhibited substantial disparities for all relevant state agency contracts and procurements considered together.³

³ Results for veteran-, SDV-, disabled, and LGBTQ+-owned businesses do not include veteran-, SDV-, disabled, and LGBTQ+-owned businesses that are also POC- and woman-owned. Those results are included with results for the corresponding race and gender groups.

2. Industry. DGS can develop programs to encourage the participation of POC- and woman-owned businesses in its work that are tailored specifically to different industries. For example, if DGS determines that it is appropriate to continue using race- or gender-conscious measures as part of its contracting and procurement, it can determine which groups might be eligible to participate in those measures separately for construction, professional services, and non-professional services and goods projects based on information about which groups face substantial disparities in each industry. BBC examined disparity analysis results separately for the construction, professional services, and non-professional services and goods work state agencies awarded during the study period to determine whether outcomes for POC- and woman-owned businesses differed by industry.

Figure 8-2.
Disparity analysis results
for construction,
professional services,
and non-professional
services and goods work

Note:
 For more detail, see Figures E-4, E-5,
 and E-6 in Appendix E.
 Source:
 BBC disparity analysis.



As shown in Figure 8-2, POC- and woman-owned businesses considered together exhibited substantial disparities for construction (disparity index of 44), professional services (disparity index of 79), and non-professional services and goods work (disparity index of 22). However, disparity indices varied by business group and industry:

- All POC- and woman-owned business groups exhibited substantial disparities for construction work: white woman-owned businesses (disparity index of 48), Asian Pacific American-owned businesses (disparity index of 15), Black American-owned businesses (disparity index of 71),

Hispanic American-owned businesses (disparity index of 10), Native American-owned businesses (disparity index of 52), and Subcontinent Asian American-owned businesses (disparity index of 49).

- Black American-owned businesses (disparity index of 15), Native American-owned businesses (disparity index of 37), and Subcontinent Asian American-owned businesses (disparity index of 75) exhibited substantial disparities for professional services work. White woman-owned businesses (disparity index of 95) and Hispanic American-owned businesses (disparity index of 81) showed disparities for professional services work, but those disparities were not substantial. Asian Pacific American-owned businesses did not show a disparity for that work (disparity index of 200+).
- White woman-owned businesses (disparity index of 16), Black American-owned businesses (disparity index of 15), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 68) exhibited substantial disparities for non-professional services and goods work. In contrast, neither Asian Pacific American-owned businesses (disparity index of 200+) nor Hispanic American-owned businesses (disparity index of 185) exhibited substantial disparities for those projects.

3. Contract role. Many POC- and woman-owned businesses are small businesses, and thus, often work as subcontractors. For that reason, it is instructive to examine disparity analysis results separately for the prime contracts and subcontracts state agencies awarded during the study period. As shown in Figure 8-3, POC- and woman-owned businesses considered together exhibited substantial disparities for prime contracts (disparity index of 32) but not for subcontracts (disparity index of 126). Disparity indices differed by business group and contract role:

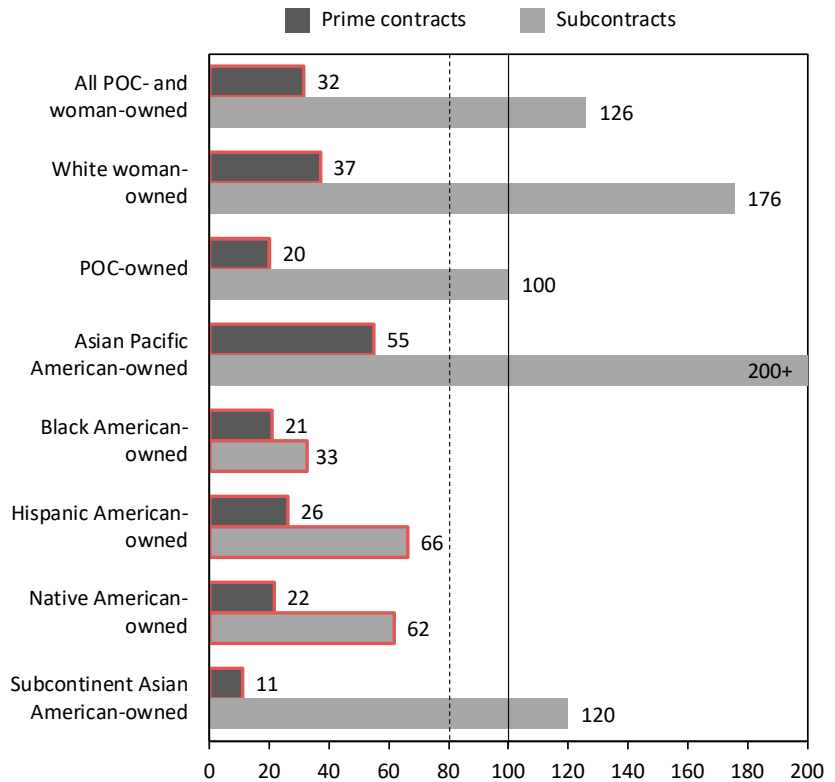
- All POC- and woman-owned business groups exhibited substantial disparities for prime contracts: white woman-owned businesses (disparity index of 37), Asian Pacific American-owned businesses (disparity index of 55), Black American-owned businesses (disparity index of 21), Hispanic American-owned businesses (disparity index of 26), Native American-owned businesses (disparity index of 22), and Subcontinent Asian American-owned businesses (disparity index of 11).
- Black American-owned businesses (disparity index of 33), Hispanic American-owned businesses (disparity index of 66), and Native American-owned businesses (disparity index of 62) exhibited substantial disparities for subcontracts. In contrast, Asian Pacific American-owned business (disparity index of 200+), Subcontinent Asian American-owned businesses (disparity index of 120), and white woman-owned businesses (disparity index of 176) did not show disparities for subcontracts.

4. Prime contract size. BBC examined disparity analysis results for POC- and woman-owned businesses separately for *large* prime contracts—construction and professional services contracts worth more than \$400,000 and non-professional services and goods contracts worth more than \$250,000—and *small* prime contracts—construction and professional services contracts worth \$400,000 or less and non-professional services and goods contracts worth \$250,000 or less—state agencies awarded during the study period to examine whether prime contract size was related to outcomes for POC- and woman-owned businesses for that work.

Figure 8-3.
Disparity analysis results
for DGS prime contracts
and subcontracts

Note:
 For more detail, see Figures E-7
 and E-8 in Appendix E.

Source:
 BBC disparity analysis.



As shown in Figure 8-4, POC- and woman-owned businesses considered together exhibited substantial disparities on both small (disparity index of 45) and large prime contracts (disparity index of 31). Disparity analysis results differed by group and contract size:

- All POC- and woman-owned business groups exhibited substantial disparities for small prime contracts: white woman-owned businesses (disparity index of 60), Asian Pacific American-owned businesses (disparity index of 4), Black American-owned businesses (disparity index of 26), Hispanic American-owned businesses (disparity index of 15), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 43).
- White woman-owned businesses (disparity index of 36), Asian Pacific American-owned businesses (disparity index of 60), Black American-owned businesses (disparity index of 21), Hispanic American-owned businesses (disparity index of 28), and Subcontinent Asian American-owned businesses (disparity index of 11) exhibited substantial disparities for large prime contracts. Native American-owned businesses (disparity index of 97) also exhibited a disparity for large prime contracts, but that disparity was not substantial.

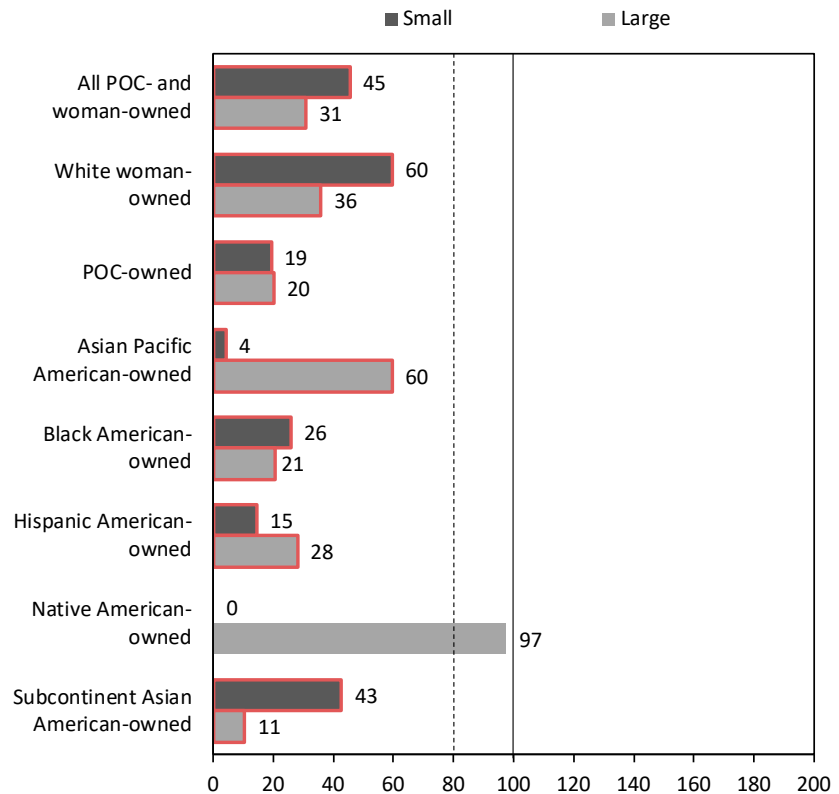
Figure 8-4.
Disparity analysis results for
large and small prime contracts

Note:

For more detail, see Figures E-9 and E-10 in Appendix E.

Source:

BBC disparity analysis.



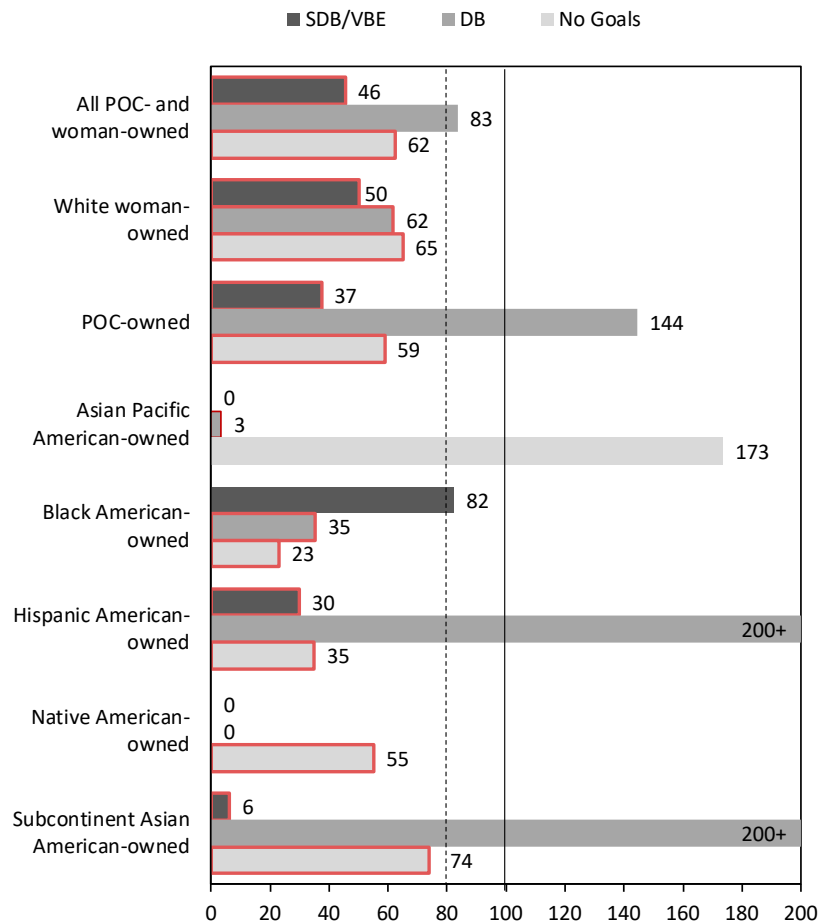
5. Goals. DGS uses race- and gender-conscious contract goals to encourage the participation of POC- and woman-owned businesses in projects state agencies award. BBC assessed differences in the outcomes of POC- and woman-owned businesses for projects state agencies award with the use of SDB/VBE contract goals (*SDB/VBE goals projects*); state-funded projects the Pennsylvania Department of Transportation (PennDOT) awards with the use of Diverse Business (DB) Program goals, which are race- and gender-neutral in nature (*DB goals projects*); and projects state agencies award without the use of any goals (*no goals projects*). As shown in Figure 8-5, POC- and woman-owned businesses exhibited substantial disparities on both SDB/VBE goals projects (disparity index of 46) and no goals projects (disparity index of 62). They also exhibited a disparity on DB goals projects (disparity index of 83), but that disparity was not substantial. Disparity analysis results differed by group and goal status:

- White woman-owned businesses (disparity index of 50), Asian Pacific American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 30), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 6) exhibited substantial disparities for SDB/VBE goals projects. Black American-owned businesses (disparity index of 82) exhibited a disparity for SDB/VBE goals projects, but that disparity was not substantial.
- White woman-owned businesses (disparity index of 62), Asian Pacific American-owned businesses (disparity index of 3), Black American-owned businesses (disparity index of 35), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities for DB goals projects. However, neither Hispanic American-owned businesses (disparity index of 200+) nor Subcontinent Asian American-owned businesses (disparity index of 200+) exhibited disparities for DB goals projects.

- White woman-owned businesses (disparity index of 65), Black American-owned businesses (disparity index of 23), Hispanic American-owned businesses (disparity index of 35), Native American-owned businesses (disparity index of 55), and Subcontinent Asian American-owned businesses (disparity index of 74) exhibited substantial disparities for no goals projects. However, Asian Pacific American-owned businesses (disparity index of 173) did not exhibit a disparity for those projects.

Figure 8-5.
Disparity analysis
results by goal status

Note:
For more detail, see Figures E-11, E-12, and E-13 in Appendix E.
Source:
BBC disparity analysis



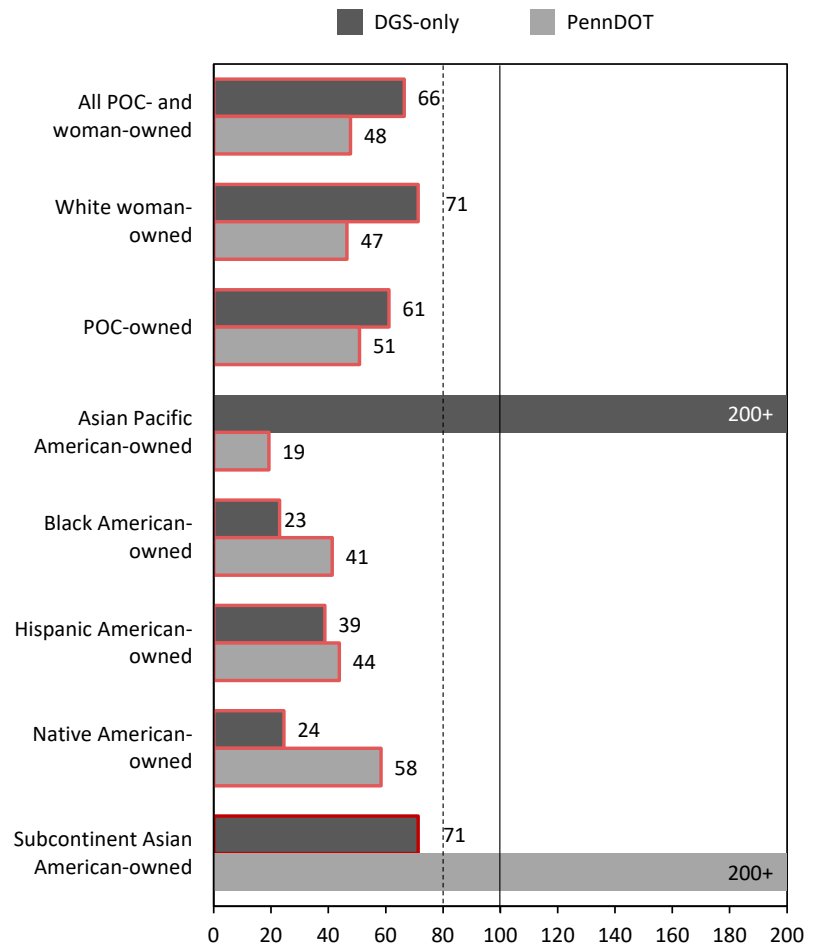
6. Agency. BBC examined disparity analysis results for POC- and woman-owned businesses separately for projects awarded by PennDOT and those awarded by all other state agencies (referred to below as *DGS-only projects*). As shown in Figure 8-6, POC- and woman-owned businesses considered together exhibited substantial disparities for DGS-only projects (disparity index of 66) and PennDOT projects (disparity index of 48). Disparity indices differed by business group and agency:

- White woman-owned businesses (disparity index of 71), Black American-owned businesses (disparity index of 23), Hispanic American-owned businesses (disparity index of 39), Native American-owned businesses (disparity index of 24), and Subcontinent Asian American-owned businesses (disparity index of 71) exhibited substantial disparities for DGS-only projects. However, Asian Pacific American-owned businesses (disparity index of 200+) did not show a disparity for that work.

- White woman-owned businesses (disparity index of 47), Asian Pacific American-owned businesses (disparity index of 19), Black American-owned businesses (disparity index of 41), Hispanic American-owned businesses (disparity index of 44), and Native American-owned businesses (disparity index of 58) exhibited substantial disparities for PennDOT projects. However, Subcontinent Asian American-owned businesses (disparity index of 200+) did not show disparities for that work.

Figure 8-6.
Disparity analysis
results for
DGS-only and
PennDOT projects

Note:
 For more detail, see Figures
 E-14 and E-15 in Appendix E.
 Source:
 BBC disparity analysis



C. Statistical Significance

Statistical significance tests allow researchers to assess the probability that any observed quantitative differences were due to *real* differences rather than to chance. In other words, a statistically significant difference is one that can be considered as statistically reliable. BBC used Monte Carlo analysis, which relies on repeated, random simulations of the data to assess the statistical significance of key disparity analysis results.

1. Overview of Monte Carlo. BBC used Monte Carlo simulations to randomly select businesses to “win” individual prime contracts and subcontracts (referred to generally as *contract elements*) included in disparity study analyses. For each contract element, the availability analysis provided information on businesses potentially available to perform that contract element based on type of work, contractor role, contract size, and other factors. Then, we randomly chose a business from the pool of available

businesses to win the contract element. The chance of a business from a particular business group winning the contract element was equal to the number of businesses from that group available for it divided by the number of all businesses available for it.

BBC conducted Monte Carlo simulations for all contract elements included in the disparity study. The output of the simulation for all the contract elements represented simulated participation of POC- and woman-owned businesses for all relevant state agency projects. The entire Monte Carlo simulation was then repeated 1 million times. The combined output from all 1 million simulations resulted in a probability distribution of the overall participation of POC- and woman-owned businesses if contracts and procurements were awarded randomly based only on the estimated availability of relevant businesses working in the local marketplace.

The output of Monte Carlo simulations represents the number of simulations out of 1 million that produced participation equal to or less than the actual, observed participation of POC- and woman-owned businesses in DGS work. If that number was less than or equal to 25,000 (i.e., 2.5% of the total number of simulations, or $p = .025$), then we considered the disparity index to be statistically significant at $\alpha = .05$, using two-tailed tests. If that number was less than or equal to 50,000 (i.e., 5% of the total number of simulations, or $p = .05$), then we considered the disparity index to be statistically significant at $\alpha = .10$, using two-tailed tests.

2. Results. BBC ran Monte Carlo simulations on all relevant state agency contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in Figure 8-7, results from the Monte Carlo analysis indicated that the disparity we observed for POC- and woman-owned businesses considered together on all relevant state agency contracts and procurements was statistically significant at $p < .05$. In addition, the disparities we observed for white woman-, Black American-, Hispanic American-, and Native American-owned businesses were also statistically significant at $p < .05$.⁴

Figure 8-7.
Statistical significance of disparities for all work

Note:
** Denotes statistical significance at the 95 percent confidence level.

Source:
BBC disparity analysis

Business Group	Disparity index	Probability that disparity is due to chance (p value)
POC-owned and woman-owned	62	0.00 **
White woman-owned	64	0.00 **
POC-owned	60	0.00 **
Asian Pacific American-owned	166	N/A
Black American-owned	26	0.00 **
Hispanic American-owned	41	0.00 **
Native American-owned	48	0.00 **
Subcontinent Asian American-owned	74	0.11

BBC also ran Monte Carlo simulations on DGS-only contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant separate from PennDOT work. As shown in Figure 8-8, results from the Monte

⁴ BBC did not observe a disparity for Asian Pacific American owned-businesses for all state agency projects considered together. As a result, we did not assess statistical significance for those businesses.

Carlo analysis indicated the disparity POC- and woman-owned businesses exhibited for DGS work was statistically significant at $p < .05$. In addition, the disparities exhibited by white woman-, Black American-, Hispanic American-, and Native American-owned businesses for that work were also statistically significant at $p < .05$. The disparity exhibited by Subcontinent Asian American-owned businesses was statistically significant at $p < .10$.⁵

Figure 8-8.
Statistical significance of disparities for DGS-only work

Note:

** Denotes statistical significance at the 95 percent confidence level.

Source:

BBC disparity analysis

Business Group	Disparity index	Probability that disparity is due to chance (p value)
POC-owned and woman-owned	66	0.00 **
White woman-owned	71	0.00 **
POC-owned	61	0.00 **
Asian Pacific American-owned	200+	N/A
Black American-owned	23	0.00 **
Hispanic American-owned	39	0.00 **
Native American-owned	25	0.00 **
Subcontinent Asian American-owned	71	0.08

BBC also ran Monte Carlo simulations on contracts and procurements that had no goals or programs applied to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in Figure 8-9, results from the Monte Carlo analysis indicated the disparity POC- and woman-owned businesses exhibited for no goals projects was statistically significant at $p < .05$. In addition, the disparities exhibited by white woman-, Black American-, Hispanic American-, and Native American-owned businesses for that work were also statistically significant at $p < .05$.⁶

Figure 8-9.
Statistical significance of disparities for no goals work

Note:

** Denotes statistical significance at the 95 percent confidence level.

Source:

BBC disparity analysis

Business Group	Disparity index	Probability that disparity is due to chance (p value)
POC-owned and woman-owned	62	0.00 **
White woman-owned	65	0.00 **
POC-owned	59	0.00 **
Asian Pacific American-owned	173	N/A
Black American-owned	23	0.00 **
Hispanic American-owned	35	0.00 **
Native American-owned	55	0.00 **
Subcontinent Asian American-owned	74	0.11

⁵ BBC did not observe a disparity for Asian Pacific American owned-businesses for DGS-only projects. As a result, we did not assess statistical significance for those businesses.

⁶ BBC did not observe a disparity for Asian Pacific American-owned businesses for no goals projects. As a result, we did not assess statistical significance for those businesses.

CHAPTER 9.

Business Programs

Chapter 9 provides an overview of the business programs the Commonwealth of Pennsylvania Department of General Services (DGS) uses to encourage the participation of small businesses as well as person of color (POC)-, woman-, veteran-, service-disabled veteran (SDV)-, disabled, and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses (referred to collectively as *diverse businesses*) in state agency contracting and procurement. BBC Research & Consulting (BBC) reviewed DGS' program measures in three parts:

- A. Program overview;
- B. Race- and gender-neutral measures; and
- C. Race- and gender-conscious measures.

A. Program Overview

DGS' Bureau of Diversity, Inclusion, and Small Business Opportunity (BDISBO) implements the Small Diverse Business (SDB) Program, which is designed to encourage the participation of POC-, woman-, disabled-, SDV-, and LGBTQ+-owned businesses in state agency contracts and procurements, and the Veteran Business Enterprise (VBE) Program, which is designed to encourage the participation of veteran- and SDV-owned businesses in state agency contracts and procurements. The Pennsylvania Department of Transportation (PennDOT), an executive agency of the Commonwealth, operates the Diverse Business (DB) Program to maximize diverse business participation on the state-funded public transportation projects it awards.

As part of its implementation of the SDB and VBE Programs, DGS has set overall aspirational goals for the participation of SDBs and VBEs in state agency work of 26.3 percent and 4.6 percent, respectively. To meet those goals, DGS uses a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures*. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an organization's contracting and are not limited to POC- and woman-owned businesses. In contrast, *race- and gender-conscious measures* are measures that are designed to specifically encourage the participation of POC-, woman-, or LGBTQ+-owned businesses in an organization's contracting (e.g., using race- or gender-based participation goals on individual projects).

B. Race- and Gender-Neutral Measures

DGS uses myriad race- and gender-neutral measures to encourage the participation of small and diverse businesses—including many POC- and woman-owned businesses—in state agency projects. The department uses the following types of race- and gender-neutral measures as part of its implementation of the SDB and VBE Programs:

- Advocacy and outreach efforts;
- Prompt payment;

- Technical assistance;
- Financing assistance;
- Mentor-Protégé Program;
- Small Business Reserve Program;
- Agency Liaison Program; and
- DB Program (PennDOT).

1. Advocacy and outreach efforts. DGS participates in various advocacy and outreach efforts, including participating in and hosting outreach events and distributing communications targeted to small and diverse businesses.

a. Outreach events. BDISBO’s outreach team attends and hosts various networking events, supplier forums, pre-bid conferences, trainings, and workshops. During these events, BDISBO shares information regarding policy, procurement, certification, and contract opportunities with the business community as well as legislators, procurement staff, agency project managers, key stakeholders, and the media. Recently, BDISBO has begun to host educational virtual networking events by industry in order to further enhance opportunities for the business community to meet the buyers responsible for procuring the specific goods or services they provide on a broader, geographical level.

b. Communications. DGS advertises state project opportunities through postings on its online procurement management system, Pennsylvania eMarketplace. DGS also sends courtesy e-mails directly to small businesses about contract opportunities that may correspond to their work types and interests. The department also sends e-mail notifications to small business owners to participate in pre-proposal meetings to meet the prime contractors that are bidding on those projects. Small businesses can register in the Pennsylvania Supplier Portal so that they can submit electronic bids for projects and manage their companies’ information. Small business owners can also opt into an e-alert subscription service through eMarketplace to receive e-mail notifications about bid opportunities that correspond to their work types. Starting in early 2023, each month, BDISBO issues a Notice of Forthcoming Procurements and a Notice of Forthcoming Construction Opportunities to more than 5,000 businesses and stakeholder organizations registered with BDISBO. In addition, DGS hosts state contracting workshops and trainings that are designed to help small and diverse businesses participate in state agency work. DGS advertises those workshops and other relevant business development events to community partners, business development organizations, its database of small business owners, and on its website.

2. Prompt payment. Pennsylvania procurement code requires DGS and other state agencies to pay prime contractors within 45 days, at most, of project completion. For property or services state agencies acquire from qualified small businesses, they are required to submit payments within 30 days of receiving proper invoices from vendors. If they fail to pay for delivered products or services within 30 days, they must pay interest penalties to vendors.¹ Additionally, the procurement code requires that all subcontractors, including small and diverse businesses, be paid within 14 days of when prime

¹ 4 Pa. Code § 2.35. Policy governing payments of interest penalties. (pacodeandbulletin.gov).

contractors receive payment for services from the Commonwealth.² For qualifying goods and services, prime contractors are required to pay SDB and VBE subcontractors within 10 days of receiving payment from the Commonwealth, according to a 2023 policy enacted by BDISBO.³ If a prime contractors fail to do so, subcontractors may bring action against their payment bonds.⁴

3. Technical assistance. DGS works with local partners, Chambers of Commerce, and Procurement Technical Assistance Centers (PTACs) across Pennsylvania to provide technical support and other training resources to small business owners interested in working with the Commonwealth.

a. Supplier Portal and e-Alert. Small businesses can register in the Pennsylvania Supplier Portal so that they can submit electronic bids for projects and manage their companies' information. Small business owners can also opt into an e-alert subscription service through eMarketplace to receive e-mail notifications about bid opportunities that correspond to their work type(s).

b. Training workshops. DGS conducts workshops across Pennsylvania designed to help small business owners understand how to do business with the Commonwealth. Those workshops cover topics such as how to self-certify as small businesses and verify themselves as small diverse businesses; how to obtain vendor numbers; and how to research business opportunities with the Commonwealth. At the workshops, DGS also provides information about the main types of procurement processes that the Commonwealth uses and highlights any changes to procurement procedures that encourage the participation of small businesses and SDBs. DGS hosts the workshops with a variety of partners, including local chambers of commerce, business organizations, and PTACs.

c. Certification assistance. DGS provides one-on-one assistance to small business owners who want to self-certify as small businesses or become verified as SDBs or VBEs with the Commonwealth. The department offers that assistance via telephone and through in-person training.

d. Procurement management system training. DGS offers training to all businesses about how to navigate and search for contract opportunities using eMarketplace. The department also helps prime contractors strategize about how to include SDBs and VBEs as part of their bids, quotes, and proposals.

4. Financing assistance. As part of the Pennsylvania Diverse Business Financing Initiative, the Commonwealth capitalizes revolving loan funds managed by local economic development service providers, including Certified Economic Development organizations and Community Development Financing Institutions. The initiative supports lending to diverse businesses, including Minority Business Enterprises; Woman Business Enterprises; Veteran Business Enterprises; Service-Disabled Veteran Business Enterprises; Disability Owned Business Enterprises; and Lesbian, Gay, Bisexual, and Transgender Business Enterprises.

5. Mentor Protégé Program (MPP). DGS implements the MPP to provide developmental assistance to certified small and diverse businesses to help them successfully bid and perform on state agency projects. The program aims to build capacity, facilitate knowledge transfer, and promote business

² Pennsylvania Procurement Handbook, Part 1, Chapter 18.

³ https://www.media.pa.gov/pages/dgs_details.aspx?newsid=176

⁴ Pennsylvania Procurement Handbook, Part 1, Chapter 38.

growth. Protégés can suggest a mentor business or request that DGS pair them with one. Both large businesses and small businesses can serve as mentors, and small and diverse businesses can serve as mentors to other small and diverse businesses. Mentor and protégé businesses enter into MPP Agreements, which define their relationships and any mentee development goals. MPP Agreements can last for up to two years.

6. Small Business Reserve (SBR) Program. The Commonwealth’s SBR program enables small businesses of similar size and resources (100 or fewer employees) to compete among themselves for specific state government contract opportunities as prime contractors. All Commonwealth agencies under the Governor’s jurisdiction are required to identify and target 15 percent of their total agency spend for SBR procurements. To facilitate achieving this target, BDISBO works one-on-one with agency liaisons and chief procurement officers to review upcoming solicitations, trends in spending, and networking opportunities to engage the small business community on a higher level. DGS posts data on a semiannual basis for each agency’s total operational award for SBR procurements.

7. Agency Liaison Program. The Agency Liaison Program evolved out of Governor Tom Wolf’s Executive Order 2015-11 which promotes diversity, inclusion, and small business opportunities. The Executive Order addresses the need for better agency coordination and a continuous focus on increasing opportunities for small and diverse businesses. As part of the program, 26 deputy secretary-level Agency Liaisons act as the official Agency points of contact working with BDISBO to implement and oversee the SBR, SDB, and VBE programs. Agency Liaisons are responsible for participating in quarterly trainings which cover policy education, inclusion strategies, and the sharing of best practices.

8. DB Program. PennDOT’s DB Program, which applies to state-funded PennDOT contracts and procurements, requires that bidders that do not anticipate self-performing projects to make good faith efforts (GFEs) to solicit participation on their project teams from DB-certified subcontractors. DBs include Disadvantaged Business Enterprises as well as POC-, woman-, veteran-, and SDV-owned businesses that have been verified as such by PennDOT. PennDOT does not establish contract-specific goals for DB participation on its state-funded public transportation projects but bidders must submit documentation of their GFEs as a contractual obligation when bidding on relevant projects.

C. Race- and Gender-Conscious Measures

As part of the SDB Program, DGS sets condition-of-award SDB contract goals on construction and professional services projects worth \$400,000 or greater and on non-professional services and supplies projects worth \$250,000 or greater. DGS is not required to establish an SDB contract goal on every project that meets those criteria, and the agency tailors goals to the circumstances of each project to which they are applied, depending on the type of work involved and the availability of SDBs to perform that work. Prime contractors must meet SDB contract goals at the time of bid by making subcontracting commitments with certified SDBs or by demonstrating genuine GFEs that they tried to include SDBs as part of their project teams but were unable to do so.

CHAPTER 10.

Implications and Considerations

The 2024 Commonwealth of Pennsylvania (Commonwealth) Disparity Study provides information related to outcomes for person of color (POC)-; woman-; veteran-; service disabled veteran (SDV)-; disabled; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses in state agency contracts and procurements. BBC Research & Consulting (BBC) summarizes key results from the study as well as their potential implications. We also present guidance the Commonwealth and the Department of General Services (DGS) should consider to further encourage the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in state agency work.

A. Key Results and Implications

BBC analyzed contract and procurement dollars state agencies awarded between July 1, 2017 and June 30, 2022 (*study period*) to calculate the participation (or, *utilization*) of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in state agency work; estimate the availability of those businesses for that work; and assess whether any disparities exist between participation and availability.¹ We also conducted quantitative and qualitative research on outcomes for POCs, women, veterans, SDVs, persons with disabilities, members of the LGBTQ+ community, and the businesses they own in Pennsylvania to assess whether any barriers exist in the larger marketplace that make it more difficult for those businesses to perform state work. That information will help the Commonwealth and DGS assess whether those businesses experience barriers as part of Commonwealth contracting processes and what types of measures they could use to help address those barriers effectively and in a legally defensible manner.

1. Availability for state agency work. The availability analysis indicates relatively high availability of Pennsylvania-based POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for the construction, professional services, and non-professional services and goods projects state agencies award. Figure 10-1 presents estimates of the availability of each relevant group of POC- and woman business for state work. Overall, the availability of those businesses considered together is 27.0 percent for state work. White woman-owned businesses account for most of that availability followed by Subcontinent Asian American-owned businesses and Black American-owned businesses. BBC also examined the overall availability of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work, the results for which are not shown in Figure 10-1. Those analyses indicated that the availability of veteran-owned businesses for DGS work is 2.6 percent, the availability of SDV-owned businesses is 3.8 percent, the availability of disabled-owned businesses is 0.6 percent, and the availability of LGBTQ+-owned businesses is 0.03 percent.

¹ BBC analyzed \$13.8 billion of relevant contracts and procurements state agencies awarded during the study period.

Figure 10-1.
Availability estimates for DGS and state-funded PennDOT work

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

Source:
 BBC availability analysis.

Business group	Availability
White woman-owned	15.5 %
Asian Pacific American-owned	0.6 %
Black American-owned	3.6 %
Hispanic American-owned	1.5 %
Native American-owned	0.1 %
<u>Subcontinent Asian American-owned</u>	<u>5.7 %</u>
Total POC-owned	11.5 %
Total POC- and woman-owned	27.0 %

BBC last conducted a disparity study for DGS in 2018. It is instructive to compare availability results for diverse businesses in state agency work between the 2024 and 2018 disparity studies to assess whether the availability of those businesses for state agency work has changed over time. As shown in Figure 10-2, the availability of several relevant business groups for state agency work—white woman-, Subcontinent Asian-, SDV-, and veteran-owned businesses—increased between the 2018 and 2024 disparity studies. The largest changes occurred for white woman- and Subcontinent Asian American-owned businesses.

Figure 10-2.
Availability estimates for DGS and state-funded PennDOT work from the 2024 and 2018 disparity studies

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

Source:
 BBC availability analysis.

SDB and VBE Business Group	Availability	
	2018 Disparity Study	2024 Disparity Study
White woman-owned	10.6 %	15.5 %
Asian Pacific American-owned	4.4 %	0.6 %
Black American-owned	4.3 %	3.6 %
Hispanic American-owned	2.0 %	1.5 %
Native American-owned	0.4 %	0.1 %
<u>Subcontinent Asian American-owned</u>	<u>0.4 %</u>	<u>5.7 %</u>
Total POC-owned	11.6 %	11.5 %
SDV-owned businesses	0.8 %	3.8 %
Disabled-owned businesses	0.4 %	0.6 %
LGBTQ+-owned businesses	0.01 %	0.03 %
Total SDB-owned	23.4 %	31.3 %
Total Veteran-owned	2.3 %	2.6 %

2. Participation of POC- and woman-owned businesses. The utilization analysis indicated relatively low participation of Pennsylvania-based POC- and woman-owned businesses in the contracts and procurements state agencies awarded during the study period. As shown in Figure 10-3, overall, state agencies awarded 16.8 percent of its relevant contract and procurement dollars to POC- and woman-owned businesses during the study period. The POC- and woman-owned business groups to which state agencies awarded the most dollars were white woman-owned businesses followed by Subcontinent Asian American-owned businesses and Black American-owned businesses. Additional analyses of the participation of POC- and woman-owned businesses in state agency work during the study period indicated that state agencies awarded most of those dollars to a relatively small number of

businesses. In total, state agencies awarded approximately \$1.7 billion to 434 different POC- and woman-owned businesses during the study period. However, only 36 of those businesses, or 8 percent of them, accounted for 75 percent of the corresponding contract and procurement dollars. BBC also examined the overall participation of veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for state agency work, the results for which are not shown in Figure 10-3. State agencies awarded 0.4 percent of relevant contract and procurement dollars to veteran-owned businesses, 0.3 percent to SDV-owned businesses, 0.04 percent to disabled-owned businesses, and 0.04 percent to LGBTQ+-owned businesses.

Figure 10-3.
Participation of POC- and woman-owned businesses in DGS and state-funded PennDOT work

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

Source:
 BBC utilization analysis.

Business group	Utilization
White woman-owned	9.9 %
Asian Pacific American-owned	1.0 %
Black American-owned	0.9 %
Hispanic American-owned	0.6 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	4.2 %
Total POC-owned	6.9 %
Total POC- and woman-owned	16.8 %

3. Disparities between participation and availability. The crux of the disparity study was to assess whether any disparities exist between the participation and availability of Pennsylvania-based POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses for DGS work. A *substantial disparity* between participation and availability—that is, a disparity where participation is 80 percent or less of availability—for a particular business group is interpreted by courts as an inference of discrimination against that group in the marketplace and often serves as evidence that the organization could consider using race- or gender-based measures to address corresponding barriers for that group. BBC observed substantial disparities between the participation and availability of all relevant POC- and woman-owned business groups—woman-owned businesses, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses—across different sets of state contracts and procurements, indicating that all relevant groups of POC- and woman-owned businesses might be considered eligible to participate in race- or gender-based measures the organization decides to continue using.

Figure 10-4 presents a visualization of various project sets for which relevant POC- and woman-owned business groups exhibited substantial disparities, as indicated by black circles. As shown in Figure 10-4, most relevant POC- and woman-owned business groups consistently showed substantial disparities for most—if not all—the project sets BBC examined as part of the disparity study. A notable exception was Asian Pacific American-owned businesses, which only showed substantial disparities for construction projects, prime contracts, and projects state agencies awarded with the use of condition-of-award goals for the participation of certified Small Diverse Businesses (SDBs) in that work. BBC also assessed whether veteran-, SDV-, disabled-, and LGBTQ+-owned businesses exhibited disparities between their participation and availability for state agency work, the results for which are not shown in Figure 10-4. Veteran-, SDV-, disabled-, and LGBTQ+-owned businesses all exhibited substantial disparities for all relevant state agency contracts and procurements considered together.

Figure 10-4.
Substantial disparities for DGS and state-funded PennDOT work

Contract set	Business group							
	All POC and white woman	White woman	All POC	Asian Pacific American	Black American	Hispanic American	Native American	Subcontinent Asian
All work	●	●	●		●	●	●	●
Construction	●	●	●	●	●	●	●	●
Professional services	●		●		●		●	●
Non-prof. svcs. and goods	●	●	●		●		●	●
Prime contracts	●		●	●	●	●	●	●
Subcontracts					●	●	●	
SDB/VBE goals	●	●	●	●		●	●	●
No goals	●	●	●		●	●	●	●

Notes: ● indicates substantial disparity (i.e., disparity index of 80 or less)

“All POC and white women” and “All POC” aggregate the participation and availability for relevant POC- and woman-owned business groups to assess whether the group as a whole exhibits a substantial disparity.

Source: BBC disparity analysis.

a. SDB/VBE goals. DGS uses contract goals to encourage the participation of certified SDBs and Veteran Business Enterprises (VBEs) in projects state agencies award. BBC assessed whether disparities for POC- and woman-owned businesses differed between projects state agencies awarded with the use of SDB/VBE contract goals (*SDB/VBE goals projects*) and projects state agencies awarded without the use of any goals (*no goals projects*). As shown in Figure 10-5, in general, POC- and woman-owned businesses actually exhibited larger disparities on goals projects than no goals projects. The only exception was Black American-owned businesses, which exhibited a substantial disparity on no goals projects but not on goals projects. Taken together, disparity analysis results for SDB/VBE goals projects and no goals projects suggest that the effectiveness of the SDB Program in encouraging the participation of POC- and woman-owned businesses in DGS work may be limited and that Black American-owned businesses benefit from the use of those goals more than other POC- and woman-owned business groups.

b. Statistical outliers. As part of the utilization analysis, BBC assessed the degree to which relevant contract and procurement dollars state agencies awarded to POC- and woman-owned businesses during the study period were spread across different businesses. That analysis indicated that 15.4 percent of the POC- and woman-owned businesses that participated in state agency work during the study period accounted for 75.0 percent of the corresponding contract and procurement dollars. An often observed characteristic of income and wealth data—which are very similar in nature to data on contract and procurement dollars—is that the underlying distributions are heavily skewed in the positive direction, usually caused by a small number of extreme values, or *statistical outliers*.^{2, 3} The presence of skewed distributions and statistical outliers can have substantial effects on measures of inequity, poverty, and disparities, sometimes masking evidence of disparities or inequities that truly exist for the rest of the

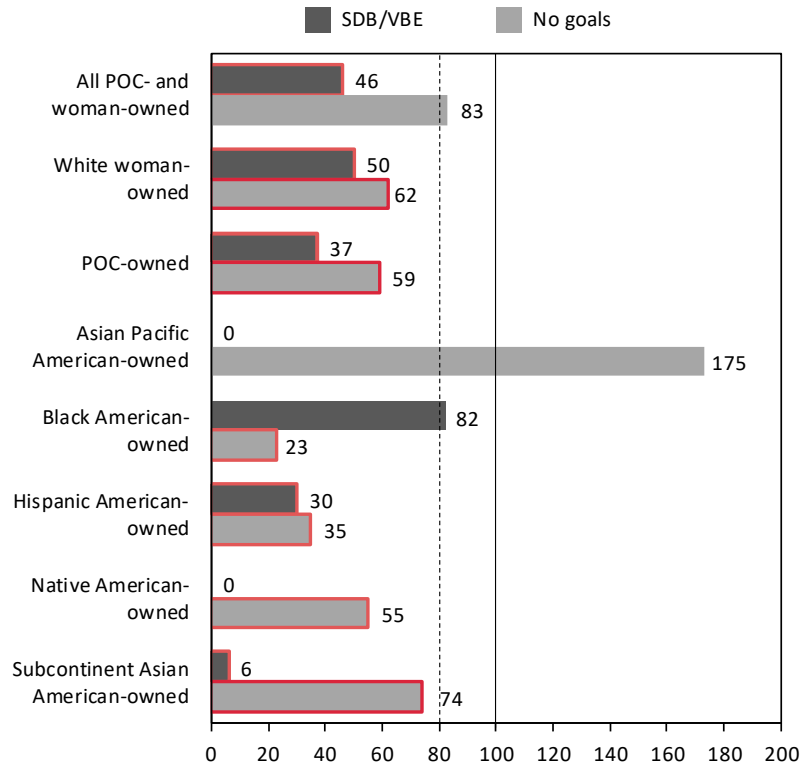
2 <https://thedocs.worldbank.org/en/doc/248311593193853901-0050022020/render/lecture12final.pdf>

3 Alvarez, E. and Garcia-Fernandez, R.M., et al. 2014. “The effect of outliers on the economic and social survey on income and living conditions.” *International Scholarly and Scientific Research & Innovation*, 8(10): 3276–3280.

population.^{4, 5} For that reason, as standard practice, researchers identify extreme values—i.e., *statistical outliers*—when working with such data and use well-accepted procedures to account for them.^{6, 7, 8, 9}

Figure 10-5.
Disparity indices for goals and no goals projects

Source:
BBC disparity analysis.



In accordance with best practices in social science, BBC assessed whether any POC- or woman-owned businesses to which state agencies awarded work during the study period represented statistical outliers based on the dollars state agencies awarded to them during the study period and what impact any such outliers had on disparity analysis results. That analysis indicated that one white woman-owned business met the criterion of being a statistical outlier using a *two-and-a-half standard deviation test*. After accounting for the dollars state agencies awarded to that firm during the study period, disparity analysis results did not change appreciably. Generally, the same groups exhibited substantial disparities for the same project sets even after accounting for the statistical outlier.

c. Comparisons to 2018 DGS disparity study. BBC last conducted a disparity study for DGS in 2018. It is instructive to compare disparity indices for POC- and woman-owned businesses in state agency work

⁴ Cowell, F.A., and Flachaire, E. (2007) "Income distribution and inequality measurement: The problem of extreme values." *Journal of Econometrics*, 141(2): 1044-1072.

⁵ Hlasny, V. and Verme, P. (2018). "Top incomes and inequality measurement: A comparative analysis of correction methods using the EU SILC data." *Econometrics*, 6(30).

⁶ Cowell, F.A. and Victoria Feser, M.P. 2002. "Welfare ranking in the presence of contaminated data," *Econometrica*, 70: 1221-1233.

⁷ Gravelle, H. and Sutton, M. 2006. "Income, relative income, and self-reported health in Britain 1979-2000," *Center for Health Economics Research Paper*, 10.

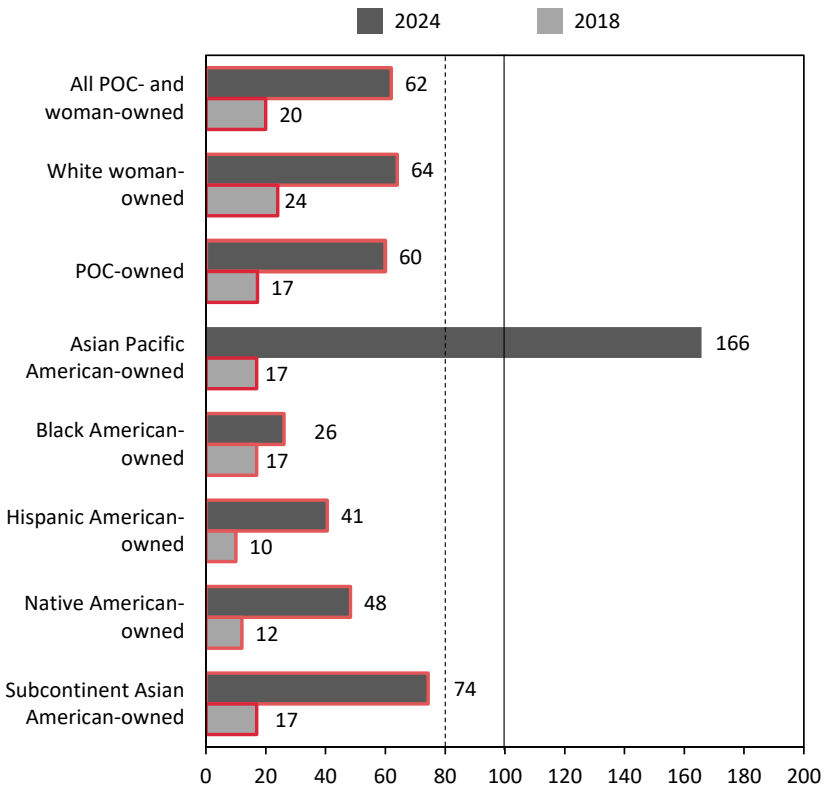
⁸ Grubbs, F.E. (1969). "Procedures for detecting outlying observations in samples," *Technometrics*, 11(1): 1-21.

⁹ Blaine, Bruce E. (2018). "Winsorizing." *The SAGE Encyclopedia of Educational Research, Measurement, and Evaluation*, 1817-1818.

between the 2024 and 2018 disparity studies to assess whether outcomes are improving for those businesses in DGS work over time. Figure 10-6 presents overall disparity indices for POC- and woman-owned business groups for all relevant state agency projects considered together from the 2024 disparity study and the 2018 disparity study. As shown in Figure 10-6, all relevant POC- and woman-owned business groups exhibited smaller disparities in 2024 than in 2018 (i.e., larger disparity indices in 2024), suggesting that outcomes for those businesses for state agency projects have improved in the six years since the 2018 disparity.¹⁰ Those improvements appear to be due primarily to increased participation of POC- and woman-owned businesses in DGS work, which has increased from 4.5 percent in the 2018 disparity study to 16.8 percent in the 2024 disparity study.

Figure 10-6.
Overall disparity indices
for DGS and state-
funded PennDOT work
from 2024 and 2018
disparity studies

Source:
 BBC disparity analysis from 2024
 and 2018 DGS disparity studies



d. Comparisons pre- and post-COVID-19. BBC also compared disparity study results for projects state agencies awarded prior to the COVID-19 pandemic (i.e., contracts and procurements they awarded between July 1, 2017 and December 31, 2019), and projects they awarded after the onset of the COVID-19 pandemic (i.e., contracts and procurements they awarded between January 1, 2020 and June 30, 2022). As shown in Figure 10-7, all relevant POC- and woman-owned business groups considered together exhibited smaller disparities prior to the pandemic than after the onset of the pandemic (i.e., larger disparity indices in 2024), suggesting that outcomes for those businesses for state agency projects declined after the onset of the pandemic. Those declines were due primarily to a substantial

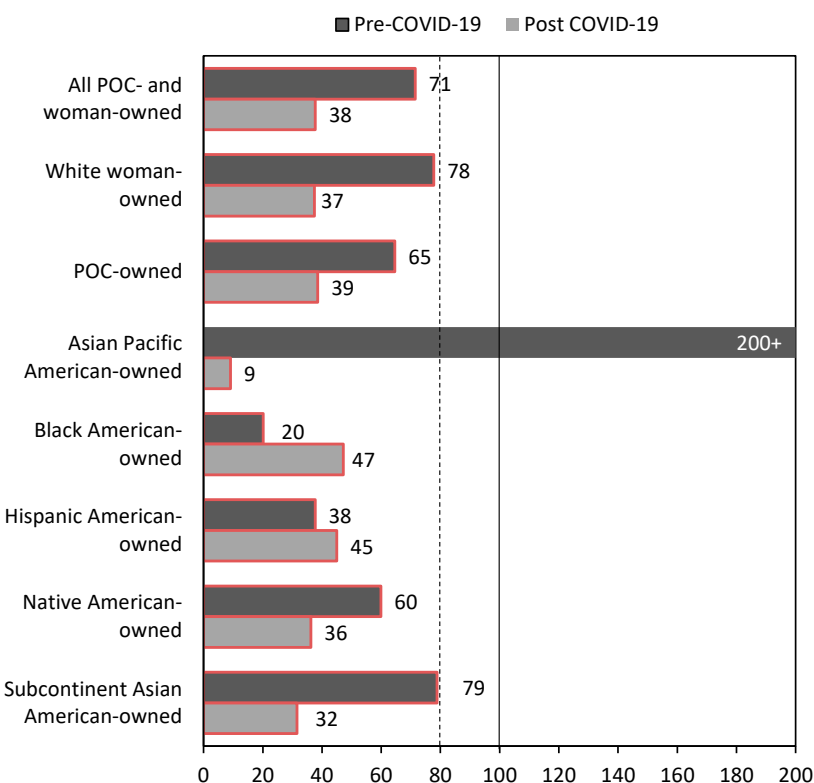
¹⁰ Because BBC did not assess disparities separately for Asian Pacific American- and Subcontinent Asian American-owned businesses in the 2018 disparity study, Figure 10-5 presents the disparity index of 17 we observed for all Asian American-owned businesses considered together for both Asian Pacific American-owned and Subcontinent Asian American-owned businesses for 2018 results.

decrease in the participation of POC- and woman-owned businesses in state agencies projects after the onset of the pandemic than before it.¹¹

Figure 10-7.
Disparity indices for
DGS and state-funded
PennDOT work pre-
and post-COVID-19

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

Source:
 BBC disparity analysis.



4. Barriers in the marketplace. The United States Supreme Court and other federal courts have held that analyses of conditions in a relevant geographic market area for POC- and woman-owned businesses are instructive in determining whether organizations’ use of race- and gender-conscious programs as part of their contracting processes are appropriate and justified. They have held that evidence of marketplace barriers for POCs, women, and POC- and woman-owned businesses helps to establish a *compelling government interest* for organizations to take remedial action to address those barriers and can help organizations narrowly tailor the use of such remedial measures to the business groups for which evidence of barriers exist. Barriers in the marketplace likely have important effects on the ability of POCs and women to start businesses in relevant industries and operate them successfully. Any difficulties they face in starting and operating businesses in the region may reduce their availability for state agency work and their ability to successfully compete for and perform that work.

BBC’s analyses of marketplace conditions in Pennsylvania indicate that POCs, women, POC- and woman-owned businesses, and other diverse individuals and businesses face various barriers in the region in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various other factors such as age, income, education, and familial status. In the next section, we present

¹¹ There was a smaller decrease in the availability of POC- and woman-owned businesses for state agency work during the same time period.

recommendations that might help the Commonwealth and DGS ameliorate some of those difficulties and help address the disparities we observed between the participation and availability of POC- and woman-owned businesses for state agency work.

B. Considerations

The disparity study provides substantial information the Commonwealth and DGS should examine as it considers potential refinements to its implementation of the SDB Program, the VBE Program, and other efforts to further encourage the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in state agency contracts and procurements. BBC presents several recommendations the Commonwealth and DGS should consider.

1. Overall SDB and VBE goals. In 2022, then-Governor Tom Wolf established an overall aspirational goal of 26.3 percent for the participation of SDBs and 4.6 percent for the participation of VBEs in state agency contracting and procurement. The Commonwealth should consider updating its overall SDB and VBE goals based on results from the availability analysis.¹² Figure 10-8 presents the combined availability of SDB business groups—that is, POC-, woman-, SDV-, disabled-, and LGBTQ+-owned businesses—for state agency work. As shown in Figure 10-8, the combined availability of SDB groups for state agency work is 31.3 percent, which the Commonwealth could consider as its new overall SDB goal. The availability of veteran-owned businesses for state agency work is 2.6 percent, which the Commonwealth could consider as its new overall VBE goal.¹³

Figure 10-8.
Availability of SDB businesses for DGS and state-funded PennDOT work

Note:

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

Source:

BBC availability analysis.

SDB business group	Availability %
POC-owned businesses	11.5%
Woman-owned businesses	15.5%
SDV-owned businesses	3.8%
Disabled-owned businesses	0.6%
LGBTQ+-owned businesses	0.03%
Total	31.3%

The Commonwealth could also examine various factors to determine whether adjustments to the 31.3 percent figure for SDBs and the 2.6 percent figure for VBEs are warranted to account for any characteristics of the Pennsylvania marketplace that might affect the ability of diverse businesses to compete for or participate in state agency work in the future. For example, the Federal Disadvantaged Business Enterprise Program sets forth several factors organizations could consider when assessing whether to adjust its base figure:

- Past participation of SDBs and VBEs in its work;

¹² Setting an overall SDB goal is not a race- and gender-conscious measure, because it is not technically a program measure at all. Instead, it represents an overall, aspirational objective that would guide various individual measures the Commonwealth might use to encourage diverse business participation in its work, each of which would either be race- and gender-neutral, or if appropriate, race- and gender-conscious in nature.

¹³ Although SDV participation can be counted toward attainment of VBE goals, the availability of potential SDVs factors into the overall SDB goal and not into the overall VBE goal.

- Information related to employment, business ownership, education, training, and unions;
- Information related to financing, bonding, and insurance; and
- Other relevant information.

If the Commonwealth decides to make an adjustment to either of its goal figures, it would have to decide which factors it would consider in making an adjustment, the direction of the adjustments, and the magnitude of the adjustments based on its assessment of relevant factors.

2. SDB contract goals. As part of its implementation of the SDB Program, DGS sets contract-specific goals for the participation of certified SDBs in certain construction and professional services contracts and procurements worth \$400,000 or greater and non-professional services and goods contracts and procurements worth \$250,000 or greater that state agencies award.¹⁴ Because the use of SDB contract goals is a race- and gender-conscious measure, agencies must ensure their use meets the requirements of the *strict scrutiny* standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring their use is *narrowly tailored*. In addition, prior to using SDB contract goals, DGS must consider whether it has maximized its use of race- and gender-neutral measures, including fully leveraging existing race- and gender-neutral measures and whether additional measures might further encourage the participation of POC- and woman-owned businesses in state agency work without the use of race and gender classifications.

a. Eligibility for participation. Because DGS already uses myriad race- and gender-neutral measures to encourage the participation of small and diverse businesses, including many POC- and woman-owned businesses, in its work, and because those measures have not addressed disparities for POC- and woman-owned businesses, the agency might consider continuing to use SDB contract goals to award certain state agency projects. To do so, DGS would continue to set goals on individual projects based on the availability of SDBs (including POC- and woman-owned businesses) and VBEs for the types of work involved in the project, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with *eligible* SDBs and VBEs as part of their bids or by demonstrating good faith efforts to do so.

BBC assessed disparity analysis results for all relevant POC- and woman-owned business groups separately for construction, professional services, and non-professional services and goods projects state agencies awarded during the study period without the use of SDB contract goals. Those results are the best indicator of outcomes for POC- and woman-owned businesses for projects state agencies awarded using only race- and gender-neutral measures, and thus, represent a useful assessment of which business groups DGS might consider eligible to participate in its SDB goal program. As shown in Figure 10-9:

- All relevant race and gender groups—Asian Pacific American-, Black American-, Hispanic American-, Native American-, Subcontinent Asian American-, and white woman-owned

¹⁴ DGS also sets contract specific goals for the participation of certified VBEs; however, these goals are not race- and gender-conscious in nature.

businesses—exhibited substantial disparities on the construction projects state agencies awarded during the study period without the use of SDB goals.

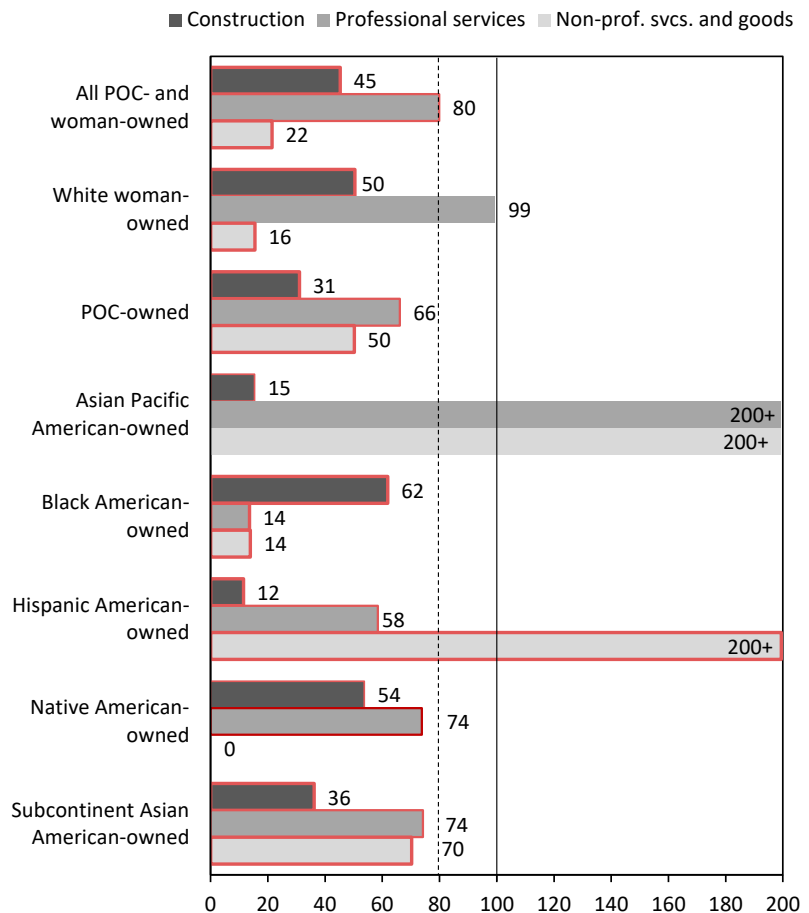
- Only Black American-, Hispanic American-, Native American-, and Subcontinent Asian American-owned businesses exhibited substantial disparities on the professional services projects state agencies awarded during the study period without the use of SDB goals.
- Only white woman-, Black American-, Native American-, and Subcontinent Asian-American owned businesses exhibited substantial disparities on non-professional services and goods projects state agencies awarded during the study period without the use of SDB goals.

If DGS bases its decisions on which groups are eligible to participate in its SDB contract goals program based on the results presented in Figure 10-9, then it should consider deeming all relevant race and gender groups as eligible to participate in the goals program for construction projects; only Black American-, Hispanic American-, Native American-, and Subcontinent Asian American-owned businesses as eligible to participate in the goals program for professional services projects; and white woman-, Black American-, Native American-, and Subcontinent Asian-American owned businesses as eligible to participate in the goals program for non-professional services and goods projects.

Figure 10-9.
Disparity indices for no goals projects by industry

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

Source:
BBC disparity analysis.



As an alternative to the above approach, some organizations base their decisions on which groups are eligible to participate in their race- and gender-conscious goals programs on disparity analysis results for all no goals projects considered together, regardless of industry. If DGS chooses to base eligibility

decisions on all no goals projects considered together, then, as shown in Figure 10-4, it would consider Black American-, Hispanic American-, Native American-, Subcontinent Asian-American, and white woman-owned businesses as eligible to participate in the SDB goals program.

b. Effectiveness of SDB Program. Disparity analysis results indicate that the SDB Program appears to only benefit one group of businesses: Black American-owned businesses, which exhibit a substantial disparity for projects state agencies award without the use of SDB goals but do not exhibit a substantial disparity for projects state agencies award with the use of those goals. All other POC- and woman-owned business groups show substantial disparities for projects state agencies award with the use of those goals. DGS should consider ways to promote the participation of other relevant business groups as part of projects they award with the use of SDB goals, perhaps by emphasizing all the business groups eligible to participate in the SDB goals program in solicitation documents.

c. Race/ethnicity data. DGS currently does not collect or maintain information on the race/ethnicity of the owners of SDB-certified businesses. To more accurately monitor the participation of POC- and woman-owned businesses in state agency work and to properly tailor the use of SDB contract goals to those business groups that exhibit substantial disparities, DGS should consider collecting information on the race/ethnicity of the owners of certified SDBs. The department can begin that process by using information BBC collected as part of the availability and utilization analyses related to the race/ethnicity of business owners and then augment that information by conducting short surveys with remaining SDB-certified business representatives to collect race/ethnicity information about their owners.

3. Other guidance. Based on our analysis of DGS policies and programs, as well as feedback we collected from stakeholders, BBC identified several procurement and contract administration policies and supportive services the agency should consider refining to help increase the participation of POC- and woman-owned businesses in state agency work. The considerations below are all race- and gender-neutral in nature—that is, they might help make it easier for all businesses, or all small businesses, to participate in state agency work, regardless of the race or gender of their owners.

a. Small business set asides. Disparity analysis results indicated substantial disparities for all relevant business groups on prime contracts state agencies awarded during the study period, regardless of size.¹⁵ In addition, as part of in-depth interviews and public meetings, several business owners indicated that small business set asides would help businesses enter the government sector and build their capacities. As part of the anecdotal information we collected, two business owners stated:

"We have submitted bids and have never been chosen. ... We are a small business and will never win a contract as a low bidder going against multimillion dollar asphalt companies."

"When I'm talking with the state government, if they have a program where they can identify and segregate these bids that can be bid only by small minority businesses, that will help. ... I spend time to get the bid prepared and [I am a] small minority business. And then the other big companies provide the same bid. So, I'm the loser."

¹⁵ The only exception was Native American-owned businesses, which did not show a substantial disparity for large prime contracts.

DGS currently implements the Small Business Reserve (SBR) Program, which enables small businesses (defined as businesses with 100 or fewer employees) to compete exclusively among themselves for specific state agency projects as prime contractors. State agencies are required to identify and target 15 percent of their total agency spend for SBR opportunities. DGS could consider expanding its target for such opportunities or setting aside all prime contracts under a certain value threshold exclusively for small business bidding to encourage the participation of small businesses, including many POC- and woman-owned businesses, as prime contractors in state agency work. The expanded use of small business set asides could help small businesses work directly with DGS and build the technical skills and capacity to perform as prime contractors on larger projects over time.

b. Microbusiness program. For certain industries, United States Small Business Administration (SBA) size thresholds for small businesses allow gross receipts of up to \$47 million. Anecdotal evidence suggests that, due to the broad range of revenues set forth by the SBA, smaller, *microbusinesses* are unable to compete with larger small businesses. DGS should consider adding an additional certification classification for microbusinesses with smaller revenue requirements. For example, the State of California Department of General Services has a microbusiness program (implemented as a subset of the agency’s small business program) for businesses with gross annual receipts of \$5 million or less. In addition, the San Francisco Bay Area Rapid Transit District has a Micro Small Business Entity certification for businesses whose average gross receipts over the prior three years do not exceed \$10 million for construction or \$6 million for professional services, non-professional services, and goods, which are thresholds DGS could consider. The organization could then add preferences and benefits exclusive to microbusinesses, including proposal points, bid reductions, or setting aside certain opportunities exclusively for microbusiness competition (e.g., contracts under a certain threshold, such as \$100,000).

c. Data collection. DGS does not collect comprehensive information on subcontractors that participate in state agency projects. The department should consider collecting subcontract data for all subcontractors regardless of the race or gender of their owners or certification status on all projects, including:

- Associated prime contract numbers (e.g., purchase order or contract numbers);
- Subcontractor names, addresses, phone numbers, and email addresses;
- Types of associated work; and
- Award and paid-to-date amounts.

DGS should consider collecting those data at the time of award and requiring prime contractors to submit data on the payments they make to subcontractors as part of monthly invoicing. Doing so will improve the agency’s monitoring of the participation of small businesses, including POC- and woman-owned businesses—regardless of certification—in its work and could also help the department identify future subcontracting opportunities for those businesses as part of state agency projects. Collecting comprehensive subcontract data might require upgrading to a different data management system that allows DGS to collect and maintain that information efficiently and effectively.

d. Vendor selection. Comments from in-depth interviews indicate that the Commonwealth’s contract and evaluation requirements often favor larger companies and inhibit the ability of small businesses or

sole proprietorships to win work with the organization. In addition, qualitative evidence indicated that stakeholders perceive state agencies to award work to a limited number of repeat vendors. For example:

"Most of the contracts go to the larger companies and we haven't received any traction. For the past 20 years, all bigger projects go to the bigger companies, it seems like the bigger companies have connections and get all the work."

"I think that sometimes work goes out for bid, but they already have chosen the company they want to work with and other businesses are not even looked at. They only go out to bid because they are required to."

"Well, when we became a disadvantaged business, you call people up and people are hesitant to use you because you're new. So that was where I felt like we struggled because we were reaching out to these firms and saying, 'Hey, we're here and we can do this.' And we didn't get the response that we were hoping to get."

In addition, results from the utilization analysis indicated that 15 percent of all POC- and woman-owned businesses that participated in state agency projects during the study period were awarded 75 percent of all the dollars associated with that work. DGS should consider reviewing its evaluation criteria to ensure they are not unduly restrictive for small businesses or businesses that have not worked with state agencies in the past. In addition, DGS should consider expanding its vendor pool through targeted advertising and outreach and revising evaluation criteria and policies to encourage the use of vendors with which state agencies or prime contractors have never worked.

e. Bid process. As part of in-depth interviews and public meetings, business owners and representatives discussed barriers they have experienced as part of Commonwealth bid processes, such as excessive paperwork, lack of training to navigate the process, and state agencies' timelines for awarding contracts and procurements. For example:

"I think the requirements that they ask for is, a lot of times, unreasonable. It doesn't cater to a small business and most government stuff is challenging. Just to even put up a bid, you got to fill out so much stuff and you got to submit a full package, and [it is] very time-consuming. You don't have time to do that, because you're trying to bid on other business, and you're trying to play some sort of numbers game."

"The whole bidding process is generally a long, drawn-out process. ... No particular item comes to my mind other than just the drawn-out process for something that just takes so long. When I quote stuff for the state, I might be quoting it for now for at the end of the year. And there's so much time in between that things change. So generally, when you quote something for the state, you inflate your numbers because everything just takes damn long to get done. And so, me, as a taxpayer, I end up paying more from all these contractors that are charging more to the state because it's not as streamlined as it can be or should be."

"We have found it to be difficult to obtain the contract or pre-qualify for DGS contracts. Access to DGS websites and the ability to bid on DGS [contracts] has been difficult. We don't know how to register as a business to bid."

I don't bid on projects because it's so convoluted. It's written where it's 20 pages long for something that's just one simple thing."

The Commonwealth should examine ways to streamline the paperwork required for bidding and contract administration. The organization should also consider ways to minimize the time between bid and proposal due dates, when the organization awards projects, and when projects start. In addition, DGS should consider providing guidance on preparing and submitting bids and proposals, offer trainings on how to interpret evaluation criteria, and provide feedback to unsuccessful bidders.

f. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many POC- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on government projects, particularly when they work as subcontractors or suppliers. Many businesses also commented that having capital on hand is crucial to business success and can often be a challenge for small businesses. For example:

"Prompt payment is a big [barrier], especially as a subconsultant, as we have limited control as when the primes submit their invoice and when they pay us."

"Another payment issue that we have experienced is the inability to be paid (through DGS) when the Commonwealth budget was not passed prior to July 1. Several years ago, we were expected to continue to provide services even though it took over six months for the state to pass a budget and even longer for us to be paid."

"[Because of delayed payment,] you're unable to pay vendors, you're unable to pay your loans, you're unable to pay your lines of credit, you're unable to bid additional work. It is a nasty slide."

The Commonwealth should consider reviewing and strengthening its current prompt payment policies to ensure timely payment to prime contractors and from prime contractors to subcontractors or suppliers, including working closely with the Pennsylvania Treasury Department to ensure payments are processed as efficiently as possible. The Commonwealth should consider making efforts to further enforce prompt payment requirements, including enforcing internal late fee penalties for delayed payments to prime contractors and requiring prime contractors to remit late fees for delayed payments to subcontractors for which they are responsible. To better track those payments, DGS could consider creating electronic systems to track and confirm subcontractor payments to all subcontractors, regardless of certification status.

g. Finance, bonding, and insurance assistance. As part of the qualitative evidence process, many business representatives noted difficulties obtaining financing to start, grow, or expand their businesses. Many businesses also commented that having access to capital is crucial to business success, but obtaining financing can be challenging for small businesses. Business owners and representatives also discussed how limited access to financing affects their ability to obtain inventory, materials, and staff prior to starting a project. For example:

"I don't think there is any bank which [wants to] help or support a new business. They all want to have some businesses two years old at the least, and then they have some reputation, then only you will be able to get a line of credit or finance from them. But what

a business needs the most when they're starting [is financing], [and] I don't think there is any bank who's supporting new businesses."

Currently, as part of the Pennsylvania Diverse Business Financing Initiative, the Commonwealth capitalizes revolving loan funds managed by local economic development service providers to support lending to diverse businesses. The Commonwealth and DGS could also consider providing guarantees for loans, encouraging contract-backed loans with lenders, or facilitating lender fairs. DGS could develop such programs with the support of local, regional, or statewide financial institutions or other business assistance organizations. For example, the City of Los Angeles, the SBA, and the Maryland Department of Transportation (DOT) have programs providing loan guarantees. In addition, the Mississippi Development Authority, the Arkansas Economic Development Commission, and the City of Philadelphia implement contract-backed loan programs. The Maryland DOT also provides term loans, lines of credit, and equity investments, which could serve as another model for the Commonwealth's consideration.

As part of the anecdotal evidence process, several business representatives also reported that bonding requirements were a barrier for small businesses, particularly POC- and woman-owned businesses. Small businesses typically obtain bonds at higher rates than other businesses, making it more difficult for them to access bonding opportunities and compete for relatively large projects. For example:

"Bonding's another issue. It's a catch-22. 'We'll bond you if you show us some work.' 'Well, I can't get to work. I need to be bonded.' 'Well, we're not taking a chance on a company that's not proven themselves.' And the thing that I've just recently found out that hinders us is DGS actually has a law on the books, 9605, [regarding] bonding and progress payments. They could put that on the contracts stating that except as provided the purchasing agency may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from veteran-owned small businesses. And I've yet to see that on a DGS contract anywhere, even though it's written [in the law]."

DGS could consider partnering with financial institutions to set standardized bonding rates at more equitable levels for its vendors. Some examples of bonding assistance programs include the SBA bonding program, the Los Angeles Contractor Development and Bonding Program, the Maryland DOT and Maryland Small Business Development Financing Authority Management Group's Bonding and Contract Financing Program, and the Ohio Development Services Agency's Minority Business Bonding Program. In addition, DGS could consider reducing bonding requirements to the extent the law allows. Currently, 51 Pa. C.S. § 9605 allows state agencies to reduce bonding requirements or waive them entirely for projects worth less than \$25,000, but only for small veteran- and SDV-owned businesses. The Commonwealth would have to expand 51 Pa. C.S. § 9605 to extend its benefits to all small businesses. In addition, it could consider increasing the maximum project value for waiving bonding requirements to further extend benefits of the program (e.g., projects worth less than \$100,000).

Business representatives who shared qualitative information with the study team also discussed difficulties they have encountered with insurance requirements on many public sector projects, including those let by state agencies. For example:

"The barrier to [insurance] is the price. It can be very expensive to acquire the insurance before you get a contract and you're expected to get everything from limited liability, professional

liability, crime insurance, cyber insurance. Currently [we] have about 11 different insurances. The policies range from \$250,000 to \$2 million each. So, on an annual basis we're spending close to, it's almost \$30,000 in insurance. Which is a huge barrier for any business because that's just a lot of capital outlay and you're not really getting anything back from that, it just goes. Ninety-nine percent of the time you're not going to use it. And I think a lot of businesses are scared to go out for big contracts because they know [they're] going to have to lay out \$30,000 or so, because when you have to pay these premiums, some of them you can pay monthly, but at the higher level, they expect your annual premium to be paid upfront. ... And that's just so that you can demonstrate that you have the insurance when you deliver an RFP, and that is no guarantee that you're going to get a contract. So once you get one, it's a lot easier because you have the insurance in place. But once, if you don't have one yet, it is a big risk for a business to have to lay out that much insurance cost."

The Commonwealth should consider the ratio of insurance required and the risk associated with a project to better ensure that insurance requirements are in line with projected risk. DGS could also consider allowing small businesses to build the cost of additional insurance into their bid or develop relationships with insurance companies to help facilitate more equitable rates for small businesses to access insurance.

h. Personnel and labor. Several business owners and managers mentioned difficulties finding personnel and labor, especially potential staff members who have experience in their industries. For example:

"I have a huge problem finding qualified personnel. I have no problem retaining them, but I'm a small business. I only have two full-time and a few part-time people. But I cannot find candidates that are qualified for this type of smaller business. Mostly they want salaries of major corporations. So it doesn't make sense. There's just never a good fit."

"[Finding talent] is extremely difficult, being a small business. And then on top of that, being a minority-owned business. And so often people feel a little bit more secure with a larger firm. Well, it's just difficult to find the people that you need when you need them. And I think everyone is experiencing that."

DGS should consider coordinating with Pennsylvania organizations that implement existing programs that focus on developing staffing and labor connections to help businesses identify and recruit qualified staff. Prior to building those relationships, the department should ensure that the organizations focus on the types of work for which state agencies contract and that vendors are sufficiently aware of the department's relationships with those organization and opportunities to use their programs.

APPENDIX A.

Definitions of Terms

Appendix A defines terms useful to understanding the 2024 Commonwealth of Pennsylvania’s Department of General Services (DGS) Disparity Study report.

Business

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

Commercially Useful Function

A commercially useful function refers to a business performing real and distinct work for which it has demonstrable skills, experience, and responsibilities. Businesses that prime contractors use to meet contract goals are often required to demonstrate that they will serve commercially useful functions on applicable projects.

Commonwealth of Pennsylvania (Commonwealth)

The Commonwealth comprises various agencies, departments, and offices to oversee the functions and management of Pennsylvania.

Compelling Governmental Interest

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

Construction

Construction refers to the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. “Buildings, structures, or other real property” includes bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, channels, and other structures.

Consultant

A consultant is a business that performs professional services work.

Contract

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

Contract Goals

Contract goals are often a race- or gender-conscious effort whereby organizations set percentage goals for the participation of person of color (POC)- or woman-owned businesses in individual contracts or procurements they award. As a condition of award, prime contractors have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified businesses, or, if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so. The use of contract goals as they apply to POC- and woman-owned businesses must meet the strict scrutiny and intermediate scrutiny standards of constitutional review, respectively.

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction work.

Control

Control means exercising management and executive authority over a business.

Custom Census Availability Analysis

A custom census availability analysis is one in which researchers attempt surveys with potentially available businesses working in the RGMA to collect information about their characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts an agency actually awarded during the study period to assess the percentage of contract and procurement dollars one might expect an agency to award to a specific group of businesses. A custom census approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes various characteristics of businesses and agency projects into account.

Department of General Services (DGS)

DGS provides services to support the business operations of all Commonwealth agencies. As part of its responsibilities, DGS oversees the procurement of necessary goods and services that Commonwealth agencies require to operate effectively and efficiently. One of DGS' functions is to operate the Small Diverse Business Program.

Disabled-owned Business

A disabled-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves as having physical or mental impairments that substantially limit major life activities. A business does not have to be certified as a Small Diverse Business to be considered a disabled-owned business in this study.

Disparity

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

Disparity Analysis

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

Disparity Index

A disparity index, or disparity ratio, is computed by dividing the actual participation of a specific group of businesses in agency work by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Dun & Bradstreet (D&B)

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

Firm

See *business*.

Industry

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

Inference of Discrimination

An inference of discrimination is the conclusion that businesses whose owners identify with particular race or gender groups suffer from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations sometimes use race- or gender-conscious measures to address barriers affecting those businesses.

Intermediate Scrutiny

Intermediate scrutiny is the legal standard an agency's use of gender-conscious measures must meet to be considered constitutional. It is more rigorous than the rational basis test, which applies to business measures unrelated to race or gender, but less rigorous than the strict scrutiny test, which applies to business measures related to race. In order for a gender-conscious program to comply with intermediate scrutiny, it must serve an important government objective, and it must be substantially related to achieving that objective.

Lesbian, Gay, Bisexual, Transgender, Queer, or Other Sexual or Gender Orientations (LGBTQ+)-owned Business

An LGBTQ+-owned business is a business with at least 51 percent ownership and control by individuals who identify as lesbian, gay, bisexual, transgender, queer, intersex, or asexual. A business does not have to be certified as a Small Diverse Business to be considered an LGBTQ+-owned business in this study.

Narrow Tailoring

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

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

Non-professional Services and Goods

A non-professional services and goods business engages in providing goods, supplies, or services that typically do not require a specific educational background, license, or high degree of expertise and training to perform. Examples of non-professional services and goods industries include cleaning and janitorial services and supplies; office equipment and supplies; printing, copying, and mailing services; safety equipment; security systems; security guard services; uniforms and apparel; automobiles; and vehicle repair services.

Participation

See *utilization*.

Person of Color (POC)

A POC is an individual who identifies with one of the following race groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other non-white race group.

POC-owned Business

A POC-owned business is a business with at least 51 percent ownership and control by individuals who identify with one of the following race groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other POC race group. The study team considered businesses owned by POC men or POC women as POC-owned businesses. A business does not have to be certified as a Small Diverse Business to be considered a POC-owned business in this study.

Prime Consultant

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

Prime Contract

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

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for an end user, such as the Commonwealth.

Procurement

See *contract* or *project*.

Professional Services

Professional services refers to the professional, scientific, or technical services that require a high degree of expertise and training. Frequently—but not always—individuals that perform professional services are required to have a license or specific educational background. Examples of professional services include legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.

Project

A project refers to a construction; professional services; or non-professional services and goods endeavor an agency bids out. A project could include one or more prime contracts and corresponding subcontracts. The study team sometimes uses the term project interchangeably with *contract* or *procurement*.

Qualitative Information

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

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures designed to increase the specific participation of POC- and woman-owned businesses in government work. Businesses owned by individuals who identify with particular race groups might be eligible for such measures whereas others would not. Similarly, businesses owned by individuals who identify as women might be eligible for such measures whereas businesses owned by individuals who identify as men would not. An example of race- and gender-conscious measures is an organization's use of POC- or woman-owned business contract goals in awarding individual contracts or procurements.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures designed to remove potential barriers for businesses attempting to perform work with an agency, regardless of the race or gender of the owners. Race- and gender-neutral measures might include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, and establishing programs to assist start-ups.

Rational Basis

Government agencies that implement contracting programs that rely only on race- and gender-neutral measures must show a rational basis for their programs. Showing a rational basis requires agencies to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which agencies award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires analyses to focus on the RGMA. The RGMA for the disparity study is the state of Pennsylvania.

Service-disabled Veteran (SDV)-owned Business

An SDV-owned business is a business with at least 51 percent ownership and control by individuals who are veterans of the United States military, and who have a physical or mental disability that resulted directly from their service in the U.S. military. A disability is defined as an impairment that substantially limits one or more major life activities. A business does not have to be certified as a Small Diverse Business to be considered an SDV-owned in this study.

Small Diverse Business (SDB) Program

The SDB Program is operated by DGS and is designed to encourage the participation of POC-, woman-, veteran-, SDV-, disabled-, and LGBTQ+-owned businesses in Commonwealth contracting.

State-funded Project

A state-funded project is any contract or procurement wholly funded by state sources. That is, the project does not include any federal funds.

Statistically Significant Difference

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

Strict Scrutiny

Strict scrutiny is the legal standard a government agency's use of race-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of

measures that might impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, an organization must:

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The study period for the disparity study was July 1, 2017 to June 30, 2022. The Commonwealth had to have awarded a contract or procurement during the study period for it to be included in the study team's analyses.

Subcontract

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

Subcontractor

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

Subindustry

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

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that the actual participation of a specific business group in agency work is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against particular business groups. Government organizations sometimes use substantial disparities as justification for the use of race- or gender-conscious measures to address barriers affecting certain groups.

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts or procurements the Commonwealth awarded to a specific group of businesses during the study period. The study team uses the term *utilization* synonymously with *participation*.

Veteran-owned Business

A veteran-owned is a business with at least 51 percent ownership and control by individuals who are veterans of the United States military. A business does not have to be certified as a Small Diverse Business to be considered a veteran-owned business in this study.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by white women. A business does not have to be certified as a Small Diverse Business to be considered a woman-owned business in this study. (The study team considered businesses owned by women of color as POC-owned businesses.)

APPENDIX B.

Legal Framework and Analysis

A. Introduction

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

The appendix also analyzes recent cases regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,¹ notes instructive guidance regarding the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,² and provides an analysis of the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program was continued and reauthorized by the 2015 Fixing America’s Surface Transportation Act (FAST Act)³. In October 2018, Congress passed the FAA Reauthorization Act⁴. In November 2021, Congress passed the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.⁵

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁶ *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,⁷ (“*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, discusses and includes significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this

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

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

³ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

⁵ Pub. L. 117-58, H.R. 3684, §11101(e), November 15, 2021, 135 Stat 443-449.

⁶ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. The Commonwealth of Pennsylvania is in the U.S. Court of Appeals for the Third Circuit. In particular, this analysis discusses and references recent Third Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Contractors Association of Eastern Pennsylvania, Inc., et al. v. City of Philadelphia, et al.*, 91 F. 3d 586 (3d Cir. 1996), *Contractors Association of Eastern Pennsylvania, Inc. et al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993), *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017), *Geod Corporation v. New Jersey Transit Corporation*,⁸

In addition, the analysis includes and references recent federal cases from other jurisdictions that have considered the validity of the Federal DBE Program and its implementation by state DOTs and local or state government agencies and the validity of local and state DBE programs, including: *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al. and Western States Paving Co. v. Washington State DOT, Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women’s Business Enterprise, U.S. DOT, et al. Mountain West Holding Co. v. Montana, Montana DOT, et al., M.K. Weeden Construction v. Montana, Montana DOT, et al. Dunnet Bay Construction Co. v. Illinois DOT*,⁹ *Northern Contracting, Inc. v. Illinois DOT*,¹⁰ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,¹¹ *Geyer Signal, Inc. v. Minnesota DOT*,¹² *Adarand Constructors, Inc. v. Slater*¹³ (“*Adarand VII*”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁴ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁵

The analysis also discusses and analyzes recent court decisions that involved challenges to MBE/WBE/DBE programs and social and economic disadvantaged business programs in other jurisdictions, which are instructive to the study and the Commonwealth of Pennsylvania.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,¹⁶ and the Federal DBE Program that was continued and

⁸ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *Geod Corporation v. New Jersey Transit Corporation, et seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

⁹ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹⁰ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹¹ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

¹² *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹³ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

¹⁴ *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

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

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

reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence¹⁷. In October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence¹⁸. Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101(e) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.¹⁹

The analyses of these and other recent cases discussed below, including the Third Circuit decisions are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs, the Federal DBE Program and its implementation by local and state governments receiving U.S. DOT funds, disparity studies, social and economic disadvantaged business programs, and construing the validity of government programs involving MBE/WBE/DBEs/Social and economic disadvantaged businesses. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored DBE Program by a state DOT implementing the Federal DBE Program and local or state government MBE/WBE/DBE programs submitted in compliance with the case law, and applicable federal regulations, including 49 CFR Part 26.

Lastly, the appendix discusses and analyzes in Section D. 4. below significant pending and very recent cases instructive and informative to the study and MBE/WBE/DBE and social and economic disadvantaged business type programs. These cases may potentially have an impact on the implementation of MBE/WBE/DBE Programs, related legislation, implementation of the Federal DBE Program by state and local governments, airports, transportation and public authorities and agencies, and other types of programs involving the participation of MBE/WBE/DBEs/Social and Economic Disadvantaged Businesses.

B. Third Circuit Court of Appeals decisions

1. *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996). The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

a. The ordinance. The City's Ordinance sought to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51%

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

¹⁸ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

¹⁹ Pub L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

b. Procedural history. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because

UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

c. Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction

industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

d. Burden of persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue. *Id.*

The Court held the district court’s opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required

evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the “strong basis in evidence” for the City’s position did not exist. *Id.*

e. Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have “passively participated” in the first two forms of discrimination. *Id.* at 599.

i. The evidence of discrimination by private prime contractors. One of the City’s theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O’Connor observed in *Croson*: if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the

project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

ii. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert’s conclusions because it found his reliance on Mr. Macklin’s work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set

forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

iii. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources;

and (3) did not account for the “neutral” explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors “willing” to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be “willing” to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the

existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study’s analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study’s analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it.

Id. Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

f. Narrowly tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

i. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

ii. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was

narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

iii. Program alternatives that are either race-neutral or less burdensome to non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court

concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

g. Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

2. Contractors Association of Eastern Pennsylvania, Inc, et. al. v. City of Philadelphia, 6 F. 3d 990 (3d Cir. 1993). An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d. Cir. 1991), affirmed in part and vacated in part the district court's decision. *Id.* On remand, the

district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

a. Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, *quoting*, 735 F.Supp. at 1295–98. The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; 735 F.Supp. at 1298–99. The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

b. Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

c. Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

d. Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.*

Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged." *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Id.* at 999.

i. Strict scrutiny. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Id.* at 999. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Id.*

The Court agreed with the district court that the definition of "socially and economically disadvantaged individuals" included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

ii. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing, Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing, Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.1991), *cert. denied*, 502 U.S. 1033 (1992); *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir.1987), *aff'd mem.*, 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.*, 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

e. Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* 735 F.Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Id.* at 1001, *citing Cleburne*, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id.*

f. Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the

Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id.* at 1002, *quoting*, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* 488 U.S. at 502.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id.* at 1002, *quoting*, 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, 1295-98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a "passive participant" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." *Id.* at 1002, n. 10, *quoting*, 488 U.S. at 492.

g. Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id.*, *quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson*, it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." *Id.* at 1002, *quoting*, 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, *quoting*, *Coral Constr.*, 941 F.2d at 919 ("anecdotal

evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” *Coral Constr.*, 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

h. Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

i. Pre-enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

j. Post-enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

k. Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson's* evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

i. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing, Cone Corp.*, 908 F.2d at 916 (10.78 disparity index); *AGC of California*, 950 F.2d at 1414 (22.4 disparity index); *Concrete Works*, 823 F.Supp. at 834 (disparity index “significantly less than” 100); *see also Stuart*, 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O'Donnell*, 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson's* reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the

Court found the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian-American, Pacific-Islander, and "other" minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity" . *Id.* at 1008.

ii. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id.* at 1008, quoting, 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

i. Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

m. Narrowly tailored. The Court then decided whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who

operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s fifteen percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, 488 U.S. at 507.

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

n. Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.* at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City

had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

o. Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, *Cleburne*, 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe*, 509 U.S. 312–43 (1993), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

p. Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

3. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017). In a recent criminal case that is noteworthy because it is in the Third Circuit and involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation’s Disadvantaged Business Enterprise Program (“Federal DBE Program”). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

a. Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors (“CSE”) and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC’s principal was paid a relatively nominal “fixed-fee” for permitting use of WMCC’s name on each of these subcontracts. *Id.* at 744.

b. Defendant’s contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the “defraud clause” of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of “commercially useful function” set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

c. Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States’ Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

d. Material facts in indictment. The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT’s and PTC’s DBE program and WMCC was paid a total of \$1.89 million.” *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT’s program, the entire amount of WMCC’s subcontract with the general contractor, including the cost of

materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

e. Motion to dismiss—challenges to Federal DBE regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id.* at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)-(2). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a "commercially useful function." *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

f. Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, 49 U.S.C. § 322(a) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); 23 U.S.C. § 304 (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); 23 U.S.C. § 315 (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep’t of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

g. Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

4. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010). Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

a. New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-

Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an

average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

b. Applying Northern Contracting v. Illinois. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the

DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, “only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge.” *Id.* at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, citing 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, quoting *Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

c. 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.

5. *Geod Corporation v. New Jersey Transit Corporation, et seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009). Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored

and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

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

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer

interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.²⁰

a. Split in analysis between Seventh and Ninth Circuit regarding implementation of Federal DBE Program by state and local governments. Also, there is a split in approach regarding implementation of the Federal DBE Program by state and local governments between the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE

²⁰ *Id.*

Program, and the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,²¹ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,²² which upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).²³ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.²⁴ The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.²⁵ These decisions regarding state DOTs, transit and transportation authorities, and recipients of federal financial assistance implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country are instructive to the legal framework and analysis and the study..

b. Congressional findings. The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal DBE Program that was continued and reauthorized by the Fixing America’s Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence²⁶. And, Congress recently passed legislation in November 2021, which was signed by the President, (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021)²⁷ that again reauthorized the Federal DBE Program and its implementation by local and state governments based on evidence and findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs. It also is instructive that recently there were Congressional findings as to discrimination regarding MBE/WBE/DBEs relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program.²⁸

c. Department of Justice 2022 Compelling Interest report. It is noteworthy and instructive to the study that the U.S. Department of Justice in January 2022 issued a report: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence.” This report “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.” The “Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs” is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This notice announces the availability on the Department of Justice’s website of the “updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate

²¹ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

²² 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

²³ 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

²⁴ *Id.*

²⁵ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

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

²⁷ Pub. L. 117-58; H.R. 3684 – 117th Congress (2021), § 11101(e), November 15, 2021, 135 Stat 443-449.

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

circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs.” The report is available on the Department of Justice’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

C. U.S. Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.²⁹ J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”³⁰ 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.³¹ 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.³²

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

²⁹ 488 U.S. 469 (1989).

³⁰ 488 U.S. at 500, 510.

³¹ 488 U.S. at 480, 505.

³² 488 U.S. at 507-510.

constitute prima facie proof of a pattern or practice of discrimination” under Title VII.³³ 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.”³⁴

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”³⁵ “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.”³⁶

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.”³⁷ 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.”³⁸

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.”³⁹ “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.”⁴⁰

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.”⁴¹

2. *Adarand Constructors, Inc. v. Peña (“Adarand I”), 515 U.S. 200 (1995).* In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that

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

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

³⁵ 488 U.S. at 502.

³⁶ *Id.*

³⁷ 488 U.S. at 509.

³⁸ *Id.*

³⁹ 488 U.S. at 509.

⁴⁰ *Id.*

⁴¹ 488 U.S. at 492.

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 *Croson* and *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 and ACDBE Program by recipients of federal funds.

a. Note: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (June 29, 2023). In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (June 29, 2023) (“*SFFA*”), the Supreme Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the admissions systems used by Harvard College and the University of North Carolina. The Majority decision of the Court referenced, cited and applied the Supreme Court decisions in *Croson* and *Adarand*, including the strict scrutiny standard, to the university admissions systems in these cases. The Majority decision of the *SFFA* case did not specifically rule on or address the constitutionality of MBE/WBE/DBE contracting programs or the implementation of the Federal DBE or ACDBE Programs by local or state governments, airports, transit or transportation authorities or other government agencies.

It is noteworthy that subsequent to the Supreme Court decision in *SFFA v. Harvard et al.*, Attorney Generals from 13 states sent a letter, dated July 13, 2023, to “Fortune 100 CEOs” in which, among other statements, they urged businesses, to “immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices.”

On July 19, 2023, Attorneys General from 20 states sent a letter to “Fortune 100 CEOs” in which they responded to and opposed the statements in the July 13, 2023 letter sent by the Attorneys General from the 13 states. This letter provides that the “*SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses.” In addition, the letter provides that “*SFFA* acknowledges that our society has a compelling interest in ‘remediating specific, identified instances of past discrimination that violated the Constitution or a statute.’ *SFFA*, slip op. at 15.”

The Pennsylvania Attorney General was not among the state Attorneys General signing either letter.

D. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE and ACDBE Programs

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local government MBE/WBE/DBE programs, state DOT DBE programs and state and local government DBE programs implementing the Federal DBE and ACDBE Programs and federal regulations, social and economic disadvantaged business programs, and their implications for a disparity study. The recent decisions involving these state and local government MBE/WBE/DBE programs, the Federal DBE Program and its implementation by state and local governments, and social and economic disadvantaged business programs are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local and state government recipients of federal financial assistance (U.S. DOT funds) based on 49 CFR Part 26 and

49 CFR Part 23. The analysis also discusses the application of intermediate scrutiny and rational basis standards as applied to gender discrimination and social and economic business type programs.

The Federal DBE Program (and ACDBE Program) Implemented By State and Local Governments.

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

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴²

Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁴³ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁴ In October 2018, Congress passed the FAA Reauthorization Act⁴⁵. Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101) that reauthorized the Federal DBE Program based on evidence and findings of continuing discrimination and related barriers found to cause significant obstacles for MBE/WBE/DBEs.⁴⁶

As noted above, the U.S. Department of Justice in January 2022 issued a report that updated its 1996 report: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,” which “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.” The “Notice of Report on Lawful Uses of Race

⁴² Appendix-The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing The Compelling Interest.

⁴³ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁴⁴ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴⁵ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

⁴⁶ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

or Sex in Federal Contracting Programs” is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This “updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs” is available on the Department of Justice’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

The Federal DBE Program provides requirements for federal aid recipients and accordingly changed how recipients of federal funds implement the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁴⁷

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE and ACDBE Programs outline certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient’s DBE and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45, and 49 CFR §§ 23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁴⁸ This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient’s market.⁴⁹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵⁰ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient’s contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁵¹ This process, based on the federal regulations, aims to

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

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

⁴⁹ *Id.*

⁵⁰ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁵¹ *Id.*

establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.⁵²

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵³ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁴

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁵⁵

U.S. DOT Final Rule issued April 9, 2024; Effective Date is May 9, 2024.⁵⁶

Summary: “The final rule improves program implementation in major areas, including by updating the personal net worth and program size thresholds for inflation; modernizing rules for counting of material suppliers; incorporating procedural flexibilities enacted during the coronavirus (COVID-19) pandemic; adding elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; updating certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; revising the interstate certification process to provide for reciprocity among certifiers; and making technical corrections to commonly misinterpreted rules.”⁵⁷

Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101(e)) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers that cause significant obstacles for MBE/WBE/DBEs.⁵⁸ Previously, in October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continued to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.⁵⁹ Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, 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

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

⁵³ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁵⁴ 49 CFR § 26.51(b); 49 CFR § 23.25.

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

⁵⁶ 24898 Federal Register / Vol. 89, No. 69 / Tuesday, April 9, 2024 / Rules and Regulations.

⁵⁷ *Id.* at 24898.

⁵⁸ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

⁵⁹ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

there is a compelling need for the continuation of the” Federal DBE Program and the Federal ACDBE Program.⁶⁰

Infrastructure Investment and Jobs Act of 2021 (November 15, 2021).

SEC. 11101. Authorization of Appropriations.

(e) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

(C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

Therefore, Congress in the Infrastructure Investment and Jobs Act passed on November 15, 2021 found based on testimony, evidence and documentation updated since the FAST Act adopted in 2015 and MAP-21 adopted in 2012, as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 11101(e), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business

⁶⁰ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

enterprise program to address race and gender discrimination in surface transportation-related business.⁶¹

Congress in the F.A.A. Reauthorization Act of 2018 (October 5, 2018) also made similar findings of discrimination that provided a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011). The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁶²

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

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.⁶³ 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.⁶⁴

⁶¹ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

⁶² 76 F.R. at 5092.

⁶³ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁶⁴ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

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.⁶⁵ 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.⁶⁶ 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.⁶⁷

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state DOTs, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁶⁸ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁶⁹

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

⁶⁵ *Id.*

⁶⁶ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁶⁷ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁶⁸ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and affirming, 84 F. Supp. 3d 705, 2015 WL 1396376.

⁶⁹ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe*’s Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See also the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). In the 2016 decision in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015).

barriers to entry.”⁷⁰ The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).⁷¹ 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.⁷²
- **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.⁷³
- **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.⁷⁴
- **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.⁷⁵
- **Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act or 2021, the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose

⁷⁰ *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁷¹ See, *e.g.*, *Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁷² *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁷³ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

⁷⁴ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁷⁵ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

significant obstacles for minority- and women-owned businesses seeking to do business in “federally-assisted surface transportation markets,” in airport-related markets, and that the continuing barriers “merit the continuation” of the Federal DBE Program and the Federal ACDBE Program.⁷⁶ Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, 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 ACDBE Program and the Federal DBE Program.⁷⁷

And, as stated above, the U.S. Department of Justice in January 2022 issued a report entitled: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,” which “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.”⁷⁸ This “updated report” by the U.S. DOJ, is issued “regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs.”⁷⁹

i. Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁸⁰ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁸¹ The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”⁸²

⁷⁶ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁷ *Id.* at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

⁷⁸ Vol. 87 Fed. Reg. 4955, January 31, 2022; located at <https://www.justice.gov/crt/page/file/1463921/download>.

⁷⁹ *Id.*; see <https://www.justice.gov/crt/page/file/1463921/download>.

⁸⁰ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁸¹ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸² See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

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.⁸³ It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.⁸⁴ In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”⁸⁵

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”⁸⁶ “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.’”⁸⁷ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁸⁸

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁸⁹ Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁹⁰ Therefore, notwithstanding the burden of

⁸³ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁴ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁵ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁶ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn., 2014); see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁷ See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*, 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁸ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁹ *Adarand Constructors, Inc. v. Peña*, (“*Adarand III*”), 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁹⁰ *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d. Cir. 1993).

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.⁹¹

To successfully rebut the government's evidence, the courts hold that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.⁹² 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.⁹³ Conjecture and unsupported criticisms of the government's methodology are insufficient.⁹⁴ 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.⁹⁵

The courts have 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.'"⁹⁶ The courts hold 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."⁹⁷

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."⁹⁸ The courts hold that a state need not

⁹¹ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁹² See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹³ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

⁹⁴ *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁹⁵ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁶ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

⁹⁷ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

⁹⁸ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-

conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.⁹⁹ Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹⁰⁰ It has been further held by the courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹⁰¹

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹⁰² In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹⁰³

Thus, courts have held that to justify a race-conscious measure, a government 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.¹⁰⁴

ii. Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local government recipient level.¹⁰⁵ “Where gross statistical disparities can be shown, they alone

218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁹⁹ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁰ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰¹ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰² See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹⁰³ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹⁰⁴ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹⁰⁵ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990,

in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹⁰⁹

Other considerations regarding statistical evidence include:

iii. Availability analysis. A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹¹⁰ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹¹¹ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹¹²

iv. Utilization analysis. Courts have accepted measuring utilization based on the proportion of an

999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹⁰⁶ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹⁰⁷ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁸ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁹ *Western States Paving*, 407 F.3d at 1001.

¹¹⁰ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹¹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹² *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

agency's contract dollars going to MBE/WBEs and DBEs.¹¹³

v. Disparity index. An important component of statistical evidence is the “disparity index.”¹¹⁴ 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.”¹¹⁵

vi. 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.¹¹⁶

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹¹⁷

vii. Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.¹¹⁸ The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision

¹¹³ See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *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.

¹¹⁴ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹¹⁵ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹¹⁶ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹¹⁷ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁸ *Id.* at 973.

in *Concrete Works II* and the plurality opinion in *Croson*.¹¹⁹ 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.”¹²⁰ 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.”¹²¹

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹²² Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹²³

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹²⁴ Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹²⁵

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹²⁶ 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.¹²⁷

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹²⁸ (“[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.*”¹²⁹). Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to

¹¹⁹ *Id.*

¹²⁰ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹²¹ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹²² *Id.* at 973.

¹²³ *Id.*

¹²⁴ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹²⁵ *Id.*

¹²⁶ *Id.* at 974.

¹²⁷ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁸ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁹ *Id.* (emphasis added).

“the Denver MSA evidence of industry-wide discrimination.”¹³⁰ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹³¹

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹³² The Tenth Circuit ruled that the local government can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹³³

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹³⁴

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.¹³⁵

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiable) 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.”¹³⁶

¹³⁰ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹³¹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹³² *Id.*

¹³³ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹³⁴ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹³⁵ *Id.* at 977.

¹³⁶ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹³⁷

viii. 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.¹³⁸ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹³⁹ 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, and that the combination of anecdotal and statistical evidence is "potent."¹⁴⁰

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹⁴¹

¹³⁷ *Id.* at 979-80.

¹³⁸ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹³⁹ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁰ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁴¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), affirmed, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

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.¹⁴²

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 Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁴³

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁴⁴

¹⁴² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

¹⁴³ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181(10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181;

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.”¹⁴⁵ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁴⁶

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹⁴⁷

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁴⁸ also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”¹⁴⁹ 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.

i. Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state DOTs and state and local government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state or local government recipient’s contracting and procurement market.¹⁵⁰ The cases considering challenges to a state government’s implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard. The narrow tailoring requirement has several components.

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.

¹⁴⁵ *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), aff’d per curiam 218 F.3d 1267 (11th Cir. 2000).

¹⁴⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁴⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

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

¹⁴⁹ 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

¹⁵⁰ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁵¹ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁵²

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity -conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁵³

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."¹⁵⁴ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹⁵⁵ The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.¹⁵⁶ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁵⁷ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁵⁸

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois*

¹⁵¹ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁵² *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

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

¹⁵⁴ 473 F.3d at 722.

¹⁵⁵ *Id.* at 722.

¹⁵⁶ *Id.* at 723-24.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

DOT followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁵⁹ The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹⁶⁰ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁶¹ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹⁶²

ii. 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.¹⁶³ 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.¹⁶⁴

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.”¹⁶⁵

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;

¹⁵⁹ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁶⁰ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁶¹ *Id.*

¹⁶² 840 F.3d 932 (7th Cir. 2016).

¹⁶³ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁶⁴ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Viridi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n(CAEP I)*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁶⁵ *Croson*, 488 U.S. at 509-510.

- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁶⁶

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.”¹⁶⁷

iii. 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.¹⁶⁸ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in

¹⁶⁶ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁶⁷ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁶⁸ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

flexibility;¹⁶⁹ (2) good faith efforts provisions;¹⁷⁰ (3) waiver provisions;¹⁷¹ (4) a rational basis for goals;¹⁷² (5) graduation provisions;¹⁷³ (6) remedies only for groups for which there were findings of discrimination;¹⁷⁴ (7) sunset provisions;¹⁷⁵ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁷⁶

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.¹⁷⁷

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Third Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁷⁸ The Third Circuit has

¹⁶⁹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁷⁰ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁷¹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷² *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc., v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

¹⁷⁵ See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁷⁶ *Coral Constr.*, 941 F.2d at 925.

¹⁷⁷ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); South Florida Chapter of the A.G.C. v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁷⁸ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); See generally, *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

applied “intermediate scrutiny” to classifications based on gender.¹⁷⁹ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁸⁰

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

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁸¹

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁸²

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

¹⁷⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, generally, *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) (citing *Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)).

¹⁸⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); .); see also, *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁸¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁸² *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*.

objective.¹⁸³ 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.¹⁸⁴

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁸⁵

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”¹⁸⁶ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.¹⁸⁷ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found

¹⁸³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F.Supp 2d 613, 619-620 (2000); see also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”)

¹⁸⁴ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁸⁵ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁸⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁸⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁸⁸

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.¹⁸⁹ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.¹⁹⁰ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁹¹ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁹² This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

Therefore, the Court in *CAEP I* affirmed the grant of summary judgment invalidating the gender preference for construction contracts.¹⁹³ The Third Circuit noted that it saw no impediment to the City re-enacting the gender preference if it could provide probative evidence of discrimination.¹⁹⁴

It is noteworthy that The Pennsylvania Supreme Court in the 2024 decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*,¹⁹⁵ held it applies a higher standard than intermediate scrutiny for gender based discrimination than the U.S. Supreme Court based on Pennsylvania's Equal Rights Amendment. The court stated: "While the United States Supreme Court applies an intermediate level of scrutiny to gender-based classifications (an approach cemented after 1971), following the adoption of the Equal Rights Amendment, this Court, unsurprisingly, did not follow the High Court's lead in its enforcement of our Equal Rights Amendment. Instead, this Court took a near absolute view of the protections."

The Pennsylvania court in *Allegheny* held that a challenge to a gender based law "begins with the premise that a sex-based distinction is presumptively unconstitutional. It is the government's burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy. "The court stated that the "judicial inquiry will be searching, and no deference will be given to legislative policy reasons for

¹⁸⁸ *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁸⁹ *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 309 A. 3d 808 (S. Ct. Penn. 2024).

creating sex-based classifications. Given these parameters, we acknowledge that few, if any, sex-based conferrals of benefits or burdens will be sustainable.”¹⁹⁶

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁹⁷ 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.¹⁹⁸ Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”¹⁹⁹ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²⁰⁰

¹⁹⁶ *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A. 3d 808 (S. Ct. Penn. 2024).

¹⁹⁷ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017) ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005

¹⁹⁸ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017) ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005)

¹⁹⁹ See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005)

²⁰⁰ *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); see e.g. *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005)

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²⁰¹ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.²⁰²

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²⁰³ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²⁰⁴

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.”²⁰⁵

The Third Circuit in *Contractors Ass’n of E. Pa. (CAEP I)* addressed the City’s two-percent preference for businesses owned by “handicapped” persons.²⁰⁶ The district court struck down this preference under the rational basis test, based on the belief, according to the Third Circuit, that *Croscon* required some evidence of discrimination against business enterprises owned by “handicapped” persons, and therefore

²⁰¹ *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); see e.g., *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005))

²⁰² *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see e.g. *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005)

²⁰³ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); see e.g., *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017). ; *Shoul v. Commonwealth, Department of Transportation, Bureau...*, 643 Pa. 302 173 A.3d 669 (S. Ct. Penn. 2017); *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309 883 A.2d 518 (S. Ct. Penn. 2005)

²⁰⁴ *Id.*

²⁰⁵ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); 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.”).

²⁰⁶ 6 F.3d *Id.* at 1011 (3d. Cir. 1993).

that the City could not rely on testimony of discrimination against “handicapped” individuals.²⁰⁷ The Court in *CAEP I* stated, however, that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose.”²⁰⁸

The Third Circuit noted that the Supreme Court affirmed the permissiveness of this test in *Heller v. Doe*, indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.”²⁰⁹ Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²¹⁰

The City of Philadelphia in *CAEP I* stated it sought to minimize discrimination against businesses owned by “handicapped” persons and encourage them to seek City contracts. The Court in *CAEP I* agreed with the district court that these were legitimate goals, but unlike the district court, the Third Circuit held the two-percent preference was rationally related to this goal.²¹¹

It is noteworthy that in *Shoul v. Penn DOT, et al.*,²¹² the Pennsylvania Supreme Court distinguished its application of the rational basis test with federal courts as follows:

“This Court, by contrast, applies what we have deemed a “more restrictive” test. *Nixon*, 839 A.2d at 287 n.15. Specifically, a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantia relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts. *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634, 636–37 (1954) (citation and footnotes omitted); see also *Nixon*, 839 A.2d at 287–88 & n.15 (distinguishing the federal test from the state test). Thus, under our state charter, we must assess whether the challenged law has “a real and substantial relation” to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary to these ends. Nevertheless, we bear in mind that, although whether a law is rationally related to a legitimate public policy is a question for the courts, the wisdom of a public policy is one for the legislature, and the General Assembly’s enactments are entitled to a

²⁰⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993), citing 735 F.Supp. at 1308.

²⁰⁸ *Id.*, citing, *Cleburne*, 473 U.S. at 440.

²⁰⁹ 6 F.3d at 1011, citing, 509 U.S. 312–43 (1993)

²¹⁰ *Id.* at 1011; see, e.g., *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (quotation marks and citation omitted).

²¹¹ 6 F.3d at 1011.

²¹² *Shoul v. Commonwealth, Department of Transportation*, 643 Pa. 302, 173 A.3d 669 (S. Ct. Penn. 2017)

strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements. *Id.* at 285– 86.”

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”)²¹³.

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.”²¹⁴

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.²¹⁵ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²¹⁶

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²¹⁷ 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....”²¹⁸

4. Pending cases (at the time of this report) and informative recent decisions. There are recent court decisions and pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and federal programs with minority and woman-owned business and social and economic disadvantaged business preferences that may potentially impact and are informative and instructive to the study, including the following:

²¹³ 2012 WL 5939228 (Fed. Cl. 2012).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

- i. ***Christian Bruckner et al. v. Joseph R. Biden Jr. et al.***, U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Dismissed, 2023 WL 2744026 (March 31, 2023).
- ii. ***Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration*** 993 F.3d 353, 2021 WL 2172181 (6th Cir. May 27, 2021).
- iii. ***Greer’s Ranch Café v. Guzman***, 2021 WL 2092995 (N.D. Tex. 5/18/21), U.S. District Court for the Northern District of Texas.
- iv. ***Faust v. Vilsack***, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).
- v. ***Wynn v. Vilsack***, 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Florida.
- vi. ***Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.***, 2023 WL 4633481 (July 19, 2023), U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.
- vii. ***Mark One Electric Company, Inc. v. City of Kansas City, Missouri***, 2022 WL 3350525 (8th Cir. 2022).
- viii. ***Nuziard, et al. v. MBDA, et al.***, 2023 WL 3869323 (June 5, 2023), U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278. Complaint filed March 20, 2023
- ix. ***Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et. al.*** U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFVT (Complaint filed on October 26, 2023)
- x. ***Landscape Consultants of Texas, Inc. et. al. v. City of Houston, Texas, et. al.*** U.S. District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:23-cv-3516. Complaint filed September 19, 2023

The following summarizes the above listed pending cases and informative recent decisions:

- i. ***Christian Bruckner et al. v. Joseph R. Biden Jr. et al.***, 2023 WL 27744026 (M.D. Fla. March 31, 2023), U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Dismissed, 2023 WL 2744026 (March 31, 2023). Federal Defendants’ Motion to Dismiss Granted and Plaintiffs’ Motion for Preliminary Injunction Denied on March 31, 2023. Judgment entered on April 3, 2023.

The Complaint filed on July 13, 2022 alleges that on November 15, 2021, President Biden signed into law the “Infrastructure Investment and Jobs Act,” a \$1.2 trillion spending bill to improve America’s infrastructure. As part of this bill, the Complaint alleges Congress authorized \$370 billion in new spending for roads, bridges, and other surface transportation projects. The Complaint asserts that Congress also implemented a set aside, or quota, requiring that at least 10% of these funds be reserved for certain “disadvantaged” small businesses. According to the White House, the Complaint alleges, the law reserves more than \$37 billion in contracts to be awarded to “small, disadvantaged business contractors.”

The Complaint asserts that Plaintiff Bruckner cannot benefit from the program and compete for the projects because of his race and gender, that the \$37 billion fund is reserved for small businesses owned by certain minorities and women, and that Bruckner is a white male.

The Complaint alleges the Infrastructure Act sets an unlawful quota based on race and gender because at least 10% of all contracts for certain infrastructure projects must be awarded based on race and gender, that this quota is unconstitutional, that Defendants have no justification for the Act's \$37 billion race-and-gender quota, and therefore the court should declare this alleged quota unconstitutional and enjoin its enforcement, "just as other courts have similarly enjoined other race-and-gender-based preferences in the American Rescue against \$28.6 billion Restaurant Revitalization Fund priority period); *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (injunction against \$4 billion Farmer Loan Forgiveness program Plan Act. E.g., *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021) (injunction)."

The Complaint alleges that Congress attempted to justify these race-and-gender classifications through findings of "race and gender discrimination" in the Infrastructure Act, "but none of these findings establish that Congress is attempting to remedy a specific and recent episode of intentional discrimination that it had a hand in." The Complaint alleges that "because he is a white male, Plaintiff Bruckner and his business, PMC, cannot compete on an equal footing for contracts under the Infrastructure Act with businesses that are owned by women and certain racial minorities preferred by federal law."

The Complaint alleges that the racial classifications under Section 11101(e)(2) & (3) of the Infrastructure Act are unconstitutional because they violate the equal protection guarantee in the United States Constitution, and that these racial classifications in the Infrastructure Act are not narrowly tailored to serve a compelling government interest. The Complaint alleges that the gender-based classification under Sections 11101(e)(2) & (3) of the Infrastructure Act is unconstitutional because it violates the equal protection guarantee in the United States Constitution. The Complaint asserts this gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective.

The Complaint requests the court: A. Enter a preliminary injunction removing all unconstitutional race and gender-based classification in Section 11101(e)(3) of the Infrastructure Act; B. Enter a declaratory judgment that the race and gender-based classifications under Section 11101(e)(3) of the Infrastructure Act are unconstitutional; and, C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications when awarding contracts under Section 11101(e)(3) of the Infrastructure Act.

The Plaintiffs filed in July 2022 an Amended Motion for Preliminary Injunction, which is pending. The federal Defendants filed a Reply in Opposition to the Motion for Preliminary Injunction on August 29, 2022. On September 27, 2022, the federal Defendants filed a Motion to Dismiss the Complaint, which is pending.

The court issued an Order on November 21, 2022 requesting the parties to address certain listed questions describing the administration and implementation process of the Federal DBE Program. In particular, the court requested the parties submit supplemental briefing describing the

authorization of funds by Congress and explain how state and local recipients award federally funded contracts.

The court ordered the Plaintiffs may clarify whether the complaint challenges the Federal DBE Program as it applies to direct contracting with the federal government. And, the court ordered the Defendants may file a statement certifying whether there are localities or federal agencies receiving funding from the Infrastructure Act that have set a DBE goal of 0%.

The parties responded on December 2, 2022. Bruckner filed a statement asserting that his complaint “challenges a single sentence in federal law: Section 11101(e)(3) of the Infrastructure Investment and Jobs Act, P.L. 117-58” and that his “requested remedy is therefore narrow and precise: an injunction preventing Defendants from enforcing and implementing this one sentence.” Plaintiffs’ Verified Complaint only challenges Section 11101(e)(3), which contains a \$37 billion race-and-gender preference.

The Defendants submitted a supplemental briefing describing the administration and implementation process of the Federal DBE Program, and filed Declarations of DOT personnel attesting to the goals implemented by recipients. The Defendants also addressed: (a) how the DOT calculates and assesses whether recipients are fulfilling their DBE goals; (b) whether a recipient’s DBE goal influences the amount of federal funds awarded under the Act; (c) the race neutral means used by recipients that employ only neutral means to award contracts; (d) whether recipients and prime contractors are aware of a bidder’s DBE status when determining whether to award a contract where a jurisdiction exclusively uses neutral means; (e) whether a subcontractor knows before bidding if the recipient or prime contractor is employing race and gender conscious or neutral means to award subcontracts; and (f) the certification process.

Order and Opinion in *Bruckner v. Biden*, 2023 WL 2744026 (March 31, 2023). The district court on March 31, 2023 issued an Order that granted the Federal Defendants’ Motion to Dismiss and denied the Plaintiffs’ Motion for Preliminary Injunction without prejudice. Judgment was issued in favor of Defendants by the court on April 3, 2023. The Order of the court was based on lack of standing by the Plaintiffs.

The court stated: “Although the Plaintiffs raise compelling merits arguments based on the preliminary-injunction-stage record, they fail to demonstrate an injury-in-fact to satisfy Article III standing. Some recipients of the Infrastructure Act’s funds do not employ race- and gender-conscious means when awarding contracts. Others employ discriminatory means only with respect to some contracts. Because the Plaintiffs do not identify which contracts they intend to bid on, the Plaintiffs’ alleged harm is speculative and they fail to allege facts demonstrating a “certainly impending” “direct exposure to unequal treatment.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, (2013); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1280 (11th Cir. 2001). “Without subject-matter jurisdiction, I deny the motion for a preliminary injunction and dismiss the case without prejudice.”

The court held that the Plaintiffs fail to allege facts showing that they are “able and ready” to bid on Infrastructure Act-funded contracts. They also fail to allege facts, the court found, demonstrating that they will necessarily be denied equal treatment based on Bruckner’s race and gender if and when they bid. The court concluded that Plaintiffs therefore have not alleged an injury in fact.

Conclusion. The burden is on Bruckner and PMC to prove standing.. Because the Plaintiffs failed to allege facts clearly demonstrating that they were able and ready to compete in a discriminatory scheme, the Plaintiffs failed to demonstrate standing. Accordingly, the Defendants’ motion to dismiss was granted, and this action was Dismissed without prejudice. The Plaintiffs’ motion for a preliminary injunction was denied as moot.

ii. Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business

Administration, 993 F.3D 353, 2021 WL 2172181 (6th Cir. May 27, 2021), on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs’ motion for temporary restraining order on 5/19/21, and Order denying plaintiffs’ motion for preliminary injunction on 5/25/21. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) created the Paycheck Protection Program (“PPP”), a \$349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional \$310 billion to the fund.

The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the “ARPA”). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated \$28,600,000,000 to a “Restaurant Revitalization Fund” and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See *id.* § 5003. Under the ARPA, the Administrator “shall award grants to eligible entities in the order in which applications are received by the Administrator,” except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that “[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals.”

Antonio Vitolo is a white male who owns and operates Jake’s Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that “[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days.”

On May 12, 2021, Vitolo and Jake’s Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the Administrator of the Small Business Administration. In their complaint, Vitolo and Jake’s Bar and Grill assert that the ARPA’s twenty-one-day priority period violates the United States Constitution’s equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo’s sworn declaration dated May 11, 2021, Vitolo and Jake’s Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict Scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in “remedying the effect of past or present racial discrimination” as related to the formation and stability of minority-owned businesses.

Compelling Interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government’s early attempts at general economic stimulus—i.e., the Paycheck Protection Program (“PPP”)—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice.”); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000) (“The government’s evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.”); *DynaLantic Corp v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012) (rejecting facial challenge to the Small Business Administration’s 8(a) program in part because “the government [had] presented significant evidence on race-based denial of access to capital and credit”).

The court said that the PPP—a government-sponsored COVID-19 relief program—was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow Tailoring found by District Court. The court then addressed the “narrow tailoring” requirement under the strict scrutiny analysis, concluding that: “Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’ “

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be “socially and economically disadvantaged” for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying “socially and economically disadvantaged” individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA’s processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant’s implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs’ motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address “any alleged inequities or past discrimination.” However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had “a weaker income statement” or “a weaker balance sheet.” But, the court noted, “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” only “serious, good faith consideration of workable race-neutral alternatives” to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be “socially disadvantaged.” However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003’s broader definition of “socially and economically disadvantaged” was free to check that box on the application. (“[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box”).) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to “an Aleut citizen who moves to Richmond tomorrow.” Here, the court

found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court held, “[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those objectives. ...” “[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate Scrutiny applied to women-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting women-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. “The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of women-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between women-owned and man-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.” However, the district court did not conclude that Plaintiffs’ constitutional rights are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits. The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs’ Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs’ motion for a preliminary injunction. The court found its denial of Plaintiffs’ motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant’s additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the “PPP”): “As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses.”

There was a written statement noting that “[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program”; testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties’ briefing on Plaintiff’s motion for preliminary injunction have not impacted the court’s analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court’s memorandum opinion denying Plaintiff’s motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court’s decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and

ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal Granted by Sixth Circuit. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using “these unconstitutional criteria when processing” Vitolo’s application.

Standing and Mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government’s argument that the Plaintiffs’ claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. Application of Strict Scrutiny by Sixth Circuit. Vitolo challenges the Small Business Administration’s use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should issue on the first factor the is typically dispositive: the factor of Plaintiffs’ likelihood of success on the merits.

Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a “generalized assertion that there has been past discrimination in an entire industry.” Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government “show[s] that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of [a] local ... industry,” then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government’s asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And , the Court said, since “an effort to alleviate the effects of societal discrimination is not a compelling interest,” the government’s policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government’s regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority- and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow Tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated an "obvious" race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of under inclusivity. The Court considered the requirement that a business must be at least 51% owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51%. But does that mean those owners did not suffer economic harm from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50% owned by a Hispanic female. It is far from obvious, the Court stated, why that 1% difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of

past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored “actually suffer[ed] a disadvantage” as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government’s prioritization system is not “substantially related to” its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all women-owned restaurants are prioritized—even if they are not “economically disadvantaged.” For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51% women-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is “substantially related” to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The Court held that plaintiffs are entitled to an injunction pending appeal, thus reversing the district court decision. Since the government failed to justify its discriminatory policy, the Court found that plaintiffs likely will win on the merits of their constitutional claim. And, the Court stated, similar to most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs’ grant application, if approved, before all later-filed applications, without regard to processing time or the applicants’ race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted.

Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs’ who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion For a Temporary Restraining Order and Preliminary Injunction. The court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs’ claims are moot.

The court thus denied the Additional Plaintiffs’ motion for temporary restraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs’ applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

- iii. Greer’s Ranch Café v. Guzman**, 540 F. Supp. 3d 638, 2021 WL 2092995 (N.D. Tex. 5/18/21). Plaintiff Philip Greer (“Greer”) owns and operates Plaintiff Greer’s Ranch Café—a restaurant which lost nearly \$100,000 in gross revenue during the COVID-19 pandemic (collectively, “Plaintiffs”). Greer sought monetary relief under the \$28.6-billion Restaurant Revitalization Fund (“RRF”) created by the American Rescue Plan Act of 2021 (“ARPA”) and administered by the Small Business Administration (“SBA”). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program’s first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to “take such steps as necessary” to prioritize eligible restaurants “owned and controlled” by “women,” by “veterans,” and by those “socially and economically disadvantaged.” ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program’s first twenty-one days, it “will accept applications from all eligible applicants, but only process and fund priority group applications”—namely, applications from those priority-group applicants listed in ARPA. Priority-group “[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements” as “an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits. Standing. Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA’s implementation of the “socially disadvantaged group” and “socially disadvantaged individual” race-based presumption and definition from SBA’s Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is “narrowly tailored” and “furthers compelling governmental interests.”

Defendants propose as the government’s compelling interest “remedying the effects of past and present discrimination” by “supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic.” To proceed based on this interest, the court said, Defendants must provide a “strong basis in evidence for its conclusion that remedial action was necessary.”

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the “well-established principle about the industry-specific inquiry required to effectuate Section 8(a)’s standards.” Thus, the court looked to Defendants’ industry specific evidence to determine whether the government has a “strong basis in evidence to support its conclusion that remedial action was necessary.”

According to Defendants, “Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA.” The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that “underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic,” that “[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates,” and that “eight out of ten minority-owned businesses are on the brink of closure.”
- Expert testimony describing how “[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses” because of “structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies,” and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.
- Expert testimony explaining that “businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently,” and that minorities are less likely to have such relationships with lenders due to “pre-existing disparities in access to capital.”
- House Committee on Small Business Chairwoman Velázquez’s evidence offered into the record showing that “[t]he COVID-19 public health and economic crisis has disproportionately affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses” and that “minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit.”
- Witness testimony that emphasized the “[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital” and noted that “[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th.”
- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, “due to the heavy reliance on large banks, with whom they have had historically poor relationships.”
- Evidence presented at other hearing showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier

COVID-19 relief funds and also describing “long-standing structural racial disparities in small business ownership and performance.”

- A statement of the Center for Responsible Lending describing present-day “overtly discriminatory practices by lenders” and “facially neutral practices with disparate effects” that deprive minority-owned businesses of access to capital.

This evidence, the court found, “largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification.” The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, “[d]efining these sorts of injuries as ‘identified discrimination’ would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.”

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in “remedying the effects of past and present discrimination” in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an “important governmental objective” or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants’ use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs’ motion for temporary restraining order, and enjoins Defendants to process Plaintiffs’ application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

- iv. **Faust v. Vilsack**, 519 F. Supp. 3d 470, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021). This is a federal district court decision that on June 10, 2021 granted Plaintiffs’ motion for a temporary restraining order holding the federal government’s use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion for a temporary restraining order.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, “Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA.” It advises that, in June 2021, the FSA will begin to process signed letters for payments, and “about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt.”

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. “The government has a compelling interest in remedying past discrimination only when three criteria are met.” (*Citing, Vitolo*, F.3d at, 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

“First, the policy must target a specific episode of past discrimination. It cannot rest on a ‘generalized assertion that there has been past discrimination in an entire industry.’ *J.A. Croson Co.*, 488 U.S. at 498, 109.”

“Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don’t cut it, although they may be used as evidence to establish intentional discrimination....”

“Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government ‘shows that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of a local industry,’ then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles.”

The court found that “Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry.... But Defendants cannot rely on a ‘generalized assertion that there has been past discrimination in an entire industry’ to establish a compelling interest.” *Citing, J.A. Croson Co.*, 488 U.S. at 498, ; *see also Parents Involved*, 551 U.S. at 731, (plurality opinion) (“remedying past societal discrimination does not justify race-conscious government action”). The court pointed out “Defendants’ evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities.”

The court concluded that: “Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts.” “An observation that prior, race-neutral relief efforts failed to

reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way.” *Citing, Vitolo*, 2021 WL 2172181, at *5. The court held “Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications.”

In addition, the court found “Defendants have not established that the remedy is narrowly tailored. To do so, the government must show “serious, good faith consideration of workable race-neutral alternatives.” *Citing, Grutter v. Bollinger*, 539 U.S. 306, 339, (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, “they have not shown that Congress engaged “in a genuine effort to determine whether alternative policies could address the alleged harm” here. *Citing, Vitolo*, 2021 WL 2172181, at *6.

The court stated: “The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.”

The court found “Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race.” On this record, the court held, “Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests.”

Conclusion. The court found a nationwide injunction is appropriate in this case. “To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper.”

The court on July 6, 2021, issued an Order that stayed the Plaintiffs’ motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (*see below*), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the *Wynn* case. For the same reason, the court dissolved the temporary restraining order.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20, 2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which was a class action.

As a result of the federal government’s recent repeal of ARPA Section 1005 and the subsequent dismissal of the related class action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case in September 2022 was dismissed without prejudice by the Court.

- v. **Wynn v. Vilsack** (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. In *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla., which is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, (2021) case in district

court in Wisconsin, the court granted the Plaintiffs' Motion for Preliminary Injunction holding: "Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency ... are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court."

The court in *Faust* granted the Plaintiffs' Motion for Temporary Restraining Order for similar reasons and as discussed below in an Order issued on July 6, 2021, stayed a Motion for Preliminary Injunction and dissolved the Temporary Restraining Order as not necessary based on the *Wynn* holding imposing a nationwide injunction.

Background. In *Wynn*, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), 2 which provides debt relief 3 to "socially disadvantaged farmers and ranchers" (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer or rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." see also U.S. Dep't of Agric., American Rescue Plan Debt Payments, <https://www.farmers.gov/americanrescueplan> (last visited June 22, 2021). White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs.

Strict Scrutiny. The court, similar to the court in *Faust*, applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented, the court stated, appears insufficient.

Compelling Governmental Interest. The Government stated that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. In cases applying strict scrutiny, the court said the Eleventh Circuit has instructed:

In practice, the interest that is alleged in support of racial preferences is almost always the same—remediating 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. *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted).

Thus, the court found that to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id.* at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade Cnty.*, the court noted the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained: A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy. However, a governmental entity can justify affirmative action by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing and able to do the work. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.

Here, to establish the requisite evidence of discrimination, the court stated the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress’ request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA’s past discrimination against SDFRs.

Due to the significant remedial measures previously taken by Congress, for purposes of this case, the court pointed out that historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA’s past discrimination or that the Government remains a “passive participant” in discrimination in USDA loans and programs. See *Eng’g Contractors*, 122 F.3d at 911. The court found that this is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The Government contends its prior measures were insufficient to remedy the effects of past discrimination, but the court found the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. Where a race-neutral basis for a statistical disparity can be shown, the court concluded it can give that statistical evidence less weight. *Eng’g Contractors*, 122 F.3d at 923. Here, the statistical discrepancies presented by the Government, the court found, can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

On the record presented here, the court expressed “serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005’s

race-based remedial action. The statistical and anecdotal evidence presented appears less substantial than that deemed insufficient in *Eng’g Contractors*, which included detailed statistics regarding the governmental entity’s hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts. *Id.* at 912.”

The court said to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to white farmers.

The court held that nevertheless, at this stage of the proceedings, it need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government’s evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, the court found Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

Narrowly Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court stated Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must be only a ‘last resort’ option.” *Eng’g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the court noted the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.” *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

The court found that the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident. More importantly, the court stated Section 1005’s rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group 11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief.

Regardless of farm size, an SDFR receives up to 120% debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120% debt relief. Yet, the court said, a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005.

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp* pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in Croson:

“(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit “groups against whom there may have been no discrimination,” instead its MBE program “target[ed] its benefits to those MBEs most likely to have been discriminated against . . .” *Id.* at 916-17.

The court found that “Section 1005's inflexible, automatic award of up to 120% debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program.”

The court noted that in *Cone Corp.*, although the MBE program included a minority participation goal, the county “would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses.” In this way the Court in *Cone Corp.* observed the county's MBE program “had been carefully crafted to minimize the burden on innocent third parties.” (*citing Cone Corp.*, 908 F.2d at 911).

The court concluded the “120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the Cone Corp. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in Croson and other similar cases.”

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. “It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship.” The court found “Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination.”

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. “The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA's discrimination against SDFRs.... However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately

to White farmers.” However, the court stated, “the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race.”

Thus, on the current record, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, the court held Plaintiff is likely to show that Congress “failed to give serious good faith consideration to the use of race and ethnicity-neutral measures” to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a “last resort,” but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest. The court holds “it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of discrimination that remain following Congress’ prior efforts to remedy the same.” Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.

The Defendants filed a Motion to Stay Proceedings and a Motion to Stay Administratively Timely Deadlines. The court on August 2, 2021, denied the Motion to Stay Proceedings.

As a result of the federal government's recent repeal of ARPA Section 1005 in September 2022 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties have filed a Stipulation of Dismissal, and the case was dismissed in September 2022 by the Court.

The Plaintiffs are seeking attorneys fees and costs of the litigation, which request is pending at the time of this report.

- vi. **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep’t of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes, and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff has filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021 issued an Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' Motion to Dismiss holding that plaintiff's 42 U.S.C. Section 1981 claims are dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021 entered a Scheduling Order providing that defendants shall file an Answer by April 28, 2021 and set a Bench Trial for 10/11/2022 with Dispositive Motions due by 6/6/2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021 filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021 and Plaintiffs filed on June 8, 2021 their Reply to the Response. The Motion was denied by the court.

Dispositive motions for summary judgment have been filed by the parties in June and July 2022.

December 8, 2022 Order requesting parties to address whether Supreme Court's decision expected in June 2023 would impact this case. The court on December 8, 2022 issued an Order requesting the parties address whether a potential decision by the Supreme Court overruling the *Grutter v. Bollinger*, 539 U.S. 306 (2003) case in the pending Harvard and University of North Carolina (UNC) admission cases would impact the issues in this case and, if so, whether this matter

should remain stayed until the Supreme Court releases its decision in the Harvard and UNC (SFFA) cases challenging the use of race-conscious admissions processes.

The parties filed on December 22, 2022 their responses to the court's Order both agreeing that the court should not stay its decision in this case, but differing on the impact of the SFFA cases: The Federal Defendants stating a decision by SCOTUS overruling Grutter in the SFFA cases would not impact this case because they involve fundamentally different issues and legal bases for the challenged actions. The Plaintiffs responded by saying it may or may not impact this case depending on the nature of the decision by SCOTUS.

The court on May 2, 2023, issued an Order denying both parties' motions to exclude expert testimony and reports by their experts.

July 19, 2023 Opinion and Order on Motions for Summary Judgment. On July 19, 2023, the district court issued its Order that granted in part and denied in part Plaintiffs' Motion for Summary Judgment, and denied Defendants' Motion for Summary Judgment.

The court stated the case concerns whether, under the Fifth Amendment's guarantee of equal protection, Defendants the United States' Department of Agriculture ("USDA") and the Small Business Administration ("SBA") may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.

Defendant SBA also applies a rebuttable presumption of social disadvantage to individuals of certain minority groups applying to the 8(a) program . The rebuttable presumption treats certain minority groups as socially disadvantaged, and it applies to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, "and members of other groups designated from time to time by [Defendant] SBA." *Id.* To qualify for the presumption, members of those groups must hold themselves out as members of their group. Individuals who qualify for the rebuttable presumption do not have to submit evidence of social disadvantage through an individual process for those who are not members of these groups.

The court citing Supreme Court precedent stated that certain classifications are subject to strict scrutiny—meaning they are constitutional "only if they are [(1)] narrowly tailored measures that further [(2)] compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). When examining racial classifications, courts apply strict scrutiny. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to the city of Richmond's racial classification); *Adarand Constructors, Inc.*, 515 U.S. at 224 (plurality holding that racial classifications are subject to strict scrutiny).

Ultima argued that the rebuttable presumption in the Section 8(a) program cannot survive strict scrutiny because Defendants cannot show that the rebuttable presumption is Narrowly tailored to achieve a compelling governmental interest. The Court addressed each prong of the strict scrutiny test, beginning with the compelling-interest prong.

Lack of a Compelling Governmental interest. To satisfy the compelling interest prong, the court held the government “must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action. *See Croson*, 488 U.S. at 498–504; *see also Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) (citing *Croson* for the proposition that the government must establish either that it “discriminated in the past” or “was a passive participant in private industry’s discriminatory practices”). The Supreme Court has held that the government has a compelling interest in “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162). Additionally, the government must present goals that are “sufficiently coherent for purposes of strict scrutiny.” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166.”

Defendants assert that their use of the rebuttable presumption in the 8(a) program is to remedy the effects of past racial discrimination in federal contracting. But, the court stated Defendant USDA admits it does not maintain goals for the 8(a) program. And Defendant SBA admits that it does not require agencies to have goals for the 8(a) program. Defendants also do not examine whether any racial group is underrepresented in a particular industry relevant to a specific contract in the 8(a) program. The court found that without stated goals for the 8(a) program or an understanding of whether certain minorities are underrepresented in a particular industry, Defendants cannot measure the utility of the rebuttable presumption in remedying the effects of past racial discrimination. In such circumstances, the court said, Defendants’ use of the rebuttable presumption “cannot be subjected to meaningful judicial review.” The lack of any stated goals for Defendants’ continued use of the rebuttable presumption, the court concluded does not support Defendants’ stated interest in “remediating specific, identified instances of past discrimination[.]” Quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162. If the rebuttable presumption were a tool to remediate specific instances of past discrimination, the court noted, Defendants should be able to tie the use of that presumption to a goal within the 8(a) program.

The court stated the Sixth Circuit addressed a challenge similar to the one Ultima raises here in *Vitolo*, 999 F.3d at 361 (6th Cir. 2021). The court said: “The Sixth Circuit held that “[t]he government has a compelling interest in remedying past discrimination only when three criteria are met.” *Id.* at 361. First, the government’s policy must “target a specific episode of past discrimination [and] cannot rest on a generalized assertion that there has been past discrimination in an entire industry.” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 498–99).”

The court found that: “Defendants do not identify a specific instance of discrimination which they seek to address with the use of the rebuttable presumption. Defendants instead rely on the disparities faced by MBEs nationally as sufficient to justify the use of a presumption that certain minorities are socially disadvantaged. ... “[A]n effort to alleviate the effects of societal discrimination is not a compelling interest,” and the court concluded Defendants’ reliance on national statistics shows societal discrimination rather than a specific instance.

Second, the court pointed out that the Sixth Circuit explained that the government must support its asserted compelling interest with “evidence of *intentional* discrimination in the past.” *Vitolo*, 999 F.3d at 361 (quoting *J.A. Croson Co.*, 488 U.S. at 503) (emphasis in original). According to the Sixth Circuit, the court noted, “statistical disparities alone are insufficient but can be used with other evidence to establish intentional discrimination.” The Sixth Circuit, the court said, reasoned that

when the government uses a race-based policy, it must operate with precision and support the policy with “data that suggest intentional discrimination.” *Id.* The court also stated that the Sixth Circuit further reasoned that evidence of general social disparities are insufficient because “there are too many variables to support inferences of intentional discrimination” when there are multiple decision makers “behind the disparity.” *Id.* at 362.

Here, the court concluded, Defendants primarily offer evidence of national disparities across different industries. They do not offer further evidence to show that those disparities are tied to specific actions, decisions, or programs that would support an inference of intentional discrimination that the use of the rebuttable presumption allegedly addresses. Moreover, the court said that Plaintiffs’ expert noted that Defendants’ evidence did not eliminate other variables that could explain the disparities on which they rely. Defendants cannot affirmatively link those disparities to intentional discrimination because they also cannot eliminate all variables that could account for the disparities. The court stated that the Sixth Circuit in *Vitolo* did not equivocate, cautioning that “broad statistical disparities ... are not nearly enough” to show intentional discrimination. *Id.*

Third, the court pointed out, the Sixth Circuit reasoned that the government must show that it participated in the past discrimination it seeks to remedy, such as by demonstrating it acted as a “passive participant in a system of racial exclusion practiced by elements of [a] local ... industry[.]” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (internal quotations omitted). It explained that the government must identify “prior discrimination by the governmental unit involved” or “passive participation in a system of racial exclusion.” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (alteration adopted). “

The court noted that additionally, in her opinion in *J.A. Croson Co.*, Justice O’Connor reasoned that the government could show passive participation in discrimination by compiling evidence of marketplace discrimination and then linking its spending practices to private discrimination. *J.A. Croson Co.*, 488 U.S. at 492 (O’Connor, J., joined by Rehnquist, C.J., and White, J).

Although the Court does not doubt the persistence of racial barriers to the formation and success of MBEs, Defendants’ evidence does not show that the government was a passive participant in such discrimination in the relevant industries in which Ultima operates. As evidence of passive participation, Defendants note that Congress found MBEs lacked access to “capital, bonding, and business opportunities” because of discrimination . Defendants further note that Congress found that MBEs faced “outright blatant discrimination directed at disadvantaged and minority business people by majority companies, financial institutions, and government at every level.” Those examples, however, relate broadly to the federal government’s actions in different areas of the national economy. They do not show that the federal government allowed discrimination to occur in the industries relevant to Ultima.

The court found that because the court must determine whether the use of racial classifications is supported with precise evidence, “examples of the federal government’s passive participation in areas other than the relevant industries do not support Defendants’ use of the rebuttable presumption here. *See Vitolo*, 999 F.3d at 361.” Accordingly, the court held that Defendants have failed to show a compelling interest for their use of the rebuttable presumption as applied to Ultima.

Even if Defendants could establish a compelling interest, the court found the rebuttable presumption is not narrowly tailored to serve the asserted interest.

Rebuttable presumption is not narrowly tailored. To determine whether the government's use of a racial classification is narrowly tailored, the court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. The court noted the Supreme Court in *Croson* held that courts also should consider whether the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications, the program does not presume discrimination against certain minority groups and, if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified.

a. Whether the 8(a) program is flexible and limited in duration. The court states that the Sixth Circuit in *Vitolo* noted, “[because] proving someone else has *never* experienced racial or ethnic discrimination is virtually impossible, this ‘presumption’ is dispositive.” *Vitolo*, 999 F.3d at 363 (emphasis in original). Individuals who do not receive the presumption must show both economic disadvantage *and* discrimination that have negatively impacted their advancement in the business world and caused them to suffer chronic and substantial social disadvantage. In effect, the court said, individuals who do not receive the presumption must put forth double the effort to qualify for the 8(a) program.

The court cites to the decision in *Drabik*, in which the Sixth Circuit held that as an aspect of narrow tailoring, a race-conscious government program “must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.” *Drabik*, 214 F.3d at 737–38 (quoting *Adarand*, 515 U.S. at 238. The court then points out that recently, the Supreme Court reaffirmed that racially conscious government programs must have a “‘logical end point.’” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (quoting *Grutter*, 539 U.S. at 342).

It is noteworthy that the court in footnote 8 states the following: “The facts in *Students for Fair Admissions, Inc.* concerned college admissions programs, but its reasoning is not limited to just those programs. See *Adarand Constructors, Inc.*, 515 U.S. at 215 (applying the reasoning in *Bolling*, 347 U.S. at 497, which discussed school desegregation, to a federal program designed to provide highway contracts to disadvantaged business enterprises).”

Defendants concede, the court stated, that “the 8(a) program has no termination date,” necessarily meaning there is no temporal limit on the use of the rebuttable presumption. The court found that such a “boundless use of a racial classification exceeds the concept of narrow tailoring as explained by Sixth Circuit and Supreme Court precedents.”

b. Whether the 8(a) program is necessary. Defendants acknowledge that the program lacks a remedial objective. The court found that the lack of a specific objective shows that Defendants are not using the rebuttable presumption in a narrow or precise manner. And the Sixth Circuit has held, according to the court, that Defendants must present “the most exact connection between justification and classification. Here, the court said, Defendants admit that they do not have any specific objectives linked to their use of the rebuttable presumption, and such unbridled discretion counsels against a racial classification being narrowly tailored.

c. Whether the 8(a) program is both over and underinclusive. Defendant SBA determines which groups receive the rebuttable presumption of social disadvantage. Some of those groups match the groups listed in the statute enacting the 8(a) program. But, the court found that Defendant SBA has added more groups since that time that appear underinclusive when compared with groups that do not receive the rebuttable presumption.

The court stated that Defendants “arbitrary line drawing for who qualifies for the rebuttable presumption shows that the “ ‘categories are themselves imprecise in many ways.’ ” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2167. Thus, the court held that the determination of which groups of Americans are presumptively disadvantaged compared with others “necessarily leads to such a determination being underinclusive because certain groups that could qualify will be left out of the presumption.”

Conversely, the court found the rebuttable presumption “sweeps broadly by including anyone from the specified minority groups, regardless of the industry in which they operate.” The court said that Defendant SBA is not making specific determinations as to whether certain groups in certain industries have faced discrimination. The court noted that it instead applies Congress's nationwide findings to all members of the designated minority groups. Thus, the court held that such “an application of the presumption proves overinclusive by failing to consider the individual applicant to the 8(a) program and the industries in which they operate.”

d. Whether Defendants considered race-neutral alternatives to the rebuttable presumption.

For a policy to survive narrow-tailoring analysis, the court stated the government must show “serious, good faith consideration of workable race-neutral alternatives” to promote the stated interest but need not exhaust every conceivable race neutral alternative. *Grutter*, 539 U.S. at 333, 339 (citing *Croson*, 488 U.S. at 507; But, the court said that in *Vitolo*, “the Sixth Circuit reasoned that ‘a court must not uphold a race-conscious policy unless it is ‘satisfied that no workable race-neutral alternative’ would achieve the compelling interest.’ ” *Vitolo*, 999 F.3d at 362 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013)).

The court found that Defendant SBA has not revisited the use of the rebuttable presumption since 1986 and insists that the presumption remains workable under the Supreme Court's precedents. The court held that because of Defendant SBA's “failure to review race-neutral alternatives in the wake of the Supreme Court's precedents, the Court cannot conclude that “ ‘no workable race-neutral alternative would achieve the compelling interest.’ ” *Vitolo*, 999 F.3d at 362.

e. Whether the rebuttable presumption impacts third parties. The court rejected Defendants' assertion that the rebuttable presumption presents only a slight burden on third parties and Ultima because a minor amount of all national federal contracting dollars is eligible for small businesses. Ultima operates within a specific set of industries and the Mississippi contract, as well as others like it, represent a substantial amount of revenue. The court found that national statistics do not lessen the burden that the rebuttable presumption places on Ultima. Defendants, the court held, have failed to show that the use of the rebuttable presumption in the 8(a) program is narrowly tailored.

Conclusion. The court held as follows: Ultima's Motion for Summary Judgment is granted in part and denied in part, and Defendants' Motion for Summary Judgment is denied. The Court declared that Defendants' use of the rebuttable presumption violates Ultima's Fifth Amendment right to equal

protection of the law. The court ordered that Defendants are enjoined from using the rebuttable presumption of social disadvantage in administering Defendant SBA's 8(a) program. The court reserved ruling on any further remedy subject to a hearing on that issue. The court scheduled a hearing on the issue of any potential further remedies.

The court issued the following Order on September 1, 2023: "Pursuant to the Court's July 19, 2023, Memorandum Opinion and Order, the Court held a videoconference to discuss what, if any, further remedies Plaintiff was pursuing based on its prayers for relief in its complaint. Based on those discussions, the only pending issues are: (1) Plaintiff's request for an injunction precluding Defendants from reserving Natural Resources Conservation Service contracts for administrative and technical support; and (2) Defendants' compliance with the injunction issued in the Memorandum Opinion and Order. The parties agreed to a final round of briefing to address these issues. Accordingly, the Court hereby establishes the following briefing schedule: Plaintiff's brief is due within fourteen (14) days of this Order; and Defendants' response brief shall be due fourteen (14) days thereafter, after which Plaintiff shall have seven (7) days to file a reply brief."

Subsequently, Plaintiff Ultima filed its Motion for Permanent Injunction and Additional Equitable Relief and the Federal Defendants filed their Response to Ultima's Motion. Ultima's Motion is pending at the time of this report.

vii. Mark One Electric Company, Inc. v. City of Kansas City, Missouri, 2022 WL 3350525 (8th Cir. 2022).

In 2020, the court in *Mark Smith*, stated that Kansas City began restricting participation in its Minority Business Enterprises and Women's Business Enterprises Program to those entities whose owners satisfied a personal net worth limitation. Mark One Electric Co., a woman-owned business whose owner's personal net worth exceeded the limit, appealed the dismissal of its lawsuit challenging the Kansas City Program as unconstitutional because of the personal net worth limitation. The court held that under its precedent, the Program's personal net worth limitation is a valid narrow tailoring measure, and therefore the court affirmed the district court's dismissal.

Background. In 2016, the court pointed out that the City conducted a disparity study to determine whether the MBE/WBE Program followed best practices for affirmative action programs and whether the Program would survive constitutional scrutiny. The 2016 Disparity Study analyzed data from 2008 to 2013 and provided quantitative and qualitative evidence of race and gender discrimination. The court said the study concluded that the City had a compelling interest in continuing the program because "minorities and women continue to suffer discriminatory barriers to full and fair access to [Kansas City] and private sector contracts."

The study also provided recommendations to ensure the program would be narrowly tailored, including: adding a personal net worth limitation like the net worth cap in the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) program.

The court stated the City enacted a new version of the MBE/WBE Program based on the 2016 Disparity Study on October 25, 2018. The amended Program incorporated a personal net worth limitation, as recommended by the study, which would require an entity to establish that its "owner's or, for businesses with multiple owners, each individual owner's personal net worth is

equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program.” See Kan. City, Mo. Code of General Ordinances ch. 3, art. IV, § 3-421(a)(34), (47) (2021).

Suit challenging the personal net worth limitation. On the day after the personal net worth limitation took effect, the court said, that Mark One Electric initiated an action against the City under 42 U.S.C. § 1983, challenging the personal net worth limitation. Mark One had been certified as a WBE since 1996, but based on the new personal net worth threshold, it would lose its certification despite otherwise meeting the requirements of the WBE Program.

Mark One, the court noted, acknowledged that, based on the 2016 Disparity Study, there was a strong basis in evidence for the City to take remedial action, but alleged the study’s recommendation that the City consider adding a personal net worth limitation was not supported by either qualitative or quantitative analysis. Mark One, the court stated, claimed that the personal net worth limitation is not narrowly tailored to remedy past discrimination and that the program as a whole is not narrowly tailored because of the personal net worth limitation.

The court pointed out that Mark One asserted, “[T]he City has adopted an arbitrary and capricious re-definition of who qualifies as a women [sic] or minority and seeks to remedy a discrimination of which there is no evidence.” According to Mark One, the personal net worth limitation is “not specifically and narrowly framed to accomplish the city’s purpose,” and therefore the program is unconstitutional.

The City moved to dismiss the complaint, arguing that the personal net worth limitation is a valid measure to narrowly tailor the MBE/WBE program. The district court granted the City’s motion, finding that the personal net worth limitation was permissible as a matter of law.

Strict scrutiny applied. The court found that race-based affirmative action programs designed to remediate the effects of discrimination toward minority-owned subcontractors, such as Kansas City’s, are subject to strict scrutiny, meaning that the program is constitutional “only if [it is] narrowly tailored to further compelling governmental interests.” (*Citing: Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 968–69 (8th Cir. 2003) (*quoting Grutter v. Bollinger*, 539 U.S. 306, 326,(2003)). The court pointed out that although Mark One is a woman-owned business and not a minority-owned business, neither party contests review of the Program under the strictest scrutiny.

The court stated the legal standard: “To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest,” such as stopping perpetuation of racial discrimination and remediating the effects of past discrimination in government contracting. (*Citing, Sherbrooke Turf*, 345 F.3d at 969. The City must “demonstrate a ‘strong basis in the evidence’ supporting its conclusion that race-based remedial action [is] necessary to further that interest.” *Id.* (*citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, (1989)). The court found that Mark One does not dispute that the City has a compelling interest in remedying the effects of race and gender discrimination on City contract opportunities for minority- and women-owned businesses. And Mark One, the court said, has conceded the 2016 Disparity Study provides a strong basis in evidence for the MBE/WBE Program to further that interest.

Narrow tailoring, rational basis, and the personal net worth limitation. Second, the City's program must be narrowly tailored, which requires that "the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose." *Id. citing Sherbrooke*, at 971. The plaintiff, according to the court, has the burden to establish that an affirmative action program is not narrowly tailored. In determining whether a race-conscious remedy is narrowly tailored, the court held it looks 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." (*citing Sherbrook*, at 971, and *United States v. Paradise*, 480 U.S. 149, 171, 187, (1987)).

The court stated that Mark One attacked the personal net worth limitation from two angles. Mark One first argued that the personal net worth limitation in the City's Program should be independently assessed under strict scrutiny, separately from the Program as a whole, and asks the court to find the provision unenforceable through the Program's severability clause.

Under strict scrutiny, Mark One argued, the personal net worth limitation is unconstitutional in its own right because it was implemented by the City without a strong basis in evidence and excludes a subset of women and minorities based on a classification unrelated to the discrimination MBEs and WBEs face.

The court found that Mark One offers no authority for the premise that an individual narrow tailoring measure which differentiates between individuals or businesses based on a non-suspect classification, such as net worth, is subject to strict scrutiny in isolation. The court pointed out the MBE/WBE Program as a whole must be premised on a strong basis in evidence under strict scrutiny review. But, the court held the City is not required to provide a separate individual strong basis in evidence for the personal net worth limitation because this limitation, on its own, is subject only to rational basis review.

Mark One also challenged the overall narrow tailoring of the MBE/WBE Program, claiming that the personal net worth limitation makes the Program unconstitutional because it excludes MBEs and WBEs that have experienced discrimination. The court held that under its precedent, this argument is unavailing. The court said that it has previously found the USDOT DBE personal net worth limitation—the limitation the City adopted for the Program—to be a valid narrow tailoring measure that ensures flexibility in an affirmative action program and reduces the impact on third parties by introducing a race- and gender-neutral requirement for eligibility. *See Sherbrooke Turf*, 345 F.3d at 972–73 (finding the federal DBE program narrowly tailored on its face in part because "wealthy minority owners and wealthy minority-owned firms are excluded" through the personal net worth limitation, so "race is made relevant in the program, but it is not a determinative factor").

The court found that Mark One had not plausibly alleged that the \$1.32 million personal net worth limitation in the City's MBE/WBE Program is different, or serves a distinguishable purpose, from the personal net worth limitation in the federal program such that it is not likewise a valid narrow tailoring measure here.

Mark One claimed that its exclusion from the Program despite its status as a woman-owned business shows that the Program is unlawful. The court noted that it did not minimize the fact that individuals and businesses may experience race- and gender-based discrimination in the

marketplace regardless of wealth, and that a minority- or women-owned enterprise may be excluded from the Program based solely on the owner's personal net worth, despite having experienced discrimination in its trade or industry and regardless of the revenue of the enterprise itself or the financial status of any of its minority and women employees.

But, the court found that the City does not have a constitutional obligation to make its Program as broad as may be legally permissible, so long as it directs its resources in a rational manner not motivated by a discriminatory purpose.

Though Mark One argued that the personal net worth limitation is "arbitrary and capricious because the city chose to discriminate against the very minorities and women its [MBE]/WBE Program was designed to help," the court stated there was no allegation in the operative complaint that the City was motivated by a discriminatory purpose when it implemented the personal net worth limitation.

Conclusion. The court concluded that under *Sherbrooke Turf*, 345 F.3d at 972-73, the City may choose to add this limitation in its Program as a rational, race and gender-neutral narrow tailoring measure.

viii. Nuziard, et al. v. MBDA, et al., 2023 WL 3869323 (N.D. Tex. June 5, 2023), U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278. Complaint filed March 20, 2023.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act ("Infrastructure Act"), creating the newest federal agency: the Minority Business Development Agency ("MBDA"). Plaintiffs' allege this agency is dedicated to helping only certain businesses based on race or ethnicity.

Plaintiffs assert that because it relies on racial and ethnic classifications to help some individuals, but not others, the MBDA violates the Constitution's core requirement of equal treatment under the law.

Plaintiffs allege they are small businesses interested in finding new ways to grow their business and would value the advice, grants, consulting services, access to programs, and other benefits offered by the MBDA. But, Plaintiffs assert that agency will not help them because of their race.

The MBDA's statutes, regulations, and website all speak a clear message of discrimination: Defendants refuse to help white business owners like Plaintiffs, as well as many other businesses owned by other non-favored ethnicities.

Plaintiffs claim that they therefore seek an order declaring the MBDA to be unconstitutional and an injunction prohibiting Defendants from discriminating against business owners based on race or ethnicity.

Plaintiffs seek the following Relief:

A. Enter a judgment declaring that the Minority Business Development Agency is unconstitutional and in violation of 5 U.S.C. § 706(2)(B) to the extent it provides Business Center Program services or other benefits and services based on race or ethnicity; and

B. Enter a preliminary and then permanent injunction prohibiting Defendants from imposing the racial and ethnic classifications defined in 15 U.S.C. §9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1 and/or as otherwise applied to the MBDA Business Center Program and other MBDA programs and services, and additionally enjoining Defendants from using the term “minority” to advertise or reference their statutorily authorized programs and services.

Plaintiffs filed a Motion for Preliminary Injunction and Defendants have replied. The court held a hearing on May 12, 2023.

June 5, 2023 Order and Opinion. The court issued an Order and Opinion on June 5, 2023 as follows:

The Constitution demands equal treatment under the law. Any racial classification subjecting a person to unequal treatment is subject to strict scrutiny. To withstand such scrutiny, the government must show that the racial classification is narrowly tailored to a compelling government interest. In this case, the Minority Business Development Agency’s business center program provides services to certain races and ethnicities but not to others. The court held that “because the Government has not shown that doing so is narrowly tailored to a compelling government interest, it is preliminary enjoined from providing unequal treatment to Plaintiffs.”

a. Defendants Lack a Compelling Interest. Defendants contend that it has a compelling interest in remedying the effects of past discrimination faced by minority-owned businesses.

The court stated that the government may establish a compelling interest in remedying racial discrimination if three criteria are met: “(1) the policy must target a specific episode of past discrimination, not simply relying on generalized assertions of past discrimination in an industry; (2) there must be evidence of past intentional discrimination, not simply statistical disparities; and (3) the government must have participated in the past discrimination it now seeks to remedy.” *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021) (O’Connor, J.) (citing *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing U.S. Supreme Court precedents)). The court found the Government’s asserted compelling interest meets none of these requirements.

First, the court said that the Government “points generally to societal discrimination against minority business owners.” *Vitolo*, 999 F.3d at 361. Defendants, the court stated, point to congressional testimony on the effects of redlining, the G.I. Bill, and Jim Crow laws on black wealth accumulation as evidence of a specific episode of discrimination. But, the court noted the Program does not target black wealth accumulation. It targets some minority business owners. Defendants, the court found, also identify no specific episode of discrimination for any of the other preferred races or ethnicities. Instead, the court concluded, they point to the effects of societal discrimination on minority business owners. But, the court found “an effort to alleviate the effects of societal discrimination is not a compelling interest.” (citing *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996)).

Second, the court held the “Government fails to offer evidence of past intentional discrimination. The Government offers no evidence of discrimination faced by some preferred races and ethnicities. And for those it does, the Government relies on studies showing broad statistical disparities with

business loans, supply chain networks, and contracting among some minorities. “These studies, according to the court, do not involve all of Defendants’ preferred minorities or every type of business. But even if they did, the court said: “statistical disparities don’t cut it.” (*quoting, Vitolo, 999 F.3d at 361*).

Because the court concluded: “when it comes to general social disparities, there are simply too many variables to support inferences of intentional discrimination.” (*quoting Vitolo, 999 F.3d at 362*). “While the Court is mindful of these statistical disparities and expert conclusions based on those disparities, ‘[d]efining these sorts of injuries as ‘identified discrimination’ would give . . . governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.” (*quoting, Greer’s Ranch Cafe, 540 F. Supp. 3d at 650 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989))*).

Third, the court found the Government “has not shown that it participated in the discrimination it seeks to remedy.” (*quoting, Vitolo, 999 F.3d at 361*). The court pointed out that the government can show that it participated in the discrimination it seeks to remedy either actively or passively. Defendants, the court said, however, provide no argument on how they participated in the discrimination it seeks to remedy.

The court noted that “perhaps the argument could be made that the Government passively discriminated by failing to address the economic inequities among minority business owners. But to be a passive participant, it must be a participant. See *Croson, 488 U.S. at 492* (government awarding contracts to those who engaged in private discrimination). “But, the court held there is no evidence that the Government passively participated by “financ[ing] the evil of private prejudice” faced by minority-owned businesses.

In sum, the court found: “the Government has failed to show that the Program targets a specific episode of discrimination, offer evidence of past intentional discrimination, or explain how it participated in discrimination against minority business owners. The Government thus lacks a compelling interest in remedying the effects of past discrimination faced by some minority-owned businesses.”

b. The Program is not Narrowly Tailored. Even if the Government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the Program is not narrowly tailored to further that interest for at least two reasons. First, the court stated the Government has not shown” that ‘less sweeping alternatives—particularly race neutral-ones—have been considered and tried.’ *Walker, 169 F.3d at 983* ... This requires the government to show that ‘no workable race-neutral alternative’ would achieve the compelling interest. *Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 312 (2013)*.”

Defendants contend that: “absent race-based remedies, ‘the needle did not move’ in efforts to remedy the effects of discrimination on the success outcomes of minority business owners.” To support this statement, the court said: “Defendants rely on a single review of various disparity studies. See U.S. Dep’t of Commerce, *Minority Business Development Agency, Contracting Barriers and Factors Affecting Minority Business Enterprise: A Review of Existing Disparity Studies* (Dec. 2016).”

But this review, the court found, “cuts against the Government. It ‘emphasize[s] the need for both race-neutral and race-conscious remedial efforts’ to move the needle and states that the disparity studies ‘fail to detail the extent to which agencies have actually implemented and measured the success or failure of these recommendation.’ ... Thus, the review of contracting disparities Defendants rely on does not show that race-neutral alternatives ‘have been considered and tried.’ See Walker, 169 F.3d at 983. Nor has the Government shown a ‘serious, good faith consideration of workable race-neutral alternatives’ in any other business context. See Grutter v. Bollinger, 539 U.S. 306, 339 (2003).”

Second, the court concluded, the Program is not narrowly tailored “because it is underinclusive and overinclusive in its use of racial and ethnic classification. See Croson, 488 U.S. at 507–08; Gratz, 539 U.S. at 273–75. It is underinclusive because it arbitrarily excludes many minority-owned business owners—such as those from the Middle East, North Africa, and North Asia. “For example, the court noted, it excludes those who trace their ancestry to Afghanistan, Iran, Iraq, and Libya. But it includes those from China, Japan, Pakistan, and India. The Program is also underinclusive, the court found, because it excludes every minority business owner who owns less than 51% of their business. “This scattershot approach does not conform to the narrow tailoring strict scrutiny requires.” (*quoting, Vitolo*, 999 F.3d at 364).

The Program, the court stated, is also overinclusive. “It helps individuals who may have never been discriminated against. See Croson, 488 U.S. at 506–08 (holding that a minority business plan is overinclusive because it includes ethnicities in which there is no evidence of discrimination).” And, the court said that it “also helps all business owners, not just those in which disparities have been shown.”

The Program, the court found, is thus not narrowly tailored to the Government’s asserted interest.

Because the Government has not shown a compelling interest or a narrowly tailored remedy under strict scrutiny, the court held that Plaintiffs are likely to succeed on the merits.

Conclusion of June 2023 Order. The Court granted Plaintiffs’ Motion for Preliminary Injunction and enjoined Defendants, the Wisconsin MBDA Business Center, the Orlando MBDA Business Center, the Dallas-Fort Worth MBDA Business Center, and the officers, agents, servants, and employees, and anyone acting in active concert or participation with them from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. § 1400.1 against Plaintiffs or otherwise considering or using Plaintiffs’ race or ethnicity in determining whether they can receive access to the Center’s services and benefits.

MARCH 5, 2024 ORDER AND OPINION

The Parties moved for summary judgment in October 2023. The following discussion summarizes the court’s Opinion and Order issued on March 5, 2024..

A. Nuziard and Bruckner Establish Article III Standing. The analysis differs for each Plaintiff. Nuziard met all posted criteria for the Agency’s services except for race/ethnicity. Bruckner is more challenging because he did not meet all the criteria. The court said at issue for both is whether any race-neutral criteria come from the MBDA or from third-party Operators. Piper is most challenging

as to standing, as he never contacted his local Business Center. For him, the issue is whether he sufficiently manifested intent to apply or if a “futility exception” excuses his inaction.

Importantly, the court found the record contained no evidence suggesting race-neutral criteria are enforced with equally demanding rigor for MBEs. As Plaintiffs observed, the court noted: “Defendants have offered no evidence even suggesting that minority applicants for MBDA Programming are subjected to such an inflexible, rigorous, post hoc application of non-statutory requirements.”

The court found that Dr. Nuziard and Mr. Bruckner suffered injuries-in-fact when they were denied an equal shot at MBDA benefits because of their race. The Agency caused their injuries. A favorable ruling would redress them..

Accordingly, the court held Nuziard and Bruckner have Article III standing, and the Court denied the Agency’s Motion on this point. The court did not find that Piper had standing.

B. The MBDA Statute is Unconstitutional. The court stated that this is a case about presumptions. The court found that Plaintiffs all encountered the same obstacle when they sought MBDA programming. Because they aren’t on the Agency’s list, the court pointed out the Agency presumes they aren’t disadvantaged. *See* 15 U.S.C. § 9501(15)(B); 15 C.F.R. 1400.1.

The court, citing the recent Supreme Court decision in *SFFA v. Harvard, et al.*, holds that any exceptions to the Equal Protection Clause “must survive a daunting two-step examination known as strict scrutiny.” *SFFA*, 600 U.S. at 206; *see Adarand*, 515 U.S. at 227 (noting “all racial classifications” must pass “strict scrutiny” by being “narrowly tailored measures that further compelling governmental interests”). As noted in *Adarand*, the court stated, the rubric has two parts. First, the court asks if the racial classification “further[s] compelling governmental interests.” (*citing Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). Second, the court asks if the classification is “narrowly tailored” to achieve those interests. (*citing, Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013)). The burden to establish both rests with the government. *Id.*

The court concluded it is “hornbook law” that strict scrutiny applies to race-based classifications. A compelling governmental interest is something that’s really important. An action is narrowly tailored if its “necessary” to achieve the interest. For racial classifications to be narrowly tailored, the court citing the *SFFA* case stated, they must be “sufficiently focused” on obtaining “measurable objectives warranting the use of race.” (*quoting SFFA*, 600 U.S. at 230). And the “twin commands of the Equal Protection Clause” dictate that “race may never be used as a ‘negative’ and . . . may not operate as a stereotype.” (*quoting SFFA* at 218. Finally, the contested classification must have a “logical endpoint.” (*quoting SFFA* at 212 (*quoting Grutter*, 539 U.S. at 342).

The court, following the *SFFA* case, pointed out that courts “have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute [and] [t]he second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.” (*quoting SFFA*, 600 U.S. at 207.

The Parties in this case agreed strict scrutiny applies. The MBDA Statute lists certain races that are presumptively entitled to benefits. *See* 15 U.S.C. § 9501(15)(B). Those not on the list can make an “adequate showing” of disadvantage. 15 C.F.R. § 1400.1(b). Those on the list don’t have to. Thus, in presuming listed groups are “socially or economically disadvantaged,” the MBDA Statute presumes *unlisted* groups are *not* “socially or economically disadvantaged.” While they can take steps to show they are, that’s their burden to bear—the Agency assumes otherwise.

The Agency says this presumption helps “remedy[] [t]he unhappy persistence . . . of racial discrimination against minority groups in this country.” (quoting *Adarand*, 515 U.S. at 237). Plaintiffs say that’s too vague, applying considerations from *SFFA*. Plaintiffs further argue the presumption is “*not tailored at all*.” The Agency disagrees, arguing the presumption is narrowly tailored because it is (1) necessary, (2) flexible, (3) neither over- nor under-inclusive, and (4) minimally impactful to third parties.

The court stated that racial presumptions are a disfavored solution. As such, the Agency’s presumption must pass strict scrutiny. (citing *SFFA*, 600 U.S. at 206; *Adarand*, 515 U.S. at 227). A failure on either prong, the court stated, is terminal.

1. The Agency’s only compelling interest concerns discrimination in government contracting.

The Agency argues its presumption remedies myriad effects of discrimination. But, the court said, “an effort to alleviate the effects of societal discrimination is not a compelling interest.” (quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

Thus, the Agency’s brief posits two specific examples: discrimination in access to credit and discrimination in private contracting markets. To determine if either is compelling, the court pointed out the Supreme Court asks two questions. *First*, did specific acts of historic discrimination cause these problems? (citing *SFFA*, 600 U.S. at 207). *Second*, if the problems arise in private-sector contexts and are not tied to discrete incidents of historic discrimination, did the government “passively participate” in causing them? (citing *Croson*, 488 U.S. at 492).

The court stated that both questions call for specifics. The Agency cannot point to general social ills and call it a day. Rather, it must identify the “who, what, when, where, why, and how” of relevant discrimination. (citing *Croson and Greer’s Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 650 (N.D. Tex. 2021) (O’Connor, J.) (noting an “industry-specific inquiry [is] needed to support a compelling interest for a government-imposed racial classification”). Otherwise, the court noted, any race-based program could be justified considering the country’s history of race-based discrimination. “[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.” (quoting *Croson*, 488 U.S. at 506).

But, the court said, discrimination is “good at hiding.” Accordingly, “significant statistical disparit[ies]” can support “an inference of discrimination.” (quoting *Croson*, at 509 (collecting cases). Yet without more, “statistical disparities don’t cut it.” (quoting *Vitolo*, 999 F.3d at 361; and *Croson*, 488 U.S. at 499, 500–02). Moreover, not all disparity studies are created equal. The court cited Plaintiffs note, that “[s]tatistical studies that do not control for...capacity factors [] do not prove intentional discrimination.” And, the court stated that even the best empirics can only do so much. Statistical disparities support an *inference* of discrimination. (citing *Croson*, 488 U.S. at 509). Without concrete examples, the court concluded, an inference alone will not pass strict scrutiny.

The court noted the Supreme Court's discussion of *Wygant* in *Croson* demonstrates when a party must show government participation. (citing *Croson*, 488 U.S. at 485–88, 491–92). The court stated that the Supreme Court rejected two extremes. On one hand, it rejected the Fourth Circuit's reading of *Wygant* that required "prior discrimination by the government" for a program to pass strict scrutiny. (quoting *Croson* at 485). On the other, it rejected the appellant's argument that the city of Richmond could "define and attack the effects of prior discrimination" wherever they exist. (quoting *Croson* at 486).

Rather, the court said, *Croson* framed the analysis around specificity. If the government actively participated in past discrimination, it can use race to remedy the effects. (citing *Croson* at 486, 491–92). But to remedy private sector disparities, the court interpreting *Croson*, concluded, government must identify discrimination with pinpoint accuracy. This, the court holds, is satisfied by showing government participation in the relevant discrimination. (citing *Croson*, 488 F.3d at 492).

So, the court noted, government participation isn't always necessary, but it is sufficient. If the Agency identifies specific historic incidents it seeks to redress, the court found, it need not show government participation. But without evidence of government participation, the court stated, the Agency cannot use race to remedy broad statistical disparities in private-sector contexts.

The court said the common theme is clear: "a generalized assertion of past discrimination" won't suffice "because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" (quoting *Hunt*, 517 U.S. at 909 (quoting *Croson*, 488 U.S. at 498)). While the government need not furnish formal findings of discrimination at the start, it must "when a remedial program is challenged." (quoting *Dean*, 438 F.3d at 455).

The MBDA has been challenged, so the Agency must now establish a "strong basis in evidence" for its presumption. . And if it seeks to remedy private-sector structural disparities rather than particular historic discrimination, the court holds that it must furnish evidence of government participation. (citing *Croson*, 488 U.S. at 492, 503; *Wygant*, 476 U.S. at 274; *SFFA*, 600 U.S. at 260 (Thomas, J., concurring); *Dean*, 438 F.3d at 455; *Vitolo*, 999 F.3d at 361). Anything less fails strict scrutiny.

a. Discrimination in Credit Access. For its first interest, the court stated the Agency observed that "evidence before Congress" shows MBEs "have far less access to capital and credit" than white-owned business "due to racial discrimination in lending markets." The court noted that the record shows that's true, but the question isn't whether it's hard for MBEs to get credit. Rather, the court pointed out the question is (1) did specific incidents of historic discrimination cause this problem, and (2) if the problem is instead rooted in private-sector disparities, did the government participate in causing it? Based on these questions, the court holds the Agency's first interest isn't compelling.

i. Specific, Identified Instances of Past Discrimination. To show a compelling interest, the Agency must identify "specific, identified instances of past discrimination that violated the Constitution or a statute." (quoting *SFFA*, 600 U.S. at 207). The court found It failed to do so. The evidence shows "[n]ationwide, 'minority businesses are two to three times more likely to be denied a loan'" and "receive less funding and pay higher interest rates on loans they do receive."

The court said that nobody can deny that's a problem, but it cannot be a compelling government interest unless the Agency identifies concrete acts of past discrimination that caused it. (citing *SFFA*,

600 U.S. at 207). And, the court found the Agency's cited studies speak only to the phenomenon itself, not contributing factors. The court stated that not even one addresses causal factors, much less "specific, identified instances of past discrimination that violated the Constitution or a statute." (quoting *SFFA*, 600 U.S. at 207).

Without more granularity, the court concluded the Agency cannot establish a compelling interest. Further, the Agency extrapolates too much from the data, as nothing shows the studies controlled for other variables that stymie MBEs seeking credit. One of the Agency's reports noted that "identifiable indicators of capacity are themselves impacted by and reflect discrimination." But, the court found, that doesn't give the Agency carte blanche to justify its presumption from generalized findings without explaining the causal nexus.

While the Agency identified a few concrete examples of past discrimination, most of the cited studies do not. And, the court noted, the record failed to trace those few examples to specific disparities *today*. The court stated that past discrimination may cause modern disparities without longitudinal studies to reflect causation. But, the Agency, according to the court, must accomplish that task to justify its presumption, and it cannot rely on "various decades-old sources or rationale[s] for supporting a compelling interest *today*." The court stated the cited evidence is wholly insufficient to pass strict scrutiny, and the Agency's first interest is not compelling because it concerns private-sector credit disparities, and the record does not show government participation contributed to such disparities.

ii. Government Participation. The court holds that the government must identify relevant government participation to use race in remedying private-sector disparities. The record, according to the court, does not establish this element for the Agency's first interest. In many respects, the court noted, the Agency conflates quantitative and qualitative merit: the record shows evidence of MBEs' credit struggles, but it contains no evidence tying this problem to specified government participation. The court found that the Agency's reports do not identify government participation in the discrimination detailed.

The court stated that to be a passive participant, the government must be a participant. Precedent requires specifics to prove even passive participation. The record here, the court concluded, contains no concrete evidence of government "induction, encouragement, or promotion" of credit discrimination. Not only does the record fail to reflect government participation for this interest, the court pointed out, it affirmatively suggests other causal factors are relevant.

The problem, the court said, is not that non-government players were involved. As explained in *Croson*, the government can use race if it was "a 'passive participant' in a system of racial exclusion practices" in the private sector. The problem, the court found, is that the record identifies other causes *and* fails to show government participation. And the evidence that purports to show passive participation concerns failed federal policy, not actual participation in discrimination.

The court stated there is a big difference between participating in discrimination and simply taking actions that make life harder for MBEs. Remedying "what the Federal Government is not doing" is not a compelling interest; rather to pass strict scrutiny, the Agency must show government participation "with the particularity required by the Fourteenth Amendment."

The court concluded that if it can't, it lacks “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.” While the government may have a role in remedying MBEs’ credit problems, the court found the evidence doesn’t show it had a role in causing them—at least not as a participant. Accordingly, the court holds, any policies aimed at fixing these issues may not use race-based classifications, and the government’s first interest is not compelling.

b. Discrimination in Private Contracting Markets. The Agency's second interest concerns discrimination in private contracting markets. Asking the same two questions as discussed above, the court found the Agency's second interest is not compelling, however, the court concluded evidence specific to government contracting reveals that “subinterest” is.

i. Specific, Identified Instances of Past Discrimination. Setting aside initially government contracting, the court examined the government’s other evidence and found it failed to support a compelling interest because the cited sources were either: (1) too generalized or (2) too limited in temporal or geographic scope. To the extent they contain specifics, those specifics concern government contracting. The court discusses the three expert reports presented by the government and concluded they illustrate this issue.

The court found the Agency takes evidence probative for a specific context and uses it to justify more than it can. The reports touch on other contexts, but they do so in a generalized way. The court pointed out the Plaintiffs note: “The reports simply claim discrimination in an ‘entire industry,’ and that ‘the government’ participates in this ‘industry.’” The court stated the Plaintiffs note here is correct, and rejects the Agency's “simplistic syllogism” that “discrimination exists in the American economy, and the government participates in the American economy, therefore, the government participates in discrimination.”

The court said that these problems only implicate “ill-defined” “exclusionary networks.” The court noted many private contracting sectors operate under the “good ol’ boys club” where what a business does it less important than who its owner knows. The record shows MBEs underperform in these situations due to biases of those in the “ingroup.” The court stated this is a prime example of a compelling societal interest that is not, as a matter of law, a compelling *governmental* interest. But, the court found, many such exclusionary networks arise in government contracting, and if constrained to that context, the Agency's evidence supports a compelling interest. The court concluded the record contains “evidence of disparities in federal contracting consistent with discrimination.”

The Agency said these findings “justify the use of race-conscious remedial measures through the MBDA Act.” The court holds the reports identify instances of discrimination in this context, and so does the record as a whole. Thus, the court said, carving away the Agency's broader interest, the record shows remedying historic discrimination in public procurement/prime contracting is a compelling government interest.

ii. Government Participation. The court noted the Agency pointed to three categories of empirical evidence to support an inference of government-linked discrimination: (1) utilization indices, (2) regression analyses, and (3) aggregations of anecdotal evidence. The court stated “[i]t is well established that disparities between a locality's utilization of ...MBEs and their availability in the

relevant marketplace [can] provide evidence for the consideration of race-conscious remedies.” Plaintiffs critique the Agency’s evidence but don’t explain how it is critically deficient.

The court found the cited studies show significant disparity ratios for MBEs in prime contracting, and that such disparities support an “inference of discriminatory exclusion.” And because the government itself is the bidder on such contracts, that inference implicates government participation.

The court noted that through regression analysis, studies show whether race is a statistically significant predictor of the disparate outcome at a 95% confidence level, and thus indicate “whether the disparate outcomes between racial/ethnic minorities and white male business owners could have occurred by chance.” Pooling data from various sources, the studies of record produced logit models showing MBE exclusion in prime contracting nationwide. The court stated the math doesn’t add up unless race was considered. The Agency’s regression analyses, the court found, support an “inference of discriminatory exclusion” in government procurement/ prime contracting, which necessarily suggests government participation.

In sum, the court stated the record showed several examples of historic discrimination in which the government participated. Taken alone, the court noted, that wouldn’t be enough. The record also showed statistical analyses and disparity studies that raise an inference of government-linked discrimination. Taken alone, the court stated, that wouldn’t be enough, either. But, the court concluded that combining the concrete examples with the robust empirics, the court found remedying past discrimination in government contracting is a compelling governmental interest.

2. The MBDA’s racial presumption is not narrowly tailored. Having established a compelling sub-interest, the Agency must show its race-based presumption is narrowly tailored to further that interest. To do so, the Agency must show a “close fit” between the means (its presumption) and the end (remedying historic discrimination in government contracting). This fit must be so close that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The court examined the several factors that determine the narrow tailoring inquiry, and holds the MBDA statute failed under these considerations.

a. Under- and Over-Inclusivity. The MBDA’s race-based presumption, the court found, is both under- and over-inclusive. An underinclusive presumption excludes groups necessary to further the identified interest; an overinclusive presumption includes groups unnecessary for that interest.

The court stated the Agency’s presumption is underinclusive because it “arbitrarily excludes” many MBEs, including those owned by individuals from “the Middle East, North Africa, and North Asia.” Such inconsistencies come with the territory of “racial taxonomies in a multiracial nation.” The court found inconsistencies in which groups from certain countries are included or excluded, and that nothing in the government’s history provided a rationale for which countries are included or excluded. The court concluded the absence of a clear regulatory framework for including or excluding certain groups means the MBDA Statute is immune from meaningful judicial review.

The court holds the MBDA’s approach does not conform to the narrow tailoring strict scrutiny requires.

The court found the Agency failed to explain why its presumption is necessary to remedy the effects of discrimination in public, and the record contained no evidence of systemic exclusion from public contracting for many groups entitled to presumptive disability under the MBDA Statute. Without clear evidence tracing one-for-one the groups in 15 U.S.C. § 9501(15)(B) to concrete discrimination in this context, the Agency's presumption is not narrowly tailored

The court concluded the Agency seeks to justify a ramshackle presumption without concrete evidence establishing why certain groups make the list and others don't.

The court determined the Agency's overinclusive presumption is like many other federal statutes without any empirical justification and without close scrutiny. And, according to the court, because the Agency includes many individuals without ever asking if individual applicants belonging to those groups have experienced discrimination, it is facially overinclusive and thus fails strict scrutiny. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is both under and over-inclusive, and thus, it is not narrowly tailored and does not pass strict scrutiny.

b. Stereotyping. The court stated that most of the above issues stem from stereotypes underlying the Agency's presumption. There isn't anything inherently race-conscious about serving “socially or economically disadvantaged individual[s].” 15 U.S.C. § 9501(15). But the MBDA Statute defines “social or economic disadvantage” in racial terms. Nor does a business owner's race inherently suggest anything about disadvantage. But the MBDA Statute defines “minority owned business enterprise” in terms of “social or economic disadvantage.”

The court stated that the Agency uses race as a reliable proxy for disadvantage, at least with respect to the listed groups. If a business owner belongs to an enumerated group, he or she is entitled to services without regard to their life circumstances, financial performance, or any social or economic metrics of “disadvantage.” The inverse is true, too. No matter how disadvantaged an entrepreneur may be, the Agency presumes otherwise if they aren't on the list. The federal courts, the court said, have rejected “such illogical stereotypes.”

As far as the Agency is concerned, the court found that race presumptively determines disadvantage—but only for those listed in 15 U.S.C. § 9501(15)(B). The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is based on racial stereotypes. As such, it is not narrowly tailored and does not pass strict scrutiny.

c. Logical Endpoint. The court found the MBDA's presumption in 15 U.S.C. § 9501(15)(B) has no logical endpoint. Thus, the court holds, it is not narrowly tailored and does not pass strict scrutiny.

d. Other Relevant Factors. The court indicated having addressed the main factors applied in the *SFFA v. Harvard* case, and held the Agency's presumption does not satisfy the narrowly tailoring requirement, it addresses other factors.

i. Necessity & Available Alternatives. The court found the MBDA's racial presumption is unnecessary for the stated interest and was not crafted after first considering alternatives. The only surviving interest is remedying past discrimination in government procurement/prime contracting. The record, according to the court, does not show the Agency's presumption is necessary for that interest. But even if the Agency's broader interests were compelling, the court stated nothing

suggests the race-based presumption in 15 U.S.C. § 9501(15)(B) is necessary to fix the credit struggles and exclusionary networks documented in the record.

The court found that nothing in the record indicated the MBDA considered race-neutral alternatives before endorsing the presumption in 15 U.S.C. § 9501(15)(B). The Agency attempted to side-step this inquiry, noting merely that the federal government has operated race-neutral business-assistance programs for decades, and still racial disparities exist. But, the court stated, evidence that other agencies tried other solutions to other problems does not carry the Agency's burden. And, the court said, the Agency alone bears the burden of showing race-neutral alternatives were considered.

The court noted the Agency's problem isn't merely that race-neutral alternatives would suffice. Rather, the court holds MBDA's fatal flaw is that no evidence suggests it considered such alternatives before resorting to its race-based presumption. Without such evidence, the Agency failed to show the meticulous "connection between justification and classification" required for its presumption to survive. MBDA's presumption in 15 U.S.C. § 9501(15)(B), the court concluded, is unnecessary and was created without first considering race-neutral alternatives. Thus, it is not narrowly tailored and does not pass strict scrutiny.

ii. Flexibility & Duration. Second, a narrowly tailored program is flexible and durationally limited. The court said the primary question when analyzing a remedy's flexibility is whether its requirements may be waived. Nothing in the MBDA Statute, the court found, says its presumption is waivable or otherwise elastic. While applicants not on the Agency's list can attempt to demonstrate disadvantage, the underlying presumption cannot be waived. The racial presumption, the court noted, is baked into countless facets of MBDA programming. The Agency cannot relax its preferences in granting a finite good (MBDA benefits) because (1) the statute itself contains no waiver provision and thus precludes that option, and (2) the "applicant pool" is not geographically constrained and is thus effectively limitless.

The Agency's presumption is also unlimited in duration. It continues to grow, the court stated, and offers increasingly expansive programming pursuant to its racial presumption. If the current trend continues, the MBDA's presumption appears, according to the court, to have limitless shelf life. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is neither flexible nor durationally limited. Thus, it is not narrowly tailored and does not pass strict scrutiny.

iii. Impact on Third Parties. Third, a narrowly tailored program minimally impacts third parties. The court pointed out the MBDA presumes certain races are entitled to benefits, giving them an effective monopoly on its services. The court noted that precedent has long recognized that "[t]he badge of inequality and stigmatization conferred by racial discrimination" is itself an impactful harm. Those not covered by 15 U.S.C. § 9501(15)(B) are not invited to the party, the court said, unless they make an "adequate showing" that they should be. Even if those not covered can access business-development services from other programs, the court found, that presumption is per se impactful to third parties.

The court holds the Agency's presumption in 15 U.S.C. § 9501(15)(B) failed the other narrow tailoring factors and thus failed strict scrutiny.

Holding. The court holds that MBDA’s statutory presumption, codified at 15 U.S.C. § 9501, is unconstitutional. The Agency grants or withholds programming based upon a threshold satisfaction of 15 U.S.C. § 9501(15)(B), or alternatively, an “adequate showing” that an unlisted group is “socially or economically disadvantaged” under 15 C.F.R. § 1400.1(b). Any provision of the MBDA Statute that is contingent on the presumption in 15 U.S.C. §9501(15)(B) is also unconstitutional. Accordingly, the court granted summary judgment on Plaintiffs’ equal protection claim and found the following provisions of the MBDA Statute unconstitutional: 15 U.S.C. §§9501, 9511, 9512, 9522, 9523, 9524.

The court found that Plaintiffs satisfy the requirements for injunctive relief, though not for the broader injunction sought. Accordingly, the court ordered that the MBDA, along with its officers, agents, servants, and employees, and/or anyone acting in active concert therewith, be permanently enjoined from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1, or otherwise considering or using an applicant's race or ethnicity in determining whether they can receive Business Center programming.

ix. ***Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et. al.*** U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFVT (Complaint filed on October 26, 2023).

On October 26, 2023, Plaintiffs filed a suit challenging the Federal DBE Program. Plaintiffs seek a preliminary and permanent injunction, and a declaratory judgment, that the Federal DBE Program, including Sections 11101(e)(2) and (3) of the Infrastructure Act and corresponding federal regulations are unconstitutional because they violate the Equal Protection Clause of the U.S. Constitution.

Specifically, the request for relief provides the court:

A. Enter a preliminary injunction enjoining Defendants from applying all unconstitutional and illegal race and gender-based classifications in the federal DBE program, including those set out in Sections 11101(e)(2)–(3) of the Infrastructure Act, the Small Business Act, 49 C.F.R. pt. 26, and 13 C.F.R. pt. 124.

B. Enter a declaratory judgment that the race and gender-based classifications in the federal DBE program, including those set out in Sections 17 11101(e)(2)–(3) of the Infrastructure Act, the Small Business Act, 49 C.F.R. pt. 26, and 13 C.F.R. pt. 124, are unconstitutional and otherwise violate the APA.

C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications in the federal DBE program.

D. Set aside the race and gender classifications in 49 C.F.R. pt. 26 and 13 C.F.R. pt. 124.

Plaintiffs have filed a Motion for Preliminary Injunction, and Defendants have filed a Motion to Dismiss. The Motions are pending at the time of this report.

- x. ***Landscape Consultants of Texas, Inc. et. al. v. City of Houston, Texas, et. al.*** U.S. District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:23-cv-3516. Complaint filed September 19, 2023.

Plaintiffs allege that this is an Equal Protection Clause challenge to the City of Houston and Midtown Management District's (MMD's) "requirements for awarding public contracts based on the race of the bidding company's owner." Plaintiffs allege that the City's MSWBE program and MMD's MWDBE program violate the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983, and 42 U.S.C. § 1981.

Plaintiffs' Prayer for Relief requests the court:

1. Declare the City of Houston's MWSBE program unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 & 1983;
2. Permanently enjoin the City of Houston from operating its MWSBE program or using similar racial preferences in the award of public contracts;
3. Declare Midtown Management District's MWDBE policy unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
4. Permanently enjoin Midtown Management District from operating its MWDBE policy or using similar racial preferences in the award of public contracts;
5. Issue an award of attorneys' fees and costs in this action pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988.

The court issued an Order for the Initial Pretrial and Scheduling Conference and Order to Disclose Interested Persons. The first Scheduling order was issued on December 14, 2023. Defendants filed their Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6).

Defendant the City of Houston filed its Answer on January 12, 2024. The court entered an Order on January 12, 2024 denying both Defendants' Motions to Dismiss. The parties filed on January 24, 2024, a Joint Motion for entry of an Amended Scheduling Order, which the court granted by Order on February 1, 2024. The Defendant Midtown filed its Answer on January 28, 2024.

This list of pending cases and informative recent decisions is not exhaustive, but in addition to the cases cited previously and discussed *infra* may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs, related legislation, implementation of the Federal DBE Program by state and local governments and public authorities and agencies, and other types of programs impacting participation of MBE/WBE/DBEs.

For example, there are other recent cases similar to *Faust v. Vilsack*, 21-cv.-548 (E.D. Wis.) and *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) cited and discussed above, including a class action filed in *Miller v. Vilsack*, 2021 WL 11115194, 4:21-cv-595 (N.D. Tex. 2021), and separate lawsuits seeking to enjoin

United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.).

Many of these cases had granted the federal Defendants Motions to Stay pending resolution of the class action challenge to Section 1005 of the American Rescue Plan Act of 2021 in the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class action litigation.

As a result of the federal government's later repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties in many of these cases filed Stipulations of Dismissal, and the cases in September 2022 were dismissed by the Courts.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, the Federal DBE and ACDBE Programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in Pennsylvania to assess whether people of color (POCs), women, and POC- and woman-owned businesses face any barriers in the local construction, professional services, and non-professional services and goods industries. Where data were available, we also assessed those effects for veterans, people with disabilities, and veteran-, disabled-, and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses. We examined marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs, women, veterans, and people with disabilities face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs, women, veterans, people with disabilities, and members of the LGBTQ+ community face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether POCs, women, veterans, and people with disabilities own businesses at rates comparable to that of white men, non-veterans, and people without disabilities, respectively; and
- **Business success**, to assess whether POC-, woman-, veteran-, disabled-, and LGBTQ+-owned businesses have outcomes similar to those of businesses owned by white men, non-veterans, people without disabilities, and non-members of the LGBTQ+ community, respectively.

Appendix C presents a series of figures and tables that show results from those analyses. We highlight statistically significant results and results that demonstrate marketplace barriers for relevant race and gender groups. Key results and their implications are presented in Chapter 3.

Figure C-1.
Percentage of all workers aged 25 and older
with at least a four-year degree, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Percentage
Race/ethnicity	
Asian Pacific American	54.8 % **
Black American	27.5 **
Hispanic American	23.5 **
Native American	31.7 **
Subcontinent Asian American	77.9 **
Other race POCs	42.1
White American	41.2
Gender	
Women	42.3 % **
Men	37.1
Disability Status	
People with disabilities	23.1 % **
All others	40.8
Veteran Status	
Veteran	28.0 % **
Non-veteran	40.2

Figure C-1 indicates that, compared to white American workers (41.2%), Black American (27.5%), Hispanic American (23.5%), and Native American (31.7%) workers in Pennsylvania are substantially less likely to have four-year college degrees. In contrast, Asian Pacific (54.8%) and Subcontinent Asian American (77.9%) workers are more likely than white American works to have four-year college degrees. In addition, workers with disabilities (23.1%) are substantially less likely than workers without disabilities (40.8%) and veteran workers (28.0%) are substantially less likely than non-veteran workers (40.2%) to have four-year college degrees.

Figure C-2.
Predictors of college completion, 2017-2021

Note:

The regression included 260,000 observations.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables variable is as follows: white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Age	-0.0178 **
Age-squared	0.0001 **
Disabled	-0.4489 **
Speaks English well	0.9652 **
Asian Pacific American	0.4522 **
Black American	-0.3993 **
Hispanic American	-0.4421 **
Native American	-0.2660 **
Subcontinent Asian American	1.0790 **
Other race POC	0.0191
Women	0.1337 **
Veteran	-0.2043 **
Constant	-0.5747 **

Figure C-2 indicates that, in Pennsylvania, Black Americans, Hispanic Americans, and Native Americans are less likely to complete college compared to white Americans, even after statistically accounting for other personal factors. In contrast, Asian Pacific Americans and Subcontinent Asian Americans are more likely to complete college compared to white Americans, even after statistically accounting for other

personal factors. In addition, veterans are less likely to complete college compared to non-veterans, even after statistically accounting for other personal factors.

Figure C-3.
Demographic characteristics of workers in study-related industries and all industries, 2017-2021

Group	All Industries (n=317,917)	Construction (n=20,371)	Professional Services (n=20,049)	Non-professional Services and Goods (n=12,969)
Race/ethnicity				
Asian Pacific American	2.6 %	0.8 % **	3.2 % **	1.6 % **
Black American	10.7 %	5.2 % **	8.7 % **	14.0 % **
Hispanic American	7.0 %	6.9 %	5.2 % **	10.3 % **
Native American	0.4 %	0.4 %	0.2 % **	0.4 %
Subcontinent Asian American	1.4 %	0.2 % **	4.4 % **	0.5 % **
Other race POCs	0.6 %	0.6 %	0.7 %	0.7 %
Total POC	22.8 %	14.1 %	22.4 %	27.4 %
White American	77.2 %	85.9 % **	77.6 %	72.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.7 %	9.1 % **	42.9 % **	29.3 % **
Men	52.3 %	90.9 %	57.1 %	70.7 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Disability Status				
People with disabilities	7.0 %	6.9 %	5.4 % **	8.7 % **
All others	93.0 %	93.1 %	94.6 % **	91.3 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	4.5 %	6.4 % **	4.5 %	6.5 % **
Non-veteran	95.5 %	93.6 %	95.5 %	93.5 %
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that, compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans (0.8%), Black Americans (5.2%), Subcontinent Asian Americans (0.2%), and women (9.1%) work in the construction industry. A greater percentage of veterans (6.4%) work in the construction industry.
- Smaller percentages of Black Americans (8.7%), Hispanic Americans (5.2%), Native Americans (0.2%), women (42.9%), and people with disabilities (5.4%) work in the professional services industry. Greater percentages of Asian Pacific Americans (3.2%) Subcontinent Asian Americans (4.4%), and people without disabilities (94.6%) work in the professional services industry.
- Smaller percentages of Asian Pacific Americans (1.6%), Subcontinent Asian Americans (0.5%), and women (29.3%) work in the non-professional services and goods industry. Greater percentages of Black Americans (14.0%), Hispanic Americans (10.3%), people with disabilities (8.7%), and veterans (6.5%) work in the non-professional services and goods industry.

**Figure C-4.
Unemployment rates, 2017-2021**

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Rate
Race/ethnicity	
Asian Pacific American	5.1 %
Black American	11.1 **
Hispanic American	8.5 **
Native American	9.2 **
Subcontinent Asian American	3.6 **
Other race POCs	7.6 **
White American	4.6
Gender	
Women	5.4 % **
Men	5.9
Disability Status	
People with disabilities	12.3 % **
All others	5.1
Veteran Status	
Veteran	4.9 % **
Non-veteran	5.7

Figure C-4 indicates that Black Americans (11.1%), Hispanic Americans (8.5%), Native Americans (9.2%), and other race POCs (7.6%) exhibit greater unemployment rates than white Americans (4.6%) in Pennsylvania. In addition, people with disabilities (12.3%) exhibit greater unemployment rates than all others (5.1%). In contrast, Subcontinent Asian Americans (3.6%) exhibit lower unemployment rates than white Americans (4.6%), women (5.4%) exhibit lower unemployment rates than men (5.9%), and veterans (4.9%) exhibit lower unemployment rates than non-veterans (5.7%).

**Figure C-5.
Predictors of unemployment, 2017-2021**

Note:

The regression included 289,962 observations.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables, white Americans for the race variables, and manufacturing for the industry variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Age	-0.0190 **
Age-squared	0.0001 **
Married	-0.2997 **
Disabled	0.3958 **
Number of children in household	0.0023
Number of people over 65 in household	0.1140 **
Speaks English well	-0.0101
Less than high school education	0.1397 **
Some college	-0.0590 **
Four-year degree	-0.1774 **
Advanced degree	-0.2555 **
Asian Pacific American	0.0584
Black American	0.3927 **
Hispanic American	0.1649 **
Native American	0.3070 **
Subcontinent Asian American	0.0729
Other race POC	0.2317 **
Women	0.0523 **
Veteran	0.0252
Extraction and agriculture	-0.4347 **
Construction	-0.1240 **
Wholesale trade	-0.3994 **
Retail trade	-0.3104 **
Transportation, warehouse, & information	-0.3366 **
Professional services	-0.3392 **
Education	-0.4875 **
Health care	-0.6028 **
Other services	-0.2108 **
Public administration and social services	-0.6406 **
Constant	-0.7489 **

Figure C-5 indicates that Black Americans, Hispanic Americans, Native Americans, and other race POCs are more likely to be unemployed compared to white Americans, even after statistically accounting for other personal factors. In addition, women are more likely to be unemployed relative to men, even after statistically accounting for other personal characteristics.

**Figure C-6.
Percentage of non-owner
workers who worked as a
manager in each study-
related industry, 2017-
2021**

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

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

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Group	Construction	Professional Services	Non-professional Services and Goods
Race/ethnicity			
Asian Pacific American	2.8 % **	5.2 %	3.5 %
Black American	5.2 %	2.0 % **	1.3 % **
Hispanic American	3.4 % **	2.8 % **	2.6 %
Native American	7.7 %	10.5 %	5.1 %
Subcontinent Asian American	24.0 % †	5.2 %	3.0 %
Other race POCs	9.7 %	6.9 %	0.0 %
White American	7.4 %	5.0 %	3.7 %
Gender			
Women	6.5 %	2.7 % **	2.4 % **
Men	7.0 %	6.1 %	3.5 %
Disability Status			
People with disabilities	5.9 %	3.5 % *	1.0 % **
All others	7.0 %	4.7 %	3.4 %
Veteran Status			
Veteran	7.4 %	7.4 % **	2.3 % *
Non-veteran	6.9 %	4.5 %	3.3 %
All individuals	7.0 %	4.6 %	3.2 %

Figure C-6 indicates that:

- Smaller percentages of Asian Pacific Americans (2.8%) and Hispanic Americans (3.4%) than white Americans (7.4%) work as managers in the Pennsylvania construction industry.
- Smaller percentages of Black Americans (2.0%) and Hispanic Americans (2.8%) than white Americans (5.0%) work as managers in the Pennsylvania professional services industry. In addition, smaller percentages of women (2.7%) than men (6.1%) and smaller percentages of people with disabilities (3.5%) than all others (4.7%) work as managers in the Pennsylvania professional services industry. In contrast, larger percentages of veterans (7.4%) work in the Pennsylvania professional services industry than non-veterans (4.5%).
- Smaller percentages of Black Americans (1.3%) than white Americans (3.7%) work as managers in the Pennsylvania non-professional services and goods industry. Smaller percentages of women (2.4%) than men (3.5%) work as managers in the Pennsylvania non-professional services and goods industry. In addition, smaller percentages of veterans (2.3%) than non-veterans (3.3%) and smaller percentages of people with disabilities (1.0%) than all others (3.4%) work as managers in the Pennsylvania non-professional services and goods industry.

**Figure C-7.
Predictors of management in
construction, 2017-2021**

Note:

The regression included 13,369 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-3.0463 **
Age	0.0242
Age-squared	-0.0002
Married	0.2085 **
Disabled	0.0057
Number of children in household	0.0387 *
Number of people over 65 in household	-0.1579 **
Part time	-0.4476 **
Speaks English well	0.4600
Less than high school education	-0.2079
Some college	0.3980 **
Four-year degree	0.9729 **
Advanced degree	1.1301 **
Asian Pacific American	-0.5553 **
Black American	0.0092
Hispanic American	-0.0220
Native American	0.2803
Subcontinent Asian American	-0.1291
Other race POC	-0.2075
Women	-0.2340 **
Veteran	-0.0570

Figure C-7 indicates that Asian Pacific Americans are less likely to work as managers in the Pennsylvania construction industry relative to white Americans, even after statistically accounting for other personal characteristics. In addition, women are less likely to work as managers in the Pennsylvania construction industry relative to men, even after statistically accounting for other personal characteristics.

**Figure C-8.
Predictors of management in
professional services, 2017-2021**

Note:

The regression included 10,470 observations.

** Denotes statistical significance at the 95% confidence level.

† Speaks English well omitted due to perfect correspondence with dependent variable.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.9337 **
Age	0.0511 **
Age-squared	-0.0003
Married	0.0828
Disabled	-0.1953
Number of children in household	0.0819 **
Number of people over 65 in household	0.0045
Part time	-0.3476 **
Speaks English well	0.0000 †
Less than high school education	-0.2408
Some college	0.2471
Four-year degree	0.4668 **
Advanced degree	0.5754 **
Asian Pacific American	-0.0217
Black American	-0.2581
Hispanic American	0.0994
Native American	-0.3517
Subcontinent Asian American	-0.6180 **
Other race POC	-0.1809
Women	-0.2751 **
Veteran	0.0148

Figure C-8 indicates that Subcontinent Asian Americans are less likely to work as managers in the Pennsylvania professional services industry relative to white Americans, even after statistically accounting for other personal characteristics. In addition, women are less likely to work as managers in the Pennsylvania professional services industry relative to men, even after statistically accounting for other personal characteristics.

**Figure C-9.
Predictors of management in non-
professional services and goods, 2017-2021**

Note:

The regression included 4,586 observations.

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

† Speaks English well, and Black American omitted due to perfect correspondence with dependent variable.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.9033 **
Age	0.0388 *
Age-squared	-0.0004
Married	0.2177 *
Disabled	-0.6650 **
Number of children in household	0.0712
Number of people over 65 in household	0.1030
Part time	-0.6127 **
Speaks English well	0.0000 †
Less than high school education	-0.1885
Some college	0.1554
Four-year degree	0.6179 **
Advanced degree	0.8625 **
Asian Pacific American	-0.1169
Black American	0.0000 †
Hispanic American	-0.0336
Native American	-0.0311
Subcontinent Asian American	-0.5666
Other race POC	-0.1395
Women	-0.2229 *
Veteran	-0.0340

Figure C-9 indicates that women are less likely to work as managers in the Pennsylvania non-professional services and goods industry compared to men, even after statistically accounting for other personal factors.

Figure C-10.
Mean annual wages, 2017-2021

Note:

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

*, ** Denotes that the difference in mean between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

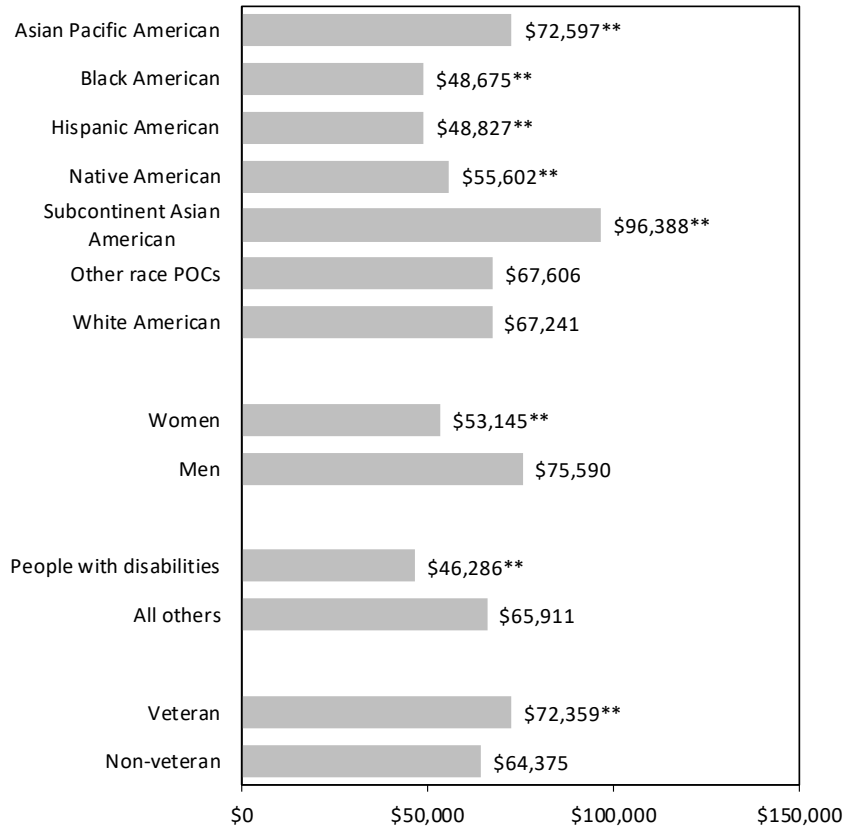


Figure C-10 indicates that Black American (\$48,675), Hispanic American (\$48,827), and Native American (\$55,602) workers in Pennsylvania earn substantially less in wages than white American workers (\$67,241). In addition, women (\$53,145) earn substantially less than men (\$75,590) and people with disabilities (\$46,286) earn substantially less than all others (\$65,911) in Pennsylvania. In contrast, Asian Pacific American (\$72,597) and Subcontinent Asian American (\$96,388) workers in Pennsylvania earn substantially more in wages than white American workers, and veteran workers (\$72,359) earn substantially more than non-veteran workers (\$64,375).

**Figure C-11.
Predictors of annual wages
(regression), 2017-2021**

Notes:

The regression includes 176,486 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

The referent for each set of categorical variables is as follows: white Americans for the race variables, high school diploma for the education variables, and manufacturing for industry variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	9717.767 **
Asian Pacific American	0.983
Black American	0.880 **
Hispanic American	0.914 **
Native American	0.953 *
Subcontinent Asian American	0.952 **
Other race POCs	0.993
Women	0.777 **
Less than high school education	0.858 **
Some college	1.175 **
Four-year degree	1.600 **
Advanced degree	2.260 **
Disabled	0.803 **
Veteran	1.017
Speaks English well	1.453 **
Age	1.047 **
Age-squared	1.000 **
Married	1.134 **
Children	1.019 **
Number of people over 65 in household	0.905 **
Public sector worker	1.108 **
Manager	1.272 **
Part time worker	0.337 **
Extraction and agriculture	0.956 **
Construction	0.992
Wholesale trade	0.976 *
Retail trade	0.756 **
Transportation, warehouse, & information	1.016 *
Professional services	1.106 **
Education	0.695 **
Health care	0.999
Other services	0.682 **
Public administration and social services	0.804 **

Figure C-11 indicates that, compared to white American workers in Pennsylvania, Black American, Hispanic American, Native American, and Subcontinent Asian American workers earn less in annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being a Black American worker is associated with making approximately \$0.88 for every dollar a white American worker makes, all else being equal.) In addition, compared to men workers in Pennsylvania, women workers earn less in annual wages, even after accounting for various other personal characteristics.

Figure C-12.
Median family net worth (in thousands), United States, 2022

Note:
 All amounts in 2022 dollars.
 Source:
 Federal Reserve Survey of Consumer Finances data 2022.

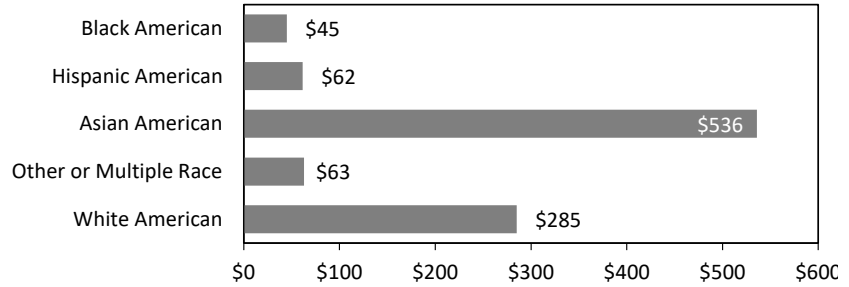


Figure C-12 indicates that Black Americans (\$45,000), Hispanic Americans (\$62,000), and other or multiple race Americans (\$63,000) in the United States have a lower median net worth than white Americans (\$285,000). In contrast, Asian Americans (\$536,000) in the United States have a greater median net worth than white Americans.

Figure C-13.
Homeownership rates, 2017-2021

Note:
 The sample universe is all households.
 ** Denotes statistically significant differences from white Americans at the 95% confidence level.
 Source:
 BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

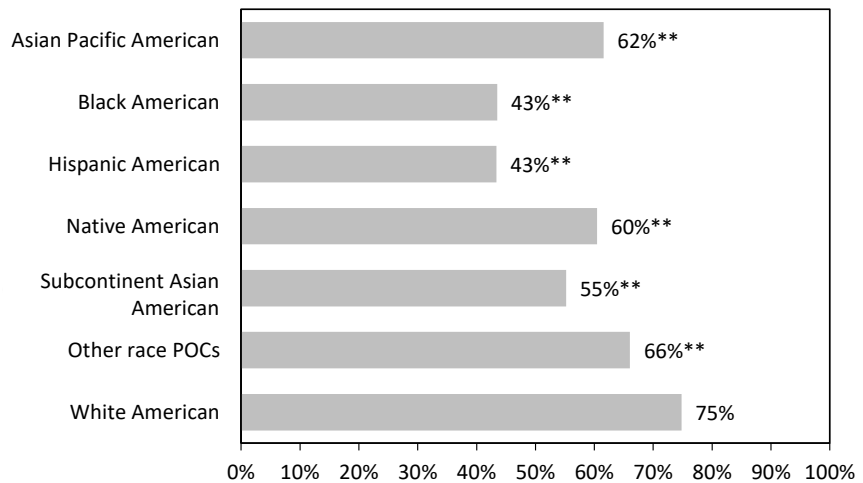


Figure C-13 indicates that Asian Pacific Americans (62%), Black Americans (43%), Hispanic Americans (43%), Native Americans (60%), Subcontinent Asian Americans (55%), and other race POCs (66%) in Pennsylvania exhibit homeownership rates less than that of white Americans (75%).

Figure C-14.
Median home values,
Pennsylvania, 2017-2021

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

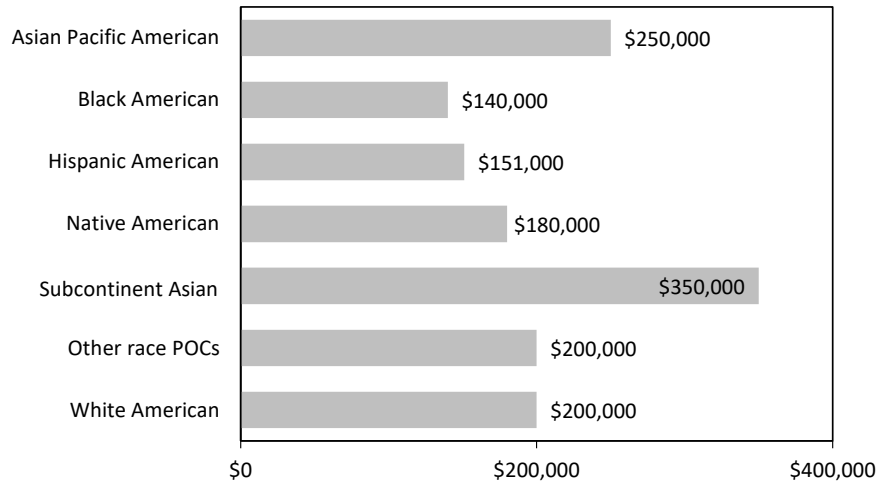


Figure C-14 indicates that, in Pennsylvania, Black American (\$140,000), Hispanic American (\$151,000), and Native American (\$180,000) homeowners own homes that, on average, are worth less than those of white American homeowners (\$200,000). In contrast, Asian Pacific American (\$250,000) and Subcontinent Asian American (\$350,000) homeowners own homes that, on average, are worth more than those of white American homeowners.

Figure C-15.
Denial rates of conventional
purchase loans for high-income
households, 2022

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2022. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

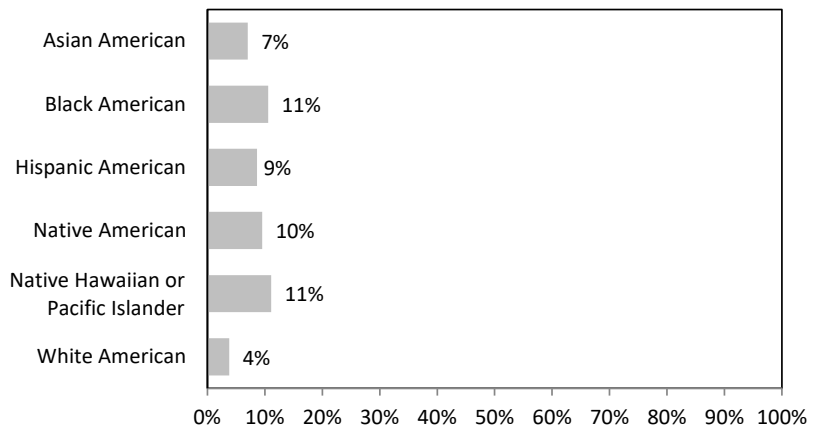


Figure C-15 indicates that Asian Americans (7%), Black Americans (11%), Hispanic Americans (9%), Native Americans (10%), and Native Hawaiian or Pacific Islanders (11%) in Pennsylvania are denied home loans at greater rates than white Americans (4%).

**Figure C-16.
Loan, line of credit, and
cash advance denial
rates, United States,
2022**

Source:
BBC from 2022 Small
Business Credit Survey.

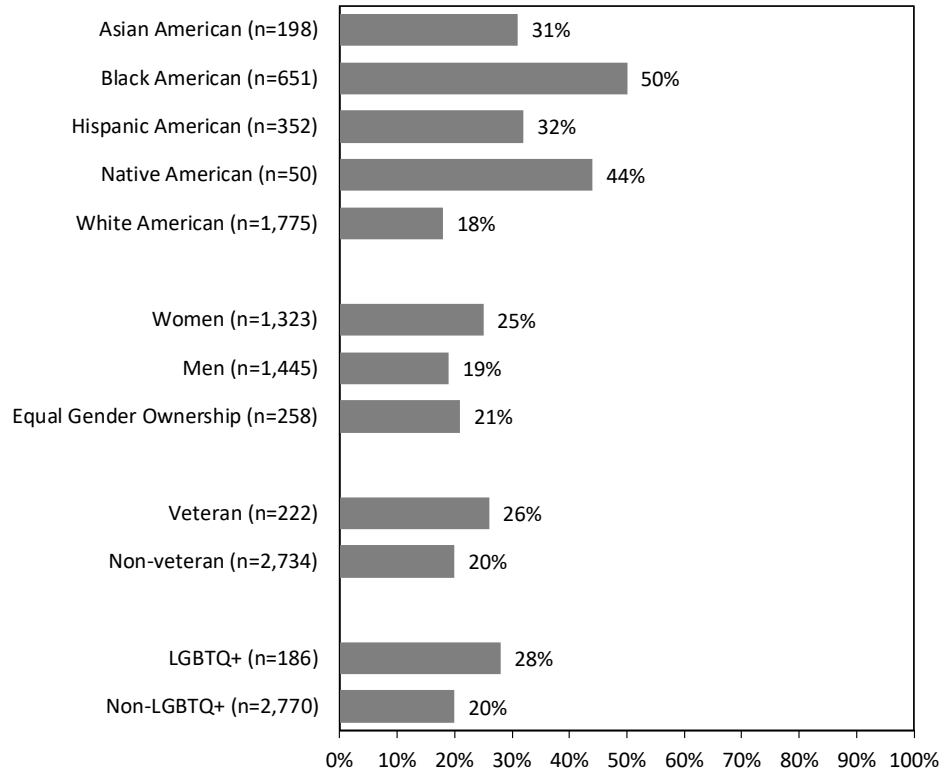


Figure C-16 indicates that Asian American- (31%), Black American- (50%), Hispanic American- (32%), and Native American- (44%) owned businesses in the United States are denied loans at greater rates than white American-owned businesses (18%). Woman-owned businesses (25%) are denied loans at greater rates than businesses owned by men (19%). In addition, veteran-owned businesses (26%) are denied loans at greater rates than businesses owned by non-veterans (20%). Finally, lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses (28%) are denied loans at greater rates than non-LGBTQ+-owned businesses (20%).

Figure C-17.
Businesses that did not apply
for loans due to fear of
denial, United States, 2021

Source:
 BBC from 2021 Small Business Credit Survey.

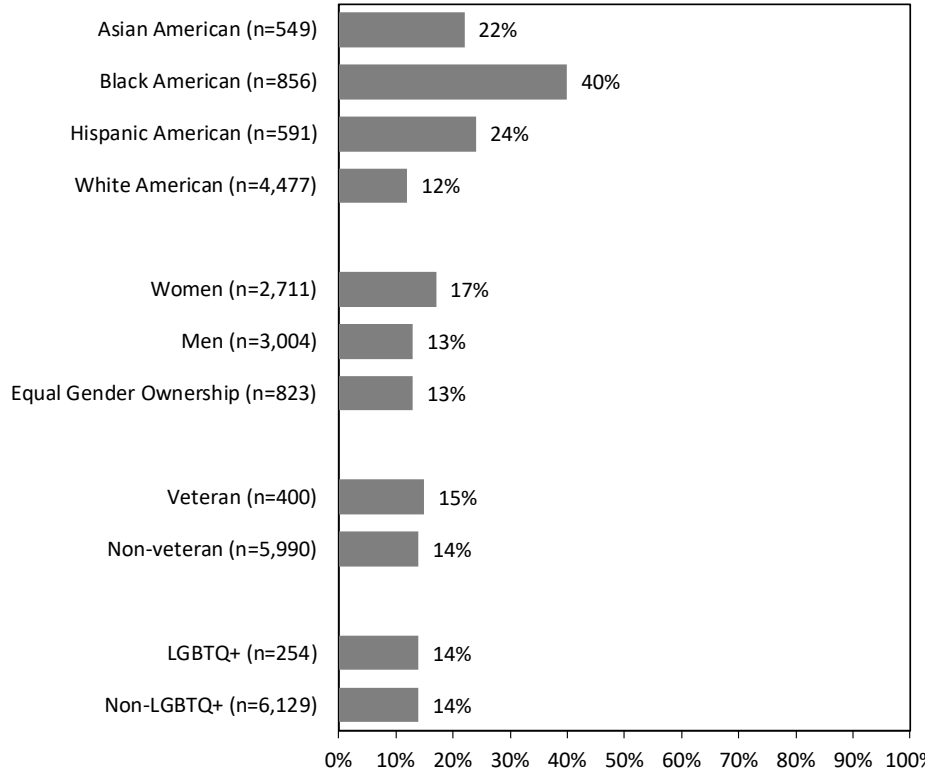


Figure C-17 indicates that Asian American- (22%), Black American- (40%), and Hispanic American- (24%) owned businesses in the United States are more likely than white American-owned businesses (12%) to not apply for loans due to a fear of denial. Woman-owned businesses (17%) are more likely than businesses owned by men (13%) to not apply for loans due to a fear of denial.

Figure C-18.
Owner demographic characteristics of businesses in study-related industries and all industries, 2018

Group	All Industries (1,079,291)	Construction (120,790)	Professional Services (152,044)	Non-professional Services and Goods (24,269)
Race/ethnicity				
POC	15.7 %	8.8 % **	10.6 % **	7.4 % **
White American	81.4 %	89.9 % **	87.9 % **	87.4 % **
Equally POC/white American	0.3 %	D %	S %	0.3 %
Gender				
Female	34.2 %	7.7 % **	35.3 % **	21.1 % **
Male	58.9 %	89.3 % **	61.1 % **	68.2 % **
Equally male/female	4.2 %	1.9 % **	2.1 % **	5.1 %
Veteran Status				
Veteran	5.2 %	7.0 % **	5.8 % **	S %
Non-veteran	91.4 %	91.7 %	92.6 % **	86.7 % **

Note: ** Denotes that the difference in proportions between businesses in each study-related industry and businesses in all industries is statistically significant at the 95% confidence level.

S Denotes proportion not reported because data did not meet US Census publication standards.

D Denotes proportion not reported to avoid disclosing data for individual companies.

Source: BBC from 2018 Nonemployer Statistics by Demographics series: Statistics for Employer and Nonemployer Firms

Figure C-18 indicates that, compared to all industries considered together:

- A smaller percentage of Pennsylvania construction businesses are owned by POCs (8.8%), and a smaller percentage of Pennsylvania construction businesses are owned by women (7.7%).
- A smaller percentage of Pennsylvania professional services businesses are owned by POCs (10.6%).
- A smaller percentage of Pennsylvania non-professional services and goods businesses are owned by POCs (7.4%). In addition, a smaller percentage of Pennsylvania non-professional services and goods businesses are owned by women (21.1%).

Figure C-19.
Ownership rates in study-related industries, 2017-2021

Group	Construction	Professional Services	Non-professional Services and Goods
Race/ethnicity			
Asian Pacific American	27.3 %	8.8 % **	9.5 %
Black American	16.6 % **	8.8 % **	6.8 % **
Hispanic American	19.4 % **	9.9 % **	6.8 % **
Native American	22.7 %	23.7 %	20.6 %
Subcontinent Asian American	1.4 % †	7.1 % **	13.7 %
Other race POC	26.9 %	21.5 %	17.4 %
White American	23.3 %	14.9 %	9.7 %
Gender			
Women	12.8 % **	11.5 % **	12.1 % **
Men	23.7 %	15.3 %	7.9 %
Disability Status			
People with disabilities	28.1 % **	17.0 % **	10.8 %
All others	22.3 %	13.5 %	9.0 %
Veteran Status			
Veteran	26.5 % **	17.5 % **	8.4 %
Non-veteran	22.4 %	13.5 %	9.2 %
All individuals	22.7 %	13.7 %	9.1 %

Note: *, ** Denotes that the difference in proportions between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

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

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates that in Pennsylvania:

- Black Americans (16.6%) and Hispanic Americans (19.4%) own construction businesses at rates less than that of white Americans (23.3%), and women (12.8%) own construction businesses at a rate less than that of men (23.7%). In contrast, people with disabilities (28.1%) own construction businesses at rates higher than all others (22.3%) and veterans (26.5%) own construction businesses at rates higher than non-veterans (22.4%).
- Asian Pacific Americans (8.8%), Black Americans (8.8%), Hispanic Americans (9.9%), and Subcontinent Asian Americans (7.1%) own professional services businesses at rates less than that of white Americans (14.9%), and women (11.5%) own professional services businesses at a rate less than that of men (15.3%). In contrast, people with disabilities (17.0%) own professional services businesses at rates higher than all others (13.5%) and veterans (17.5%) own professional services businesses at rates higher than non-veterans (13.5%).
- Black Americans (6.8%) and Hispanic Americans (6.8%) own non-professional services and goods businesses at a rate less than that of white Americans (9.7%). In contrast, women (12.1%) own non-professional services and goods businesses than men (7.9%).

**Figure C-20.
Predictors of business ownership in
construction (regression), 2017-2021**

Note:

The regression included 17,638 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-2.2446 **
Age	0.0468 **
Age-squared	-0.0003 **
Married	0.0734 **
Disabled	0.1369 **
Number of children in household	0.0624 **
Number of people over 65 in household	0.0348
Owns home	-0.0531
Home value (\$000s)	0.0006 **
Monthly mortgage payment (\$000s)	-0.0265
Interest and dividend income (\$000s)	0.0052 **
Income of spouse or partner (\$000s)	0.0001
Speaks English well	-0.1345
Less than high school education	0.1411 **
Some college	0.0664 *
Four-year degree	-0.0216
Advanced degree	-0.0364
Asian Pacific American	0.1933
Black American	-0.1038
Hispanic American	-0.0213
Native American	-0.0993
Subcontinent Asian American	-1.1325 *
Other race POC	0.1946
Women	-0.5033 **
Veteran	-0.1024

Figure C-20 indicates that Subcontinent Asian Americans are less likely to own construction businesses in Pennsylvania relative to white Americans, even after statistically accounting for other personal characteristics. In addition, women are less likely to own construction businesses in Pennsylvania relative to men, even after statistically accounting for other personal characteristics.

**Figure C-21.
Predictors of business ownership in
professional services (regression), 2017-2021**

Note:

The regression included 17,832 observations.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.9502 **
Age	0.0155
Age-squared	0.0001
Married	0.0103
Disabled	0.1006
Number of children in household	0.0050
Number of people over 65 in household	0.0737 **
Owns home	-0.0098
Home value (\$000s)	0.0004 **
Monthly mortgage payment (\$000s)	0.0083
Interest and dividend income (\$000s)	0.0019 **
Income of spouse or partner (\$000s)	0.0009 **
Speaks English well	0.4194
Less than high school education	0.0751
Some college	0.2515 **
Four-year degree	0.4370 **
Advanced degree	0.4812 **
Asian Pacific American	-0.3313 **
Black American	-0.0087
Hispanic American	0.0194
Native American	0.4230
Subcontinent Asian American	-0.3249 **
Other race POC	0.1904
Women	-0.1471 **
Veteran	-0.2695 **

Figure C-21 indicates that Asian Pacific Americans and Subcontinent Asian Americans are less likely to own professional services businesses in Pennsylvania compared to white Americans, even after statistically accounting for other personal factors. Women are also less likely to own professional services businesses relative to men, even after statistically accounting for other personal factors. In addition, veterans are also less likely to own professional services relative to non-veterans, even after statistically accounting for other personal factors.

Figure C-22.
Predictors of business ownership in non-professional services and goods (regression), 2017-2021

Note:

The regression included 11,170 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.8517 **
Age	0.0469 **
Age-squared	-0.0003 **
Married	0.1153 **
Disabled	0.1130
Number of children in household	0.0048
Number of people over 65 in household	-0.0033
Owns home	-0.1126 *
Home value (\$000s)	0.0004 **
Monthly mortgage payment (\$000s)	0.0325
Interest and dividend income (\$000s)	0.0041 **
Income of spouse or partner (\$000s)	-0.0004
Speaks English well	0.0317
Less than high school education	0.1991 **
Some college	-0.0027
Four-year degree	-0.0250
Advanced degree	-0.1414
Asian Pacific American	-0.0465
Black American	-0.0871
Hispanic American	-0.1353
Native American	0.7547 **
Subcontinent Asian American	0.1713
Other race POC	0.4720
Women	0.2715 **
Veteran	-0.1273

Figure C-22 indicates that no groups of POCs, women, or veterans are less likely to own non-professional services and goods businesses in Pennsylvania compared to white Americans, men, or non-veterans, respectively, after statistically accounting for other personal factors.

Figure C-23.
Disparities in business ownership rates for Pennsylvania construction workers, 2017-2021

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Subcontinent Asian American	1.8%	17.3%	11
White women	12.7%	26.2%	48

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that Subcontinent Asian Americans and white women working in construction in Pennsylvania own businesses at a rate that is 11 percent and 48 percent, respectively, that of similarly situated white men.

Figure C-24.
Disparities in business ownership rates for Pennsylvania professional services workers, 2017-2021

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	7.6%	13.6%	56
Subcontinent Asian American	7.9%	13.0%	61
White women	12.5%	15.6%	80
Veteran	15.9%	20.0%	79

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that Asian Pacific Americans, Subcontinent Asian Americans, and white women working in professional services in Pennsylvania own businesses at rates that are 56 percent, 61 percent, and 80 percent, respectively, that of similarly situated white men. In addition, veterans working in professional services in Pennsylvania own businesses at rates that are 79 percent that of similarly situated non-veterans.

Figure C-25.
Businesses in poor
financial condition,
United States, 2022

Source:
 BBC from 2022 Small
 Business Credit Survey.

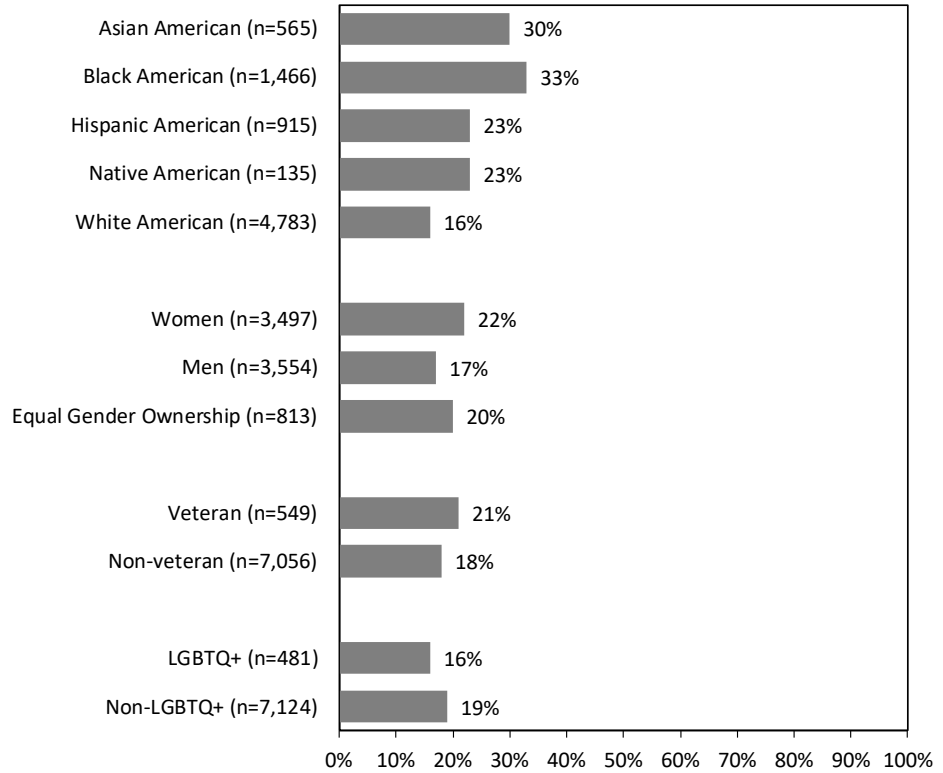


Figure C-25 indicates that, nationally, Asian American- (30%), Black American- (33%), Hispanic American- (23%), and Native American-owned businesses (23%) are more likely than white American-owned businesses (16%) to report being in poor financial condition. Woman-owned businesses (22%) are more likely to report being in poor financial condition than businesses owned by men (17%). In addition, veteran-owned businesses (21%) are more likely to report being in poor financial condition than businesses owned by non-veterans (19%). Finally, LGBTQ+-owned businesses are less likely to report being in poor financial condition than non-LGBTQ+-owned businesses.

Figure C-26.
Mean annual business
receipts (in thousands), 2017

Note:

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

† Mean not reported because data did not meet US Census publication standards.

Source:

BBC from 2017 Annual Business Survey.

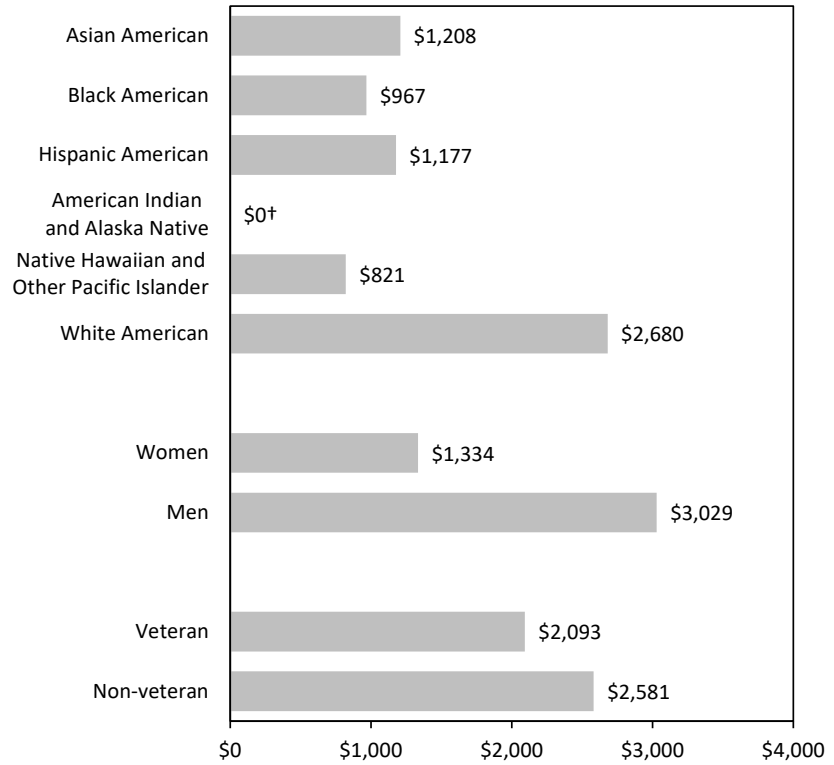


Figure C-26 indicates that Asian American- (\$1.2 million), Black American- (\$967,000), Hispanic American- (\$1.2 million), and Native Hawaiian and other Pacific Islander-owned businesses (\$821,000) in Pennsylvania have mean annual business receipts less than that of white American-owned businesses (\$2.7 million). Woman-owned businesses (\$1.3 million) have mean annual business receipts less than that of businesses owned by men (\$3.0 million). In addition, veteran-owned businesses (\$2.1 million) have mean annual business receipts less than that of businesses owned by non-veterans (\$2.6 million).

Figure C-27.
Mean annual business
owner earnings, 2017-
2021

Note:

The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2021 dollars.

*, ** Denotes that the difference in mean between the POC group and white Americans, between women and men, between people with disabilities and all others, or veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

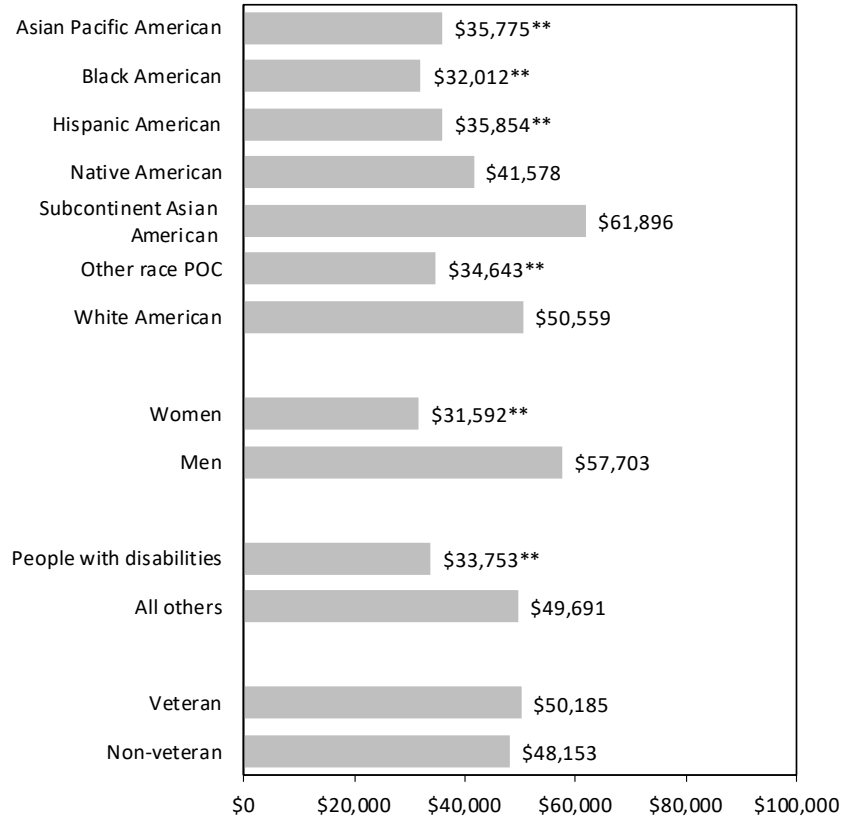


Figure C-27 indicates that, in Pennsylvania, Asian Pacific American (\$35,775), Black American (\$32,012), Hispanic American (\$35,854), and other race POC (\$34,643) business owners earn less on average than white American business owners (\$50,559). In addition, woman business owners (\$31,592) earn less on average than male business owners (\$57,703) and business owners with disabilities (\$33,753) earn less on average than all other business owners (\$49,691).

**Figure C-28.
Predictors of business owner
earnings (regression), 2017-2021**

Notes:

The regression includes 15,880 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners aged 16 and over who reported positive earnings.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white American for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	1,107.062 **
Age	1.129 **
Age-squared	0.999 **
Married	1.244 **
Speaks English well	1.131
Disabled	0.561 **
Less than high school	0.945
Some college	1.021
Four-year degree	1.212 **
Advanced degree	1.768 **
Asian Pacific American	0.773 **
Black American	0.919
Hispanic American	1.127 *
Native American	0.870
Subcontinent Asian American	0.813
Other race POC	0.869
Women	0.481 **
Veteran	1.035

Figure C-28 indicates that Asian Pacific American business owners earn less on average than white American business owners, even after accounting for various personal characteristics. In addition, woman business owners earn less than man business owners in Pennsylvania, even after accounting for various personal characteristics. In contrast, Hispanic American business owners earn more on average than white American business owners, even after accounting for various personal characteristics.

APPENDIX D.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a custom census approach to estimate the availability of businesses located in Pennsylvania for the state-funded construction, professional services, and non-professional services and goods prime contracts and subcontracts the Commonwealth of Pennsylvania's Department of General Services (DGS) awards. Appendix D expands on the information presented in Chapter 5 to further describe:

- A. Availability Data;
- B. Representative Businesses;
- C. Availability Survey Instrument; and
- D. Survey Execution.

A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with thousands of businesses throughout the relevant geographic market area (RGMA), which we identified as Pennsylvania. Davis Research surveyed businesses with locations in the RGMA that perform work in fields closely related to the types of contracts and procurements state agencies awarded between July 1, 2017 and June 30, 2022 (i.e., the *study period*). We began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract state agencies awarded during the study period and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about local businesses D&B listed as having their primary lines of business within those work specializations, and Davis Research attempted surveys with each business multiple times on different days of the business week and at different times of the business day to maximize response rates. In total, the study team attempted to contact 17,372 local businesses that perform work relevant to DGS contracting and procurement. We were able to successfully contact 3,756 of those businesses, 2,054 of which completed surveys.

B. Representative Businesses

The objective of the availability analysis was not to collect information about every business operating in the RGMA but instead was to collect information from a large, unbiased subset of local businesses that appropriately represented the entire relevant business population. That approach allowed BBC to estimate the availability of person of color (POC)-; woman-; veteran-; service disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses (referred to collectively as *diverse businesses*) for state agency work in an accurate, statistically valid manner.¹ In addition, we did not design the survey effort to contact every local business possibly performing construction, professional services, or non-professional services or

¹ "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

goods work. Instead, we reviewed the relevant prime contract and subcontract dollars state agencies awarded during the study period, determined the types of work most relevant to those projects, and limited our survey efforts to those businesses that perform work consistent with those work types. Figure D-1 lists 8-digit work specialization codes within construction, professional services, and non-professional services and goods most related to the contract and procurement dollars state agencies awarded during the study period, which BBC included as part of the availability analysis. We grouped those specializations into distinct subindustries, which are shown as headings in Figure D-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect extensive information from relevant businesses located in the RGMA. As an example, the instrument the study team used with construction businesses is presented at the end of Appendix D. We modified the construction survey instrument slightly for use with businesses working in professional services and non-professional services and goods to reflect terms more commonly used in those industries and to collect information specifically relevant to them.² (For example, BBC substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services businesses.)

1. Survey structure. The availability survey included 14 sections, and Davis Research attempted to cover all sections with each business the firm successfully contacted.

a. Identification of purpose. The surveys began by identifying DGS as well as the Pennsylvania Department of Transportation (PennDOT) as the survey sponsors and describing the purpose of the study. (e.g., “DGS and PennDOT are conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, DGS and PennDOT want to understand the availability of different types of businesses for the contracts and procurements they award. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Pennsylvania.”)

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information if the business representative provided it (see areas “X” and “Y” of the survey).

c. Verification of for-profit business status. The surveyor asked whether the entity was a for-profit business as opposed to a government or nonprofit organization (Question A1). Surveyors continued the survey only with those entities that responded “yes” to that question.

d. Verification of active business status. The surveyor asked whether the entity was in business and operational (Question A2). Surveyors continued the survey only with those entities that responded “yes” to that question.

² BBC also developed e-mail versions of the survey instruments for businesses that preferred to complete the survey online.

**Figure D-1.
Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Concrete, asphalt, sand, and gravel products (continued)	
15420100	Commercial and office building contractors	50320102	Paving mixtures
15420103	Commercial and office buildings, renovation and repair	32720300	Precast terrazzo or concrete products
15410000	Industrial buildings and warehouses	32730000	Ready-mixed concrete
15419905	Industrial buildings, new construction, nec	29510206	Road materials, bituminous (not from refineries)
Concrete work		52110506	Sand and gravel
17710000	Concrete work	50329907	Sand, construction
Concrete, asphalt, sand, and gravel products		50329908	Stone, crushed or broken
50329901	Aggregate	Electrical work	
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	17310100	Electric power systems contractors
29520000	Asphalt felts and coatings	17310000	Electrical work
50320101	Asphalt mixture	17310200	Electronic controls installation
29110501	Asphalt or asphaltic materials, made in refineries	17319904	Lighting contractor
29510101	Asphalt paving blocks (not from refineries)	17310305	Voice, data, and video wiring contractor
29510000	Asphalt paving mixtures and blocks	Excavation, drilling, wrecking, and demolition	
50329904	Cement	17949901	Excavation and grading, building construction
50320502	Concrete and cinder block	17950000	Wrecking and demolition work
50320500	Concrete and cinder building products	Fencing, guardrails, barriers, and signs	
50320503	Concrete building products	17999912	Fence construction
50320504	Concrete mixtures	Heavy construction equipment rental	
32720303	Concrete products, precast, nec	35310000	Construction machinery
29510204	Concrete, bituminous	50820300	General construction machinery and equipment
14420000	Construction sand and gravel	35319908	Road construction and maintenance machinery
14220000	Crushed and broken limestone	50820102	Road construction and maintenance machinery
50329905	Gravel	50820100	Road construction equipment
50320100	Paving materials		
29510200	Paving mixtures		

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Highway, street, and bridge construction		Plumbing and HVAC	
16110201	Airport runway construction	17110000	Plumbing, heating, air-conditioning
17710301	Blacktop (asphalt) work		
16229901	Bridge construction	Railroad construction	
16220000	Bridge, tunnel, and elevated highway construction	16290202	Railroad and railway roadbed construction
16229900	Bridge, tunnel, and elevated highway, nec	16290200	Railroad and subway construction
16110202	Concrete construction: roads, highways, sidewalks	16290203	Subway construction
16119901	General contractor, highway and street construction		
16110000	Highway and street construction	Rebar and reinforcing steel	
16119902	Highway and street maintenance	34410201	Bridge sections, prefabricated, highway
16110204	Highway and street paving contractor	34419901	Building components, structural steel
16229902	Highway construction, elevated	34410000	Fabricated structural metal
16110205	Resurfacing contractor	34410200	Fabricated structural metal for bridges
16110200	Surfacing and paving		
16229903	Tunnel construction	Traffic control and safety	
Landscape services		73899921	Flagging service (traffic control)
7829902	Highway lawn and garden maintenance services	36690201	Highway signals, electric
7820204	Mowing services, lawn	36690200	Transportation signaling devices
7830000	Ornamental shrub and tree services	73599912	Work zone traffic equipment (flags, cones, barrels)
7210410	Weed control services, after planting	Trucking, hauling and storage	
Painting, striping, and marking		42139902	Building materials transport
17210302	Bridge painting	42129905	Dump truck haulage
17210200	Commercial painting	Water, sewer, and utility lines	
17210201	Exterior commercial painting contractor	16290105	Drainage system construction
17210300	Industrial painting	16230302	Sewer line construction
17210202	Interior commercial painting contractor		
17210303	Pavement marking contractor		

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional services			
Advertising, marketing and public relations		Human resources and job training services	
73119901	Advertising consultant	87489903	Employee programs administration
Architectural and design services		87420200	Human resource consulting services
87120000	Architectural services	73639905	Medical help service
Business services and consulting		73610204	Nurses' registry
87480300	Communications consulting	73610100	Placement agencies
87429904	General management consultant	73630103	Temporary help service
87420505	Planning consultant	IT and data services	
Construction management		73760000	Computer facilities management
87419902	Construction management	73730000	Computer integrated systems design
87420402	Construction project management consultant	73790100	Computer related maintenance services
Engineering		73730101	Computer systems analysis and design
87110402	Civil engineering	73790202	Data processing consultant
87110400	Construction and civil engineering	73749902	Data processing service
Environmental services		73750000	Information retrieval services
87489905	Environmental consultant	73730102	Systems engineering, computer related
Finance and accounting		73730200	Systems integration services
87210200	Accounting services, except auditing	73730100	Systems software development services
87210000	Accounting, auditing, and bookkeeping	Medical testing, laboratories and pharmaceutical services	
87210100	Auditing services	80710102	Biological laboratory
		80710103	Blood analysis laboratory
		87349904	Forensic laboratory
		Testing and inspection	
		73890200	Inspection and testing services

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and goods			
Automobiles		Office equipment, supplies, and furniture (continued)	
55110000	New and used car dealers	50440207	Photocopy machines
Cleaning and janitorial services		51110000	Printing and writing paper
73490104	Janitorial service, contract basis	51120000	Stationery and office supplies
Communications equipment		Petroleum and petroleum products	
36630104	Cellular radio telephone	51720202	Diesel fuel
50650200	Communication equipment	29110302	Diesel fuels
59990602	Communication equipment	51729902	Fuel oil
48130101	Data telephone communications	59849902	Liquefied petroleum gas
36699901	Intercommunication systems, electric	51729905	Petroleum brokers
59990605	Mobile telephones and equipment	51719901	Petroleum bulk stations
36630000	Radio and t.v. communications equipment	51710000	Petroleum bulk stations and terminals
57319907	Radios, two-way, citizens band, weather, short-wav	59849903	Propane gas, bottled
59990600	Telephone and communication equipment	Printing, copying, and mailing	
59990603	Telephone equipment and systems	73319904	Mailing service
50990500	Video and audio equipment	Safety equipment	
50650409	Video equipment, electronic	50630503	Fire alarm systems
36699902	Visual communication systems	50990300	Safety equipment and supplies
Food products, wholesale		59990103	Safety supplies and equipment
51419901	Food brokers	Security guard services	
51479904	Meats, fresh	73810100	Guard services
51480202	Vegetables, fresh	73810105	Security guard service
Office equipment, supplies, and furniture		Vehicle repair services	
26770000	Envelopes	75490000	Automotive services, nec
57129904	Office furniture		
51999918	Packaging materials		

e. Confirmation of primary lines of work. Businesses confirmed their primary lines of work according to D&B (Question A3a). If D&B's work specialization codes were incorrect, they described their primary lines of work (Question A3b) as well as other types of work they perform (Question A3c). BBC coded information on primary lines of work and additional types of work (if any) into appropriate 8-digit D&B work specialization codes.

f. Locations and affiliations. The surveyor asked participants if their businesses had other locations (Question A4) and if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

g. Willingness and ability to work. The surveyor asked businesses whether they are willing and able to work in various roles (Questions B1-B3).

h. Interest in future work. The surveyor asked businesses about their interest in future prime contract and subcontract work with DGS, PennDOT, or other government agencies (Question B4).

i. Geographic area. The surveyor asked businesses whether they could serve customers in various regions of Pennsylvania (Questions C0-C12).

j. Capacity. The surveyor asked businesses about the values of the largest prime contracts and subcontracts they can perform as well as the maximum volume of work they can perform at any given time (Questions D1 and D2).

k. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by POCs or women (Questions E1 and E2). If businesses indicated they were POC-owned, they were also asked about the race of the business' owner(s) (Question E3). The surveyor also asked whether businesses were at least 51 percent owned and controlled by veterans of the United States military (Question E4), by veterans that have a physical or mental disability that resulted directly from their service in the military (Question E5), by individuals with a physical or mental impairment that substantially limits one or more major life activities (Question E6), or by individuals that identify as LGBTQ+ (Question E7). BBC confirmed that information through several other data sources, including:

- DGS contract and vendor data;
- The Pennsylvania Unified Certification Program directory;
- D&B business listings and other business information sources;
- Information from other available certification directories and business lists; and
- Business websites and other secondary research.

l. Business revenue. The surveyor asked questions about businesses' sizes in terms of their revenues and number of employees across all their locations (Questions F1 through F4).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question about businesses' experiences working with DGS, PennDOT and other local government agencies as well as general insights about conditions in the Pennsylvania marketplace (Questions G1a and G1b). In addition, the survey included a question asking whether respondents would be willing to participate in follow-up

interviews about conditions in the local marketplace, which BBC used to recruit participants for in-depth interviews (Question G2).

n. Contact information. The survey concluded with questions about the participant’s name, position, and contact information (Questions H1 through H3).

D. Survey Execution

Davis Research conducted all availability surveys between August 2023 and March 2024. The firm attempted to survey the owner, manager, or other officer of each business that could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure D-2 presents the disposition of the 17,372 businesses the study team attempted to contact for availability surveys and how that number resulted in the 3,756 businesses the study team was able to successfully contact.

Figure D-2.
Disposition of attempts to contact businesses for availability surveys

Source:
BBC availability analysis.

	Number of businesses
Beginning list	17,372
Less duplicate phone numbers	119
Less non-working phone numbers	1,400
Less wrong number/business	731
Unique business listings with working phone numbers	15,122
Less no answer	8,300
Less could not reach responsible staff member	3,060
Less language barrier	6
Businesses successfully contacted	3,756

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B were:

- Duplicate phone numbers (119 listings);
- Non-working phone numbers (1,400 listings); or
- Wrong numbers for the desired businesses (731 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them.

b. Working phone numbers. As shown in Figure D-2, there were 15,122 businesses with working phone numbers Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 8,300 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 3,060 businesses.
- The firm could not conduct the availability survey due to language barriers for six businesses.

Thus, Davis Research was able to successfully contact 3,756 businesses.

2. Businesses included in the availability database. Figure D-3 presents the disposition of the 3,756 businesses Davis Research successfully contacted and how that number resulted in the 1,692 businesses BBC considered potentially available for DGS work.

Figure D-3.
Disposition of successfully contacted businesses

Source:
BBC availability analysis.

	Number of businesses
Businesses successfully contacted	3,756
Less businesses not interested in discussing availability for work	1,101
Less companies no longer in business	573
Less not a for-profit business	28
Businesses that completed surveys	2,054
Less line of work outside of study scope	40
Less no interest in future work	273
Less multiple locations of same business	49
Businesses potentially available for DGS work	1,692

a. Businesses not eligible or interested in discussing availability for DGS work. Of the 3,756 businesses the study team successfully contacted:

- BBC excluded 1,101 businesses from the analysis because they reported that they were not interested in discussing their availability for DGS (or PennDOT) work.
- We excluded 573 businesses from the analysis that indicated they were no longer in business.
- We excluded 28 businesses from the analysis that indicated they were not-for-profit businesses.

b. Businesses available for DGS work. Two-thousand fifty-four businesses completed availability surveys, but BBC deemed only a portion of those businesses as potentially available for the prime contracts and subcontracts DGS (and PennDOT) awarded during the study period. We excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded 40 businesses that reported primary lines of work outside the study scope.
- We excluded 273 businesses that reported they were not interested in contracting opportunities with DGS, PennDOT, or other government organizations.
- Forty-nine survey participants represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record according to the following rules:

- If any of the participants reported bidding or working on a project within a particular subindustry, we considered the business to be interested in participating in work in that subindustry.
- BBC combined the different roles of work (i.e., prime contractor or subcontractor) different participants representing the same business reported into a single response. For example, if one participant reported that the business works as a prime contractor and another participant reported that the business works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts.
- BBC considered the largest project any participants representing the same business reported being able to perform as the business' capacity (i.e., the largest project for which the business could be considered available).

After those exclusions and reconciliations, BBC compiled a database of 1,692 businesses we considered potentially available for DGS (and PennDOT) work.

AVAILABILITY SURVEY INSTRUMENT

Construction

Hello. My name is [INTERVIEWER NAME] from Davis Research, calling on behalf of the Commonwealth of Pennsylvania's Department of General Services (DGS) and the Pennsylvania Department of Transportation (PennDOT). This is not a sales call. DGS and PennDOT are conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, DGS and PennDOT want to understand the *availability* of different types of businesses for the contracts and procurements they award. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Pennsylvania.

The survey is designed only to gather information and will have no impact on present or future work opportunities with DGS or PennDOT. Your participation in the survey would be very valuable to the process, and it should only take 15 minutes to complete.

Whom can I speak with to gather information about your business' characteristics and potential interest in working with government and other public agencies, entities, and offices in Pennsylvania?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS.]

[IF ASKED, THE INFORMATION DEVELOPED IN THE SURVEYS WILL RESULT IN DATA ON BUSINESSES QUALIFIED AND INTERESTED IN WORKING WITH GOVERNMENT AND OTHER PUBLIC AGENCIES, ENTITIES, AND OFFICES IN THE REGION AND WILL INFORM VARIOUS ANALYSES AS PART OF THE RESEARCH.]

Please answer each question as honestly and accurately as possible so DGS and PennDOT can develop a realistic understanding of the businesses potentially available for government and other public agency work in Pennsylvania.

X1. I have a few basic questions about your business and the type of work you do. Can you confirm this is [BUSINESS NAME]?

1=Correct business [SKIP TO Y4]

2=Incorrect business

99=Refused [TERMINATE]

Y1. What is the name of this business?

1=Verbatim

Y2. Is [NEW BUSINESS NAME] associated with [OLD BUSINESS NAME] in any way?

1=Yes, same owner doing business under a different name

2=Yes, can give information about new business

3=Business bought/sold/changed ownership

98=No, does not have information [TERMINATE]

99=Refused to give information [TERMINATE]

Y3. Do you work for [NEW BUSINESS NAME]?

1=Yes

2=No [TERMINATE]

Y4. Can you give me the address for [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=[VERBATIM]

A1. Let me confirm [BUSINESS NAME/NEW BUSINESS NAME] is a for-profit business, as opposed to a non-profit organization, a foundation, or government office. Is that correct?

1=Yes, a for-profit business

2=No, other [TERMINATE]

A2. Is your company in business and operational?

1=Yes

2=No [TERMINATE]

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates your main line of work is [SIC DESCRIPTION]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes [SKIP TO A3c]

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of work at [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES BUSINESS' MAIN LINE OF WORK IS "GENERAL CONSTRUCTION" OR "GENERAL CONTRACTOR," PROBE TO FIND OUT MORE DETAIL ABOUT TYPES OF WORK THEY PERFORM.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

1=VERBATIM

97=(NONE)

A4. Is this the sole location of your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is your business a subsidiary or affiliate of another business?

1=Independent [SKIP TO B1]

2=Subsidiary or affiliate of another business

98=(DON'T KNOW) [SKIP TO B1]

99=(REFUSED) [SKIP TO B1]

A6. What is the name of the parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

A prime or general contractor is a business that contracts directly with the project owner. In contrast, a subcontractor is a business that contracts with a prime or general contractor as part of a larger project. Some businesses work in both roles on different projects. Based on these definitions:

B1. Is your business willing and able to work as a prime contractor or general contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B2. Is your business willing and able to work as a subcontractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B3. What about as a supplier? Is your business willing and able to supply construction materials or goods?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. I'm also interested in the sectors in which your business works. Specifically, is your business interested in performing work on projects for government or other public agencies, entities, or offices in Pennsylvania?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

[NOTE TO INTERVIEWER: IF ASKED, EXAMPLES INCLUDE STATES, CITIES, COUNTIES, PUBLIC SCHOOLS AND UNIVERSITIES, TRANSPORTATION ORGANIZATIONS, AND OTHERS]

Now, I want to ask you about the geographic areas your business works within Pennsylvania. Please think about the geographic areas in which your business is able to perform work or serve customers as you answer the following question.

C0. Is your company able to serve all regions of Pennsylvania or only certain regions of the state?

1=All of the state [SKIP TO D1]

2=Only parts of the state

98=(DON'T KNOW)

99=(REFUSED)

C1. Is your company able to do work or serve customers in any part of Erie, Crawford, Mercer, Venango, Warren, and Forest counties, which make up PennDOT District 1?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE NORTHEAST CORNER OF THE STATE INCLUDING THE CITY OF ERIE.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2. Is your company able to do work or serve customers in any part of McKean, Potter, Elk, Cameron, Clinton, Clearfield, Centre, Mifflin, and Juniata counties, which make up PENNDOT District 2?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA EXTENDS ALONG THE BORDER WITH NEW YORK SOUTH TO THE EAST CENTRAL PORTION OF THE COMMONWEALTH AND INCLUDES THE CITIES OF SMETHPORT, COUDERSPORT, EMPORIUM, RIDGWAY, CLEARFIELD, LOCK HAVEN, STATE COLLEGE, BELLEFONTE, LEWISTON, AND MIFFLINTOWN.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3. Is your company able to do work or serve customers in any part of Tioga, Bradford, Lycoming, Sullivan, Montour, Columbia, Northumberland, Snyder, and Union counties, which make up PENNDOT District 3?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA EXTENDS SOUTH FROM THE NEW YORK BORDER TO THE WEST CENTRAL PORTION OF THE COMMONWEALTH AND INCLUDES THE CITIES OF TOWANDA, WELLSBORO, LAPORTE, DANVILLE, LEWISBURG, SUNBURY, MIDDLEBURG, AND BLOOMSBURG.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4. Is your company able to do work or serve customers in any part of Susquehanna, Wayne, Wyoming, Luzerne, Lackawanna, and Pike counties, which make up PENNDOT District 4?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITIES OF WILKES-BARRE AND SCRANTON AND STRECHES EAST TO THE BORDER OF NEW YORK AND NEW JERSEY.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C5. Is your company able to do work or serve customers in any part of Monroe, Carbon, Schuylkill, Berks, Lehigh, and North Hampton counties, which make up PennDOT District 5?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITIES OF ALLENTOWN AND READING, AND STRECHES EAST THROUGH THE TO THE BORDER OF NEW JERSEY.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C6. Is your company able to do work or serve customers in any part of Bucks, Montgomery, Philadelphia, Delaware, and Chester counties, which make up PennDOT District 6?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE PHILADELPHIA METROPOLITAN AREA AND STRECHES EAST TO THE BORDER OF NEW JERSEY AND SOUTH TO THE BORDERS OF DELAWARE AND MARYLAND.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C8. Is your company able to do work or serve customers in any part of Dauphin, Perry, Cumberland, Lebanon, Lancaster, York, Adams, and Franklin counties, which make up PennDOT District 8?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITY OF HARRISBURG AND STRECHES SOUTHEAST THROUGH YORK TO THE BORDER OF MARYLAND.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C9. Is your company able to do work or serve customers in any part of Cambria, Blair, Huntingdon, Somerset, Bedford, and Fulton counties, which make up PennDOT District 9?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITY OF HOLLIDAYSBURG AND STRECHES SOUTH THROUGH BEDFORD TO THE BORDER OF MARYLAND.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C10. Is your company able to do work or serve customers in any part of Butler, Clarion, Jefferson, Armstrong, and Indiana counties, which make up PennDOT District 10?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITIES OF CLARION, BROOKVILLE, BUTLER, KITTANNING, AND INDIANA.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C11. Is your company able to do work or serve customers in any part of Lawrence, Beaver, and Allegheny counties, which make up PennDOT District 11?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE PITTSBURGH METROPOLITAN AREA AND NORTHEAST THROUGH BEAVER AND NEW CASTLE TO THE BORDER OF OHIO.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C12. Is your company able to do work or serve customers in any part of Washington, Westmoreland, Greene, and Fayette counties, which make up PennDOT District 12?

[NOTE TO INTERVIEWER: IF RESPONDENT ASKS, THIS AREA INCLUDES THE CITY OF GREENSBURG AND STRECHES SOUTH TO THE BORDER OF WEST VIRGINIA AND EAST TO THE BORDER OF OHIO.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I'd like to ask you a few questions about the size of work your business is able to compete for or perform.

D1. What is the largest prime contract, subcontract, or other piece of work your company is able to compete for or perform?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=Greater than \$200 million |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED) |
| 8=More than \$10 million to \$20 million | |

D2. Approximately what is the maximum volume of work your business can take on or perform at any given time?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY.]

[NOTE TO INTERVIEWER – FOR EXAMPLE, IS THERE SOME AMOUNT OF TOTAL WORK THAT IF YOUR FIRM OBTAINED IT, YOU WOULD HAVE TO START TURNING DOWN ADDITIONAL WORK BECAUSE YOU SIMPLY COULDN'T TAKE ON ANYMORE?]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=Greater than \$200 million |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED) |
| 8=More than \$10 million to \$20 million | |

My next questions are about the ownership of your business.

E1. A business is defined as a woman-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as women. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E2. A business is defined as a person of color-, or POC-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as Asian, Black, Hispanic, Native American, or another non-white race or ethnicity. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a POC-owned business?

1=Yes

2=No [SKIP TO E4]

98=(DON'T KNOW) [SKIP TO E4]

99=(REFUSED) [SKIP TO E4]

E3. Which of the following best represents the race/ethnicity of the business' owner(s)?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic or Latin 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, Alaska Natives, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by veterans of the United States military. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a veteran-owned business?

1=Yes

2=No [SKIP TO E6]

98=(DON'T KNOW) [SKIP TO E6]

99=(REFUSED) [SKIP TO E6]

E5. Does that veteran owner have a physical or mental disability that resulted directly from their service in the U.S. military? A disability is defined as an impairment that substantially limits one or more major life activities.

1=Yes [SKIP TO E7]

2=No

98=(DON'T KNOW)

99=(REFUSED)

E6. A business is defined as disabled-owned if more than half—that is, 51 percent or more—of the ownership and control is by a person with physical and or mental impairment that substantially limits one or more major life activities. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a disabled-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E7. A business is defined as an LGBTQ+-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations, is by people who identify at LGBTQ+. People who identify as LGBTQ+ include people who identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, or Asexual, among other gender or sexual orientations. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] an LGBTQ+-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I want to ask you a few questions about your business' size.

F1. Dun & Bradstreet indicates that your business has about [number] employees across all its locations. Is that an accurate estimate of the number of employees who work at your business, including both full-time and part-time employees?

1=Yes [SKIP TO F3]

2=No

98=(DON'T KNOW) [SKIP TO F3]

99=(REFUSED) [SKIP TO F3]

F2. About how many employees work at your business, including both full-time and part-time employees, across all your locations?

1=VERBATIM

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

1=100 employees or fewer

6=501-750 employees

2=101-150 employees

7=751-1,000 employees

3=151-200 employees

8=1,001-1,250 employees

4=201-250 employees

9=1,251-1,500 employees

5=251-500 employees

10=1,501 or more employee

F3. Dun & Bradstreet lists the average annual gross revenue of your business, including all your locations, to be [dollar amount]. Is that an accurate estimate of your business' annual gross revenue?

1=Yes [SKIP TO G1a]

2=No

98=(DON'T KNOW) [SKIP TO G1a]

99=(REFUSED) [SKIP TO G1a]

F4. What is an accurate estimate of your company's annual gross revenue, including all of your locations?

1=VERBATIM

[READ LIST IF NECESSARY]

1=\$1 Million or less

7= More than \$16 Million to \$19 Million

2=More than \$1 Million to \$3 Million

8= More than \$19 Million to \$22 Million

3=More than \$3 Million to \$6 Million

9= More than \$22 Million to \$28 Million

4=More than \$6 Million to \$8 Million

10=More than \$28 Million

5=More than \$8 Million to \$12 Million

98= (DON'T KNOW)

6=More than \$12 Million to \$16 Million

99= (REFUSED)

G1a. We're interested in whether your business has experienced barriers or difficulties related to working with, or attempting to work with, DGS, PennDOT, or other government or public agencies in Pennsylvania. Do you have any thoughts to share?

1=VERBATIM **[PROBE FOR COMPLETE THOUGHTS]**

97=(NOTHING/NONE/NO COMMENTS)

G1b. Do you have any additional thoughts to share regarding general marketplace conditions in Pennsylvania, being successful in your industry, or obtaining work?

1=VERBATIM **[PROBE FOR COMPLETE THOUGHTS]**

97=(NOTHING/NONE/NO COMMENTS)

G2. Would you be willing to participate in a follow-up interview about any of those topics?

1=Yes

2=No

Just a few final questions.

H1. What is your name?

1=VERBATIM

H2. What is your position at [BUSINESS NAME/NEW BUSINESS NAME]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. At what email address can you be reached?

1= VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact:

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If you have any questions for the disparity study project team or wish to submit written questions, comments, or insights on the Pennsylvania marketplace, please email PADisparityStudy@bbcresearch.com.

APPENDIX E.

Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of person of color (POC)-; woman-; veteran-; service-disabled veteran (SDV)-; disabled-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses in construction, professional services, and non-professional services and goods prime contracts and subcontracts Commonwealth of Pennsylvania state agencies awarded between July 1, 2017 and June 30, 2022 (the *study period*) with the percentage of contract and procurement dollars one might expect them to award to those businesses based on their availability for that work.¹ Appendix E presents results from the disparity analysis for relevant business groups and various sets of projects state agencies awarded during the study period.

A. Format and Information

Each table in Appendix E presents disparity analysis results for a different set of projects. For example, Figure E-1 presents disparity analysis results for all relevant projects state agencies awarded during the study period. A review of Figure E-1 introduces the calculations and format of all disparity analysis tables in Appendix E.² Figure E-1 presents disparity study results for each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity or gender of their owners.
- Row (2) presents results for all POC- and woman-owned businesses considered together, regardless of whether they were certified as Minority Business Enterprises (MBEs) or Woman Business Enterprises (WBEs) as part of the Department of General Services’ Small Diverse Business (SDB) Program.
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as Woman Business Enterprises (WBEs) as part the SDB Program.
- Row (4) presents results for all POC-owned businesses considered together, regardless of whether they were certified as MBEs.
- Rows (5) through (9) present results for businesses of each relevant race/ethnic group, regardless of whether they were certified as MBEs.
- Row (10) presents results (utilization only) for POC- and woman-owned businesses that are not located in Pennsylvania (i.e., POC- and woman-owned businesses located outside the RGMA).

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

² Results for veteran-, SDV-, disabled, and LGBTQ+-owned businesses are not presented in the tables included in Appendix E. Disparity analysis results for those groups are presented in Chapter 8.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the set. As shown in row (1) of column (a) of Figure E-1, we analyzed 39,462 contract elements state agencies awarded during the study period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 353 contract elements state agencies awarded during the study period.
- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure E-1, BBC examined approximately \$13.8 billion that was associated with the 39,462 relevant contract elements state agencies awarded during the study period. The value presented in column (b) for each individual business group represents the dollars state agencies awarded to businesses of that particular group on the set of contract elements. For example, as shown in row (6) of column (b), state agencies awarded approximately \$105.8 million of project dollars to Black American-owned businesses during the study period.
- Column (c) presents the dollars (in thousands) associated with the set of contract elements after adjusting those dollars for the fact that BBC collected subcontract data on a sample of prime contracts state agencies awarded during the study period. The study team weighted the data to be representative of the entire set of those contracts likely to have included subcontract opportunities and adjusted dollars each relevant racial/ethnic and gender group received during the study period accordingly. Chapter 5 describes BBC's subcontract data collection process.
- Column (d) presents the participation of each group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$130.8 million by \$14.0 billion and multiplied by 100 for a result of 0.9 percent, as shown in row (6) of column (d).

2. Availability results. Column (e) of Figure E-1 presents the availability of each relevant group for all the contract elements BBC analyzed as part of the project set. Availability represents the percentage of dollars one might expect state agencies to award to businesses of a particular group based on their specific characteristics and the characteristics of the contract elements included in a particular set of projects. Availability estimates, which are represented as percentages of the total dollars associated with the project set, serve as benchmarks against which to compare the participation of specific groups in those projects. For example, as shown in row (6) of column (e), the availability of Black American-owned businesses for state agency work is 3.6 percent. That is, one might expect state agencies to award 3.6 percent of relevant contract dollars to Black American-owned businesses based on their availability for that work.

3. Disparity indices. BBC calculated a disparity index, or ratio, for each relevant race/ethnic and gender group, which compares the participation of POC- and woman-owned businesses in agency work to their estimated availability for that work. Column (f) of Figure E-1 presents the disparity index for each group. For example, as reported in row (6) of column (f), the disparity index for Black American-owned businesses was 26, indicating that state agencies awarded approximately \$0.26 to Black American-owned businesses for every dollar one might expect them to award to those businesses based

on their availability for that work. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation and no availability for a particular group for a particular set of projects, BBC reported a disparity index of “100,” indicating parity.

B. Index and Tables

The table of contents presents an index of the sets of projects for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix E provides a description of the subset of projects BBC analyzed for that particular set of projects.

Table of Contents

Table	Characteristics					
	Time period	Contract area	Contract role	Contract size	Goals	Agency
E-1	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-2	07/01/17 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-3	01/01/20 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-4	07/01/17 - 06/30/22	Construction	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-5	07/01/17 - 06/30/22	Professional services	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-6	07/01/17 - 06/30/22	Non-professional services and goods	Prime contracts and subcontracts	N/A	N/A	DGS, PennDOT
E-7	07/01/17 - 06/30/22	All industries	Prime contracts	N/A	N/A	DGS, PennDOT
E-8	07/01/17 - 06/30/22	All industries	Subcontracts	N/A	N/A	DGS, PennDOT
E-9	07/01/17 - 06/30/22	All industries	Prime contracts	Large	N/A	DGS, PennDOT
E-10	07/01/17 - 06/30/22	All industries	Prime contracts	Small	N/A	DGS, PennDOT
E-11	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	SDB, VBE	DGS
E-12	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	DB	PennDOT
E-13	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	No Goals	DGS, PennDOT
E-14	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	N/A	DGS
E-15	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	N/A	PennDOT

Figure E-1.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	39,462	\$13,828,177	\$13,960,802			
(2) POC- and woman-owned businesses	6,006	\$1,694,846	\$2,339,972	16.8	27.0	62.1
(3) White woman-owned	4,801	\$1,083,480	\$1,380,192	9.9	15.5	64.0
(4) POC-owned	1,205	\$611,365	\$959,780	6.9	11.5	59.6
(5) Asian Pacific American-owned	103	\$93,312	\$144,477	1.0	0.6	165.8
(6) Black American-owned	353	\$105,816	\$130,800	0.9	3.6	26.1
(7) Hispanic American-owned	383	\$74,807	\$83,910	0.6	1.5	40.6
(8) Native American-owned	106	\$7,370	\$7,644	0.1	0.1	48.3
(9) Subcontinent Asian American-owned	260	\$330,060	\$592,950	4.2	5.7	74.3
(10) Non-local POC- and woman-owned businesses	511	\$577,071	\$541,514	3.9		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-2.
Time period: 07/01/2017 - 12/31/2019 (Pre-COVID-19)
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	21,308	\$9,350,843	\$9,524,211			
(2) POC- and woman-owned businesses	3,289	\$1,315,106	\$1,946,177	20.4	28.6	71.4
(3) White woman-owned	2,612	\$820,319	\$1,104,811	11.6	14.9	77.7
(4) POC-owned	677	\$494,787	\$841,366	8.8	13.7	64.6
(5) Asian Pacific American-owned	64	\$90,580	\$141,624	1.5	0.6	200+
(6) Black American-owned	200	\$53,088	\$79,017	0.8	4.1	20.2
(7) Hispanic American-owned	182	\$38,591	\$46,820	0.5	1.3	37.7
(8) Native American-owned	64	\$4,692	\$4,848	0.1	0.1	59.9
(9) Subcontinent Asian American-owned	167	\$307,837	\$569,058	6.0	7.6	78.8
(10) Non-local POC- and woman-owned businesses	257	\$485,474	\$466,684	4.9		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-3.
Time period: 01/01/2020 - 06/30/2022 (Post COVID-19)
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	18,154	\$4,477,334	\$4,436,591			
(2) POC- and woman-owned businesses	2,717	\$379,739	\$393,795	8.9	23.5	37.7
(3) White woman-owned	2,189	\$263,161	\$275,381	6.2	16.6	37.4
(4) POC-owned	528	\$116,578	\$118,414	2.7	6.9	38.5
(5) Asian Pacific American-owned	39	\$2,732	\$2,853	0.1	0.7	9.0
(6) Black American-owned	153	\$52,728	\$51,783	1.2	2.5	47.2
(7) Hispanic American-owned	201	\$36,217	\$37,090	0.8	1.9	45.0
(8) Native American-owned	42	\$2,678	\$2,796	0.1	0.2	36.2
(9) Subcontinent Asian American-owned	93	\$22,223	\$23,892	0.5	1.7	31.5
(10) Non-local POC- and woman-owned businesses	254	\$91,597	\$74,830	1.7		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-4.
Time period: 07/01/2017 - 06/30/2022
Contract area: Construction
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	20,500	\$6,029,936	\$6,127,059			
(2) POC- and woman-owned businesses	4,355	\$468,512	\$508,319	8.3	18.7	44.4
(3) White woman-owned	3,707	\$383,033	\$405,817	6.6	13.7	48.4
(4) POC-owned	648	\$85,479	\$102,502	1.7	5.0	33.4
(5) Asian Pacific American-owned	74	\$8,126	\$8,484	0.1	0.9	14.8
(6) Black American-owned	294	\$55,839	\$70,457	1.1	1.6	71.2
(7) Hispanic American-owned	160	\$12,663	\$13,320	0.2	2.1	10.2
(8) Native American-owned	104	\$6,226	\$6,501	0.1	0.2	52.2
(9) Subcontinent Asian American-owned	16	\$2,624	\$3,739	0.1	0.1	48.6
(10) Non-local POC- and woman-owned businesses	242	\$28,349	\$28,720	0.5		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-5.
Time period: 07/01/2017 - 06/30/2022
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	3,848	\$6,347,488	\$6,366,042			
(2) POC- and woman-owned businesses	1,342	\$1,138,976	\$1,737,905	27.3	34.4	79.3
(3) White woman-owned	820	\$649,725	\$917,379	14.4	15.2	95.1
(4) POC-owned	522	\$489,251	\$820,526	12.9	19.3	66.9
(5) Asian Pacific American-owned	19	\$84,320	\$135,093	2.1	0.5	200+
(6) Black American-owned	51	\$43,124	\$53,408	0.8	5.6	15.0
(7) Hispanic American-owned	209	\$46,413	\$54,858	0.9	1.1	81.3
(8) Native American-owned	2	\$1,144	\$1,144	0.0	0.0	36.7
(9) Subcontinent Asian American-owned	241	\$314,249	\$576,024	9.0	12.1	74.7
(10) Non-local POC- and woman-owned businesses	189	\$535,473	\$499,544	7.8		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-6.
Time period: 07/01/2017 - 06/30/2022
Contract area: Non-professional services and goods
Contract role: Prime contracts and subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	15,114	\$1,450,753	\$1,467,700			
(2) POC- and woman-owned businesses	309	\$87,358	\$93,748	6.4	29.3	21.8
(3) White woman-owned	274	\$50,722	\$56,996	3.9	24.2	16.1
(4) POC-owned	35	\$36,636	\$36,752	2.5	5.1	48.8
(5) Asian Pacific American-owned	10	\$866	\$900	0.1	0.0	200+
(6) Black American-owned	8	\$6,853	\$6,935	0.5	3.2	14.8
(7) Hispanic American-owned	14	\$15,731	\$15,731	1.1	0.6	185.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0
(9) Subcontinent Asian American-owned	3	\$13,187	\$13,187	0.9	1.3	68.3
(10) Non-local POC- and woman-owned businesses	80	\$13,250	\$13,250	0.9		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-7.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	28,349	\$12,063,355	\$10,982,729			
(2) POC- and woman-owned businesses	1,771	\$835,776	\$810,206	7.4	23.3	31.7
(3) White woman-owned	1,590	\$656,073	\$646,260	5.9	15.8	37.1
(4) POC-owned	181	\$179,703	\$163,947	1.5	7.4	20.1
(5) Asian Pacific American-owned	7	\$33,453	\$30,875	0.3	0.5	55.1
(6) Black American-owned	65	\$63,858	\$60,030	0.5	2.6	21.0
(7) Hispanic American-owned	74	\$35,923	\$34,618	0.3	1.2	26.1
(8) Native American-owned	2	\$1,144	\$1,144	0.0	0.0	21.6
(9) Subcontinent Asian American-owned	33	\$45,325	\$37,280	0.3	3.0	11.1
(10) Non-local POC- and woman-owned businesses	361	\$454,848	\$300,618	2.7		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-8.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Subcontracts
Agency: DGS and PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	11,113	\$1,764,822	\$2,978,073			
(2) POC- and woman-owned businesses	4,235	\$859,070	\$1,529,766	51.4	40.7	126.1
(3) White woman-owned	3,211	\$427,407	\$733,933	24.6	14.0	175.5
(4) POC-owned	1,024	\$431,663	\$795,834	26.7	26.7	100.1
(5) Asian Pacific American-owned	96	\$59,859	\$113,601	3.8	1.0	200+
(6) Black American-owned	288	\$41,957	\$70,770	2.4	7.2	32.8
(7) Hispanic American-owned	309	\$38,885	\$49,292	1.7	2.5	66.3
(8) Native American-owned	104	\$6,226	\$6,501	0.2	0.4	61.8
(9) Subcontinent Asian American-owned	227	\$284,735	\$555,670	18.7	15.6	120.0
(10) Non-local POC- and woman-owned businesses	150	\$122,223	\$240,897	8.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-9.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Agency: DGS and PennDOT

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	3,315	\$11,494,565	\$10,410,276			
(2) POC- and woman-owned businesses	261	\$773,636	\$747,829	7.2	23.2	30.9
(3) White woman-owned	204	\$603,161	\$593,137	5.7	15.9	35.9
(4) POC-owned	57	\$170,475	\$154,692	1.5	7.4	20.2
(5) Asian Pacific American-owned	3	\$33,262	\$30,680	0.3	0.5	59.6
(6) Black American-owned	29	\$60,011	\$56,174	0.5	2.6	20.7
(7) Hispanic American-owned	14	\$33,252	\$31,934	0.3	1.1	28.0
(8) Native American-owned	2	\$1,144	\$1,144	0.0	0.0	97.5
(9) Subcontinent Asian American-owned	9	\$42,806	\$34,761	0.3	3.2	10.6
(10) Non-local POC- and woman-owned businesses	44	\$442,659	\$288,429	2.8		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period. Large contracts include construction and professional services contracts worth more than \$400K and non-professional services and goods contracts worth more than \$250K.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-10.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Agency: DGS and PennDOT

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	25,034	\$568,790	\$572,453			
(2) POC- and woman-owned businesses	1,510	\$62,140	\$62,377	10.9	24.0	45.5
(3) White woman-owned	1,386	\$52,912	\$53,122	9.3	15.6	59.6
(4) POC-owned	124	\$9,228	\$9,254	1.6	8.4	19.3
(5) Asian Pacific American-owned	4	\$191	\$195	0.0	0.8	4.2
(6) Black American-owned	36	\$3,847	\$3,857	0.7	2.6	25.8
(7) Hispanic American-owned	60	\$2,671	\$2,683	0.5	3.2	14.6
(8) Native American-owned	0	\$0	\$0	0.0	0.7	0.0
(9) Subcontinent Asian American-owned	24	\$2,519	\$2,519	0.4	1.0	42.8
(10) Non-local POC- and woman-owned businesses	317	\$12,189	\$12,189	2.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period. Small contracts include construction and professional services contracts worth \$400K or less and non-professional services and goods contracts worth \$250K or less.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-11.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: DGS

SDB / VBE Goal

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	458	\$924,867	\$855,693			
(2) POC- and woman-owned businesses	55	\$89,874	\$87,889	10.3	22.6	45.5
(3) White woman-owned	38	\$61,598	\$61,594	7.2	14.4	50.2
(4) POC-owned	17	\$28,276	\$26,295	3.1	8.2	37.4
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	0.3	0.0
(6) Black American-owned	13	\$20,991	\$18,730	2.2	2.7	82.2
(7) Hispanic American-owned	2	\$6,050	\$6,050	0.7	2.4	29.8
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0
(9) Subcontinent Asian American-owned	2	\$1,235	\$1,515	0.2	2.8	6.3
(10) Non-local POC- and woman-owned businesses	11	\$44,424	\$35,866	4.2		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-12.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: PennDOT

DB Program

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	892	\$501,132	\$523,232			
(2) POC- and woman-owned businesses	457	\$101,294	\$105,761	20.2	24.2	83.5
(3) White woman-owned	268	\$55,301	\$57,740	11.0	17.9	61.8
(4) POC-owned	189	\$45,992	\$48,021	9.2	6.4	144.3
(5) Asian Pacific American-owned	1	\$32	\$33	0.0	0.2	3.4
(6) Black American-owned	8	\$5,471	\$5,713	1.1	3.1	35.4
(7) Hispanic American-owned	77	\$13,397	\$13,988	2.7	0.8	200+
(8) Native American-owned	0	\$0	\$0	0.0	0.3	0.0
(9) Subcontinent Asian American-owned	103	\$27,092	\$28,287	5.4	2.0	200+
(10) Non-local POC- and woman-owned businesses	16	\$2,089	\$2,181	0.4		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-13.

Time period: 07/01/2017 - 06/30/2022

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: DGS and PennDOT

No Goals or Programs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	38,112	\$12,402,178	\$12,581,877			
(2) POC- and woman-owned businesses	5,494	\$1,503,677	\$2,146,322	17.1	27.4	62.3
(3) White woman-owned	4,495	\$966,581	\$1,260,858	10.0	15.4	64.9
(4) POC-owned	999	\$537,096	\$885,464	7.0	12.0	58.8
(5) Asian Pacific American-owned	102	\$93,280	\$144,444	1.1	0.7	173.3
(6) Black American-owned	332	\$79,353	\$106,357	0.8	3.7	23.0
(7) Hispanic American-owned	304	\$55,360	\$63,872	0.5	1.4	35.0
(8) Native American-owned	106	\$7,370	\$7,644	0.1	0.1	55.1
(9) Subcontinent Asian American-owned	155	\$301,733	\$563,148	4.5	6.1	73.8
(10) Non-local POC- and woman-owned businesses	484	\$530,558	\$503,468	4.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-14.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: DGS

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	27,246	\$9,938,987	\$9,900,099			
(2) POC- and woman-owned businesses	1,888	\$1,296,076	\$1,923,617	19.4	29.2	66.5
(3) White woman-owned	1,612	\$799,421	\$1,083,605	10.9	15.4	71.3
(4) POC-owned	276	\$496,655	\$840,011	8.5	13.9	61.1
(5) Asian Pacific American-owned	15	\$84,364	\$135,135	1.4	0.4	200+
(6) Black American-owned	84	\$72,681	\$96,204	1.0	4.2	23.0
(7) Hispanic American-owned	79	\$43,441	\$51,160	0.5	1.3	38.8
(8) Native American-owned	2	\$1,144	\$1,144	0.0	0.0	24.5
(9) Subcontinent Asian American-owned	96	\$295,025	\$556,369	5.6	7.9	71.3
(10) Non-local POC- and woman-owned businesses	448	\$566,842	\$530,834	5.4		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-15.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: PennDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Disparity index
(1) All businesses	12,216	\$3,889,190	\$4,060,703			
(2) POC- and woman-owned businesses	4,118	\$398,770	\$416,356	10.3	21.5	47.7
(3) White woman-owned	3,189	\$284,060	\$296,587	7.3	15.7	46.5
(4) POC-owned	929	\$114,710	\$119,769	2.9	5.8	50.9
(5) Asian Pacific American-owned	88	\$8,948	\$9,342	0.2	1.2	19.2
(6) Black American-owned	269	\$33,135	\$34,596	0.9	2.1	41.4
(7) Hispanic American-owned	304	\$31,366	\$32,749	0.8	1.8	43.8
(8) Native American-owned	104	\$6,226	\$6,501	0.2	0.3	58.4
(9) Subcontinent Asian American-owned	164	\$35,035	\$36,581	0.9	0.4	200+
(10) Non-local POC- and woman-owned businesses	63	\$10,229	\$10,680	0.3		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses. Values in column c were adjusted for the sampling weights for the subcontract data BBC collected related to projects state agencies awarded during the study period.

Source: BBC Research & Consulting Disparity Analysis.