



2025 City of Little Rock Disparity Study

FINAL REPORT

Final Report

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2025 City of Little Rock Disparity Study

Prepared for

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Table of Contents

ES. Executive Summary

A. Disparity Study Results	ES-1
B. Recommendations	ES-10

1. Introduction

A. Background.....	1-2
B. Study Scope	1-2
C. Study Team Members	1-4

2. Legal Framework

A. Legal Standards	2-1
B. Court Decisions	2-3
C. Addressing Legal Requirements with the Disparity Study	2-4

3. Data Collection and Analysis

A. Contract and Procurement Data	3-1
B. Vendor Data.....	3-3
C. Relevant Geographic Market Area (RGMA)	3-3
D. Subindustry Classifications.....	3-3
E. Review Process.....	3-5

4. Econometric Analysis of Marketplace Conditions

A. Historical and Current Marketplace Conditions	4-1
B. Quantitative Analyses of Marketplace Conditions	4-3
C. Summary	4-21

5. Qualitative Evidence of Marketplace Conditions

A. Data Collection.....	5-1
B. Key Themes	5-2

6. Availability Analysis

A. Purpose.....	6-1
B. Approach.....	6-1
C. Methodology	6-3
D. Availability Analysis Results	6-5

Table of Contents

7. Utilization Analysis

A. Purpose	7-1
B. Utilization Analysis Results.....	7-1

8. Disparity Analysis

A. Overview	8-1
B. Disparity Analysis Results.....	8-1

9. Analyses of the Business Community

A. Available Businesses.....	9-1
B. Utilized Businesses	9-7

10. Contracting Policies and Business Programs

A. Regulations and Policies.....	10-1
B. Business Programs	10-2

11. Recommendations

A. Framework for an Effective Contracting Inclusion Program.....	11-1
B. Recommendations	11-3

Appendices

- A. Definitions of Terms
- B. Legal Framework and Analysis
- C. Availability Methodology
- D. Disparity Analysis Results

CHAPTER ES.

Executive Summary

BBC Research & Consulting (BBC) conducted a disparity study to evaluate whether small businesses and person of color (POC)-, woman-, and veteran-owned businesses (referred to collectively as *small and diverse businesses*) have equitable opportunities to participate in the City of Little Rock's (the City's) contracts and procurements.¹ As part of the disparity study, we examined whether there are any *disparities*, or differences, between:

- The percentage of prime contract and subcontract dollars the City awarded to small and diverse businesses during the *study period*, which was January 1, 2019 through December 31, 2023 (i.e., *utilization* or *participation*); and
- The percentage of prime contract and subcontract dollars one might expect the City to award to small and diverse businesses based on their availability to perform specific types and sizes of its prime contracts and subcontracts (i.e., *availability*).

Information from the disparity study will help the City better understand outcomes for small and diverse businesses in its contracting and procurement and help the City address any substantial disparities between the participation and availability of those businesses for that work.

A. Disparity Study Results

BBC analyzed \$160 million of construction, professional services, and goods and support services contracts the City awarded during the study period to measure the participation and availability of small and diverse businesses for that work and 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 C of the report). BBC conducted a *custom census availability analysis* to estimate the availability of POC-, woman-, and veteran-owned businesses for City work while accounting for the specific characteristics of relevant businesses that exist in the *Little Rock marketplace* and the specific characteristics of the relevant prime contracts and subcontracts the City awards.² Figure ES-1 presents the availability of each relevant group of POC-, woman-, and veteran-owned businesses for all relevant contracts and procurements the City awarded during the study period. The availability of POC-owned businesses considered together for Little Rock work is 18.3 percent. The POC-owned business groups that account for the largest shares of the total availability of POC-owned businesses are Black-owned businesses (9.8%) and Hispanic-owned businesses (5.9%). 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 We defined the relevant geographic market area (RGMA) for the disparity study as six counties in Central Arkansas: Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties (see Chapter 3 of the report for additional details). We also refer to this area as the *Little Rock marketplace*.

availability of White woman-owned businesses is 13.3 percent for City work, and the availability of veteran-owned businesses is 6.0 percent.

Figure ES-1.
Availability estimates
for City work

Notes:

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

MENA stands for Middle Eastern and North African

Business group	
Race and gender	
POC	18.3 %
Asian Pacific	1.3 %
Black	9.8 %
Hispanic	5.9 %
MENA	0.1 %
Native American	0.8 %
Subcontinent Asian	0.4 %
White woman	13.3 %
Veteran	
Veteran	6.0 %

Many POC-, woman-, and veteran-owned businesses are small businesses, and thus, often work as subcontractors, so it is instructive to examine availability estimates separately for City prime contracts and subcontracts. As shown in Figure ES-2, the availability of those businesses differs for the prime contracts and subcontracts the City awards:

- The availability of POC-owned businesses is greater for subcontracts (21.7%) than for prime contracts (16.7%). The POC-owned business groups that exhibit the greatest levels of availability are the same for prime contracts and subcontracts: Black-owned businesses (prime contracts: 9.1%; subcontracts: 11.1%) and Hispanic-owned businesses (prime contracts: 4.9%; subcontracts: 7.8%).
- White woman-owned businesses exhibit greater availability for prime contracts (14.5%) than for subcontracts (10.8%).
- Veteran-owned businesses exhibit greater availability for prime contracts (6.5%) than for subcontracts (5.2%).

Figure ES-2.
Availability estimates for prime contracts and subcontracts

Note:

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

Business group	Role	
	Prime contracts	Subcontracts
Race and gender		
POC	16.7 %	21.7 %
Asian Pacific	1.4 %	1.2 %
Black	9.1 %	11.1 %
Hispanic	4.9 %	7.8 %
MENA	0.1 %	0.2 %
Native American	0.6 %	1.2 %
Subcontinent Asian	0.4 %	0.2 %
White woman	14.5 %	10.8 %
Veteran		
Veteran	6.5 %	5.2 %

2. Utilization analysis (Chapter 7 of the report). BBC also calculated the participation of POC-, woman-, and veteran-owned businesses in the relevant contracts and procurements the City awarded during the study period. As shown in Figure ES-3, during the study period, the City awarded 9.6 percent of its contracting and procurement dollars to POC-owned businesses. The only POC-owned business groups to which the City awarded more than 1 percent of its dollars were Black-owned businesses (6.1%) and Hispanic-owned businesses (3.0%). White woman-owned businesses received 2.0 percent of City contract dollars, and veteran-owned businesses received 2.0 percent of those dollars.

Figure ES-3.
Utilization analysis results for City work

Note:

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

Business group	
Race and gender	
POC	9.6 %
Asian Pacific	0.1 %
Black	6.1 %
Hispanic	3.0 %
MENA	0.0 %
Native American	0.0 %
Subcontinent Asian	0.4 %
White woman	2.0 %
Veteran	
Veteran	2.0 %

BBC also assessed the participation of POC-, woman-, and veteran-owned businesses separately for the prime contracts and subcontracts the City awarded during the study period. However, as shown in Figure ES-4, the participation of POC-owned businesses was actually *greater* in the City's prime contracts (10.8%) than in its subcontracts (7.3%). The POC-owned business groups that exhibited the greatest levels of participation were the same for prime contracts and subcontracts: Black-owned businesses (prime contracts: 7.1%; subcontracts: 4.3%) and Hispanic-owned businesses (prime contracts: 3.3%; subcontracts: 2.3%). The participation of White woman-owned businesses was

virtually identical in the City's prime contracts (2.0%) and subcontracts (1.9%). The participation of veteran-owned businesses was greater in the City's prime contracts (2.9%) than in subcontracts (0.1%).

Figure ES-4.
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.

Business group	Role	
	Prime contracts	Subcontracts
Race and gender		
POC	10.8 %	7.3 %
Asian Pacific	0.1 %	0.2 %
Black	7.1 %	4.3 %
Hispanic	3.3 %	2.3 %
MENA	0.0 %	0.0 %
Native American	0.0 %	0.0 %
Subcontinent Asian	0.3 %	0.6 %
White woman	2.0 %	1.9 %
Veteran		
Veteran	2.9 %	0.1 %

3. Disparity analysis (Chapter 8 and Appendix D of the report). The crux of the disparity study was to assess whether any disparities exist between the participation and availability of POC-, woman-, and veteran-owned businesses for City work. We used the following formula to calculate *disparity indices* to compare utilization and availability for relevant business groups:

$$\text{Disparity Index (\$)} = \frac{\text{dollars of participation}}{\text{dollars of availability}}$$

A disparity index indicates the proportion of the City's contract dollars it awarded to a business group for every \$1.00 of the group's availability for that work. For example, a disparity index of \$0.57 would indicate that the City awarded \$0.57 of its contract dollars to a business group for every \$1.00 of that group's availability for the City's work. A disparity index of less than \$1.00 indicates a *disparity* between participation and availability. That is, the participation of a group is less than its availability. A disparity index of \$1.00 or greater indicates *parity* between participation and availability. That is, the participation of a group is in line with or exceeds its availability. A disparity index of less than \$0.80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been substantially underutilized relative to its availability.

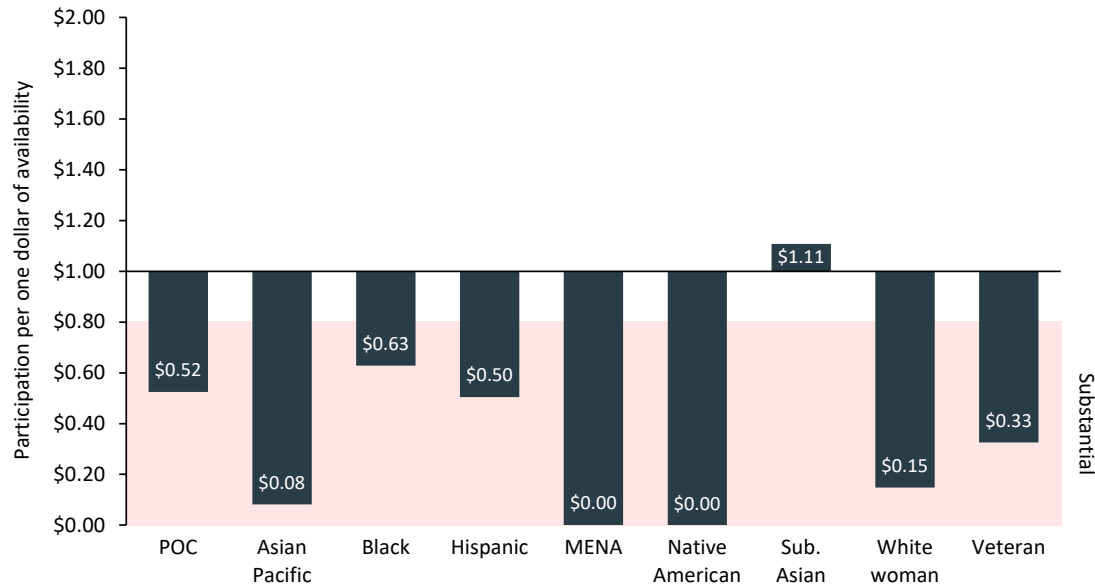
a. Overall. Figure ES-5 presents disparity indices for POC-, woman-, and veteran-owned businesses for all City contracts considered together. There is a red box at the disparity index level of \$0.80 and below, which indicates substantial disparities. As shown in Figure ES-5, POC-owned businesses (disparity index of \$0.52) exhibited a substantial disparity for City work. There were some differences in disparities when considering each POC-owned business group separately:

- Asian Pacific- (\$0.08), Black- (\$0.63), Hispanic- (\$0.50), Middle Eastern and North African (MENA)- (\$0.00), and Native American-owned businesses (\$0.00) showed substantial disparities for City work.

- Subcontinent Asian-owned businesses (\$1.11) did not show a disparity for City work.

White woman-owned businesses (disparity index of \$0.15) and veteran-owned businesses (disparity index of \$0.33) also showed substantial disparities for all City contracts considered together.

Figure ES-5.
Overall disparity analysis results for City work



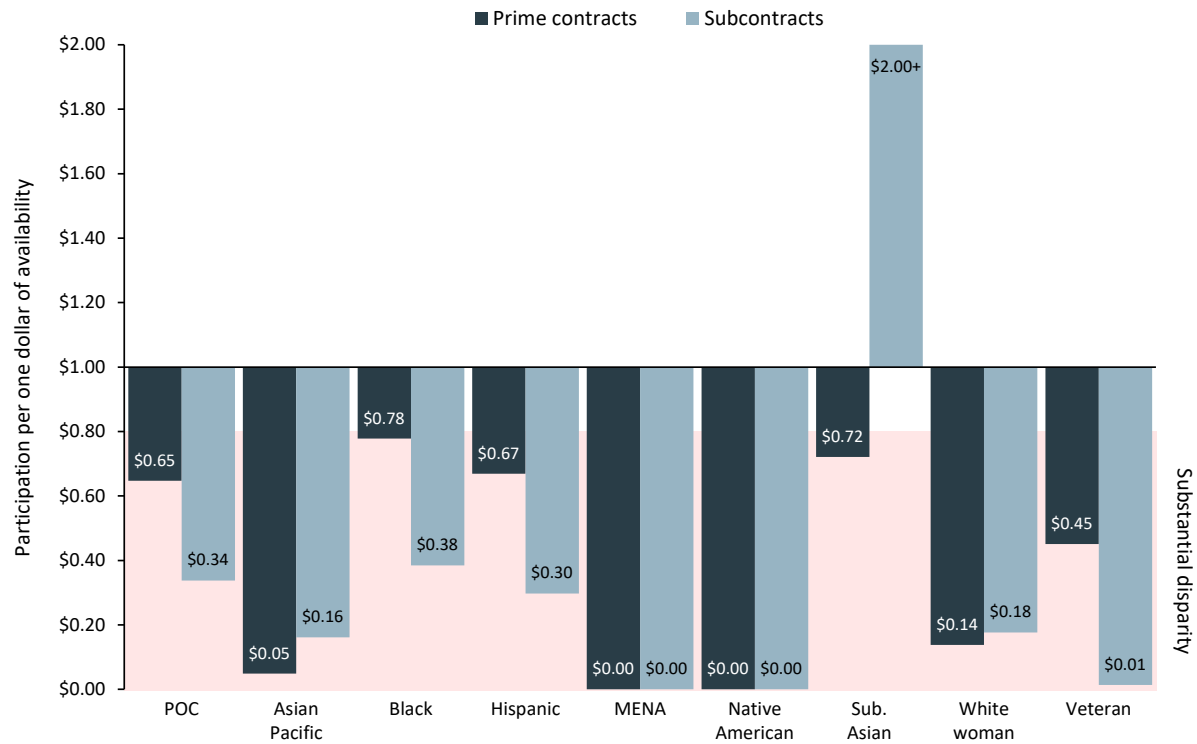
Note: For more detail, see Figure D-1 in Appendix D.

b. Contract role. BBC also looked at disparity analysis results separately for the prime contracts and subcontracts the City awarded during the study period. As shown in Figure ES-6, POC-owned businesses exhibited a larger disparity on subcontracts (disparity index of \$0.34) than on prime contracts (disparity index of \$0.65). Disparity indices differed by POC-owned business group and contract role:

- All groups of POC-owned businesses exhibited substantial disparities for prime contracts.
- Asian Pacific-owned businesses (\$0.16), Black-owned businesses (\$0.38), Hispanic-owned businesses (\$0.30), MENA-owned businesses (\$0.00), and Native American-owned businesses (\$0.00) all exhibited substantial disparities for subcontracts. Subcontinent Asian-owned businesses (\$2.00+) did not show a disparity for subcontracts.

White woman-owned businesses exhibited a larger disparity on prime contracts (disparity index of \$0.14) than on subcontracts (disparity index of \$0.18). Veteran-owned businesses exhibited a greater disparity on subcontracts (disparity index of \$0.01) than on prime contracts (disparity index of \$0.45).

Figure ES-6.
Disparity analysis results for prime contracts and subcontracts



Note: For more detail, see Figures D-5 and D-6 in Appendix D.

c. Summary. In addition to analyzing disparities for the City’s contracts overall and by contract role, BBC analyzed various other contract sets as part of the disparity analysis, including contracts in different industries and of various sizes. Figure ES-7 presents a summary of disparity analysis results for the various contract sets we analyzed. For a particular business group and contract set, a dot indicates that the group exhibited a substantial disparity for the contract set. As shown in Figure ES-7, POC-, woman-, and veteran-owned businesses showed substantial disparities in most but not all contract sets, with the exception of Subcontinent Asian-owned businesses, which only showed substantial disparities for goods and support services contracts, prime contracts, and large prime contracts.

Figure ES-7.
Substantial disparities observed for City work

Contract set	Business Group								
	POC	Asian Pacific	Black	Hispanic	MENA	Native American	Subcontinent Asian	White woman	Veteran
All work	•	•	•	•	•	•		•	•
Construction	•	•	•	•	•	•		•	•
Professional Services	•	•	•	•	•	•		•	•
Goods and support services	•	•		•	•	•	•	•	
Prime contracts	•	•	•	•	•	•	•	•	•
Subcontracts	•	•	•	•	•	•		•	•
Small prime contracts	•	•			•	•		•	•
Large prime contracts	•	•	•	•	•	•	•	•	

Notes: • indicates substantial disparity (i.e., disparity index of \$0.80 or less)

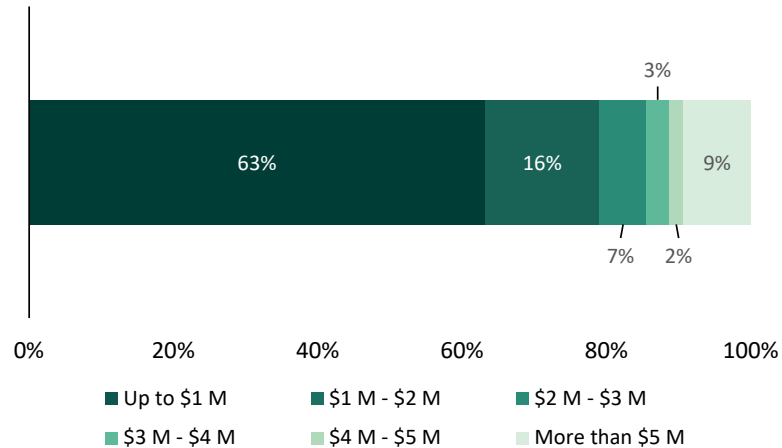
4. Analysis of business characteristics (Chapter 9 of the report). BBC collected extensive information on businesses available for City contracts and on businesses that participated in City work during the study period. The City can use that information to tailor its contracting inclusion efforts to the specific needs of the businesses—including many POC-, woman-, and veteran-owned businesses—in the marketplace. Doing so may become particularly important if the City considers implementing a Small Local Business Enterprise (SLBE) Program to support small and local businesses in the region.

a. Available businesses. BBC analyzed various characteristics of businesses we identified as available for City work, including information on their revenues, numbers of employees, ages, bidding capacities, and whether they work as prime contractors or subcontractors. We highlight results from two key analyses—those on businesses’ revenues and bidding capacities—in this chapter.

i. Business revenues. Contracting inclusion programs are typically designed to support socially and economically disadvantaged businesses in organizations’ contracting. A common indicator of economic disadvantage is business revenue, so we explored the distribution of businesses available for City work based on their annual revenues. Figure ES-8 shows the distribution of the businesses that provided data on their annual revenues as part of availability surveys. As shown in Figure ES-8, 63 percent of businesses available for City work have annual revenues of \$1 million or less, and 86 percent of them have annual revenues of \$3 million or less. BBC separately examined the revenue distribution of POC- and woman-owned businesses available for City work, which we do not present in Figure ES-8. That analysis indicated that 74 percent of POC- and woman-owned businesses have annual revenues of \$1 million or less, and 95 percent of them have annual revenues of \$3 million or less. These results indicate

that, in general, POC- and woman-owned businesses have annual revenues that are less than those of non POC- and non woman-owned businesses.

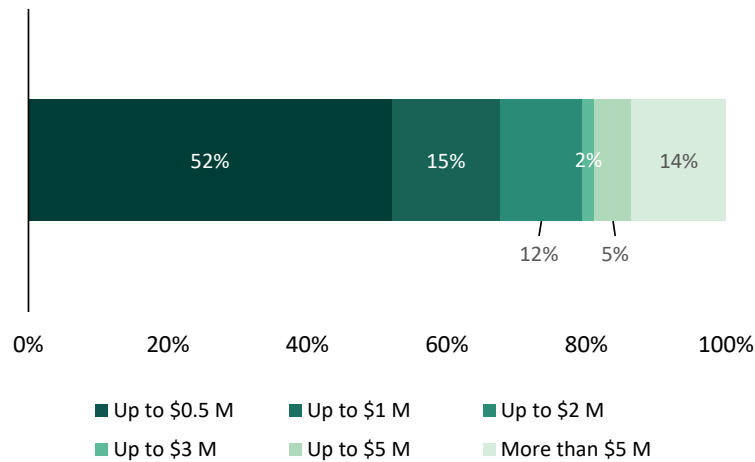
Figure ES-8.
Distribution of available businesses based on their annual revenues



Note: Values may not sum exactly to 100 percent due to rounding.

ii. Bidding capacity. It is useful for the City to understand the largest contracts for which available businesses can realistically compete (i.e., *bidding capacity*) so the organization can right-size its opportunities for them. As part of availability surveys, businesses reported the largest contract for which they are able to compete or perform. Figure ES-9 shows the distribution of those businesses that provided that information. As shown in Figure ES-9, 52 percent of businesses available for City work can bid on contracts worth up to \$500,000 and an additional 16 percent can bid on contracts worth up to \$1 million. We also separately examined the distribution of POC- and woman-owned businesses available for City work based on their capacities. We found that 63 percent of those businesses can bid on contracts worth up to \$500,000 and an additional 13 percent can bid on contracts worth up to \$1 million (not shown in Figure ES-9). Thus, in general, the contracts for which POC- and woman-owned businesses can compete are smaller than those for which non POC- and non woman-owned businesses can compete.

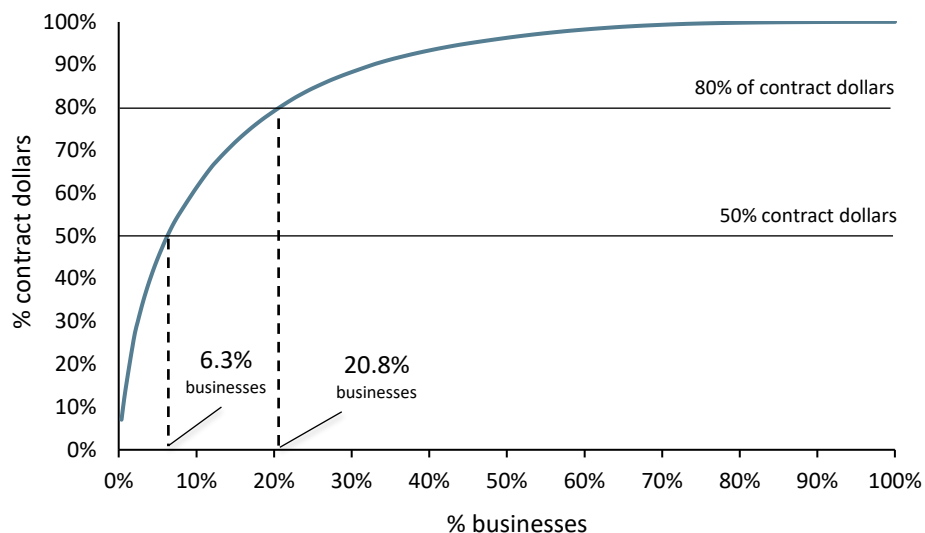
Figure ES-9.
Distribution of available businesses based on their capacities



Note: Values may not sum exactly to 100 percent due to rounding.

b. Utilized businesses. A common finding in disparity study research is that government organizations tend to award a disproportionate percentage of their contracts and contract dollars to relatively few businesses. BBC conducted a concentration analysis of the contract dollars the City awarded during the study period to assess whether they were awarded to a relatively large number of businesses or whether they were heavily concentrated among a relatively small number of businesses. BBC identified all businesses that the City awarded a contract to that was worth less than \$1 million and then ordered businesses in descending order based on the volume of contract dollars the City awarded to each one. We then calculated the percentage of businesses that accounted for 50 percent and 80 percent of the dollars the City awarded. As shown in Figure ES-10, during the study period, the City awarded 50 percent of the dollars associated with contracts worth less than \$1 million to only 6.3 percent of the businesses that participated in its work. The organization awarded 80 percent of those dollars to only 20.8 percent of businesses. BBC observed similar results for POC- and woman-owned businesses considered separately.

Figure ES-10.
Cumulative distribution of businesses based on the volume of contract dollars the City awarded to them (contracts worth less than \$1 million)



Source: BBC utilization analysis.

B. Recommendations (Chapter 11 of the report)

The disparity study provides substantial information the City should examine as it considers potential refinements to its policies and business inclusion efforts to further encourage the participation of small and diverse businesses in its contracts and procurements. Although BBC analyzed outcomes for POC- and woman-owned businesses as part of the disparity study, it is important to note that, in February 2025, the State of Arkansas enacted a law that prohibits government organizations from using race- or gender-based measures as part of awarding contracts and procurements (see Chapter 2 for more details). As a result, the City can only consider using race- and gender-neutral measures to support small and diverse businesses in its contracting and procurement. Accordingly, BBC has limited our recommendations to only race- and gender-neutral policies and program measures that support the participation of small businesses in City contracting.

1. Subcontracting minimums. Subcontracting opportunities are important for small businesses because they are generally smaller, both in terms of work scope and dollar value, than prime contracts and are easier for businesses with fewer resources and less experience to compete for and perform. By creating additional subcontracting opportunities and providing more support to subcontractors bidding on and performing those subcontracts, the City can help small businesses gain experience with government contracting and gradually grow their capacities over time. To increase the number of available subcontracting opportunities, the City could consider implementing a policy on some contracts that requires prime contractors to subcontract out a minimum amount of the project work they are awarded. Prime contractors would have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If the City were to implement such a program, it should include good faith efforts provisions so that a prime contractor that is unable to meet the subcontracting minimum could instead document its efforts to identify and include potential subcontractors in its bid or proposal.

2. SLBE Program. Developing and implementing an SLBE Program would be one of the most effective ways for the City to increase the participation of small and diverse businesses in its contracts. The City should consider creating a process to certify businesses as SLBEs, which would then allow the City to introduce program measures that encourage the participation of SLBEs on City contracts.

a. Certification. To implement an SLBE Program, the City would need to develop a certification program or partner with an organization like the Arkansas Economic Development Commission to do so. Certification criteria could include a local provision such as limiting certifications to businesses in Little Rock, in Pulaski County, or in the larger Little Rock metropolitan area. Certification criteria should also be tailored to the size characteristics of local businesses. BBC's analyses indicate that the vast majority of businesses available for the City's work have annual revenues of \$3 million or less, which the City could consider as the upper limit for eligibility for SLBE certification. The City could also consider creating multiple tiers of SLBEs, such as one tier for businesses with less than \$500,000 in annual revenue and another tier for businesses with less than \$3 million in annual revenue. The City could then create procurement policies that support businesses in each tier.

b. Program measures. Once it has established the SLBE Program, the City could use myriad measures to encourage the participation of certified SLBEs in its work, including:

- Offering **bid discounts or preference points** to bidders and proposers that include SLBEs on their project teams as subcontractors or that are SLBEs themselves;
- **Setting aside certain prime contracts** under a certain value threshold exclusively for SLBE competition; and
- Setting **condition-of-award percentage goals** for the participation of SLBE-certified businesses as subcontractors on the individual contracts and procurements it awards.

Chapter 11 of the report describes these policies in more detail.

3. De-concentration of awards. The City should make efforts to diversify the pool of businesses to which it awards contracts and de-concentrate its contract dollars. The City should consider exploring different ways to engage with more and different businesses as part of its contracting, including:

- Working with local organizations to engage directly with businesses that have not worked with the City in the past;
- Introducing bid or proposal incentives to prime contractors that commit to working with a subcontractor they have never worked with before;
- Setting aside contract opportunities for exclusive competition among businesses that have not worked with the City in the past; and
- De-emphasizing previous experience with the City in evaluating qualifications for contract awards.

4. Technical assistance. Although the City already provides technical assistance to small businesses through its BUILD Academy and EMPRENDE programs, it should consider several other efforts to provide additional technical assistance, including:

- Increasing coordination with local trade organizations and economic development organizations to facilitate the provision of such assistance from industry experts;
- Creating technical assistance curricula tailored to the specific industries and subindustries relevant to the contracts and procurements it awards;
- Providing businesses with information, resources, and training related to obtaining financing and bonding; and
- Promoting mentorship opportunities between emerging businesses and established businesses, including developing a mentor-protégé program that provides incentives and reimbursements to mentors to encourage their meaningful participation in the program.

More technical assistance would help small businesses grow their skills, capacities, and ability to compete for and perform work on City contracts.

5. Performance tracking. The City should consider developing annual reporting for its contracting inclusion efforts to measure progress and identify areas for improvement in encouraging the participation of small businesses in the contracts it awards. First, the City should improve the tracking of its contract and vendor data, including by collecting data on all the subcontracts associated with the prime contracts it awards. Second, the City should track key performance indicators (KPIs) related to its procurement. Although tracking the percentage of the total contract dollars the City awards to small and diverse businesses would be useful, that percentage alone may not capture the full value that contracting inclusion programs provide. The City should consider tracking additional KPIs on a regular basis (e.g., semi-annually), including:

- The total number of businesses that participated in City contracts;
- The number of contracts it awarded to local businesses, small businesses, and diverse businesses;
- The average contract size the City awarded to those businesses;
- The number of businesses that have not previously worked with the City to which the City awarded contracts; and
- Success stories from businesses that participated in the City's contracting inclusion efforts.

CHAPTER 1.

Introduction

Little Rock is the capital city of Arkansas and the state's largest municipality. The City of Little Rock (the City) provides myriad services to over 200,000 people who live and work in the region. Each year, the City spends millions of contract and procurement dollars to procure various construction services, professional services, and goods and support services to serve the needs of local residents, visitors, and businesses.

The City retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether small businesses as well as person of color (POC)-, woman-, and veteran-owned businesses (collectively referred to as *small and diverse businesses*) face any barriers in the City's contracting and procurement. As part of the disparity study, BBC examined whether there are any *disparities*, or differences, between:

- The percentage of contract dollars that the City spent with small and diverse businesses during the *study period*, which was January 1, 2019 through December 31, 2023 (i.e., *utilization* or *participation*); and
- The percentage of contract dollars small and diverse businesses might be expected to receive based on their availability to perform specific types and sizes of the City's relevant prime contracts and subcontracts (i.e., *availability*).

The disparity study also provides other quantitative and qualitative information related to local marketplace conditions for small and diverse businesses. Additionally, the study provides information related to contracting practices and business assistance programs that the City has in place or could consider implementing in the future to better encourage the participation of small and diverse businesses in City work. There are several reasons why information from the disparity study is potentially useful to the City:

- The study provides information about whether substantial disparities exist between the participation and availability of POC-, woman-, and veteran-owned businesses for the City's contracts and procurements.
- The study provides insights into how the City could refine its contracting processes and implement program measures to better encourage the participation of small businesses as well as POC-, woman-, and veteran-owned businesses in its contracting and procurement and help address any barriers those businesses face in the marketplace.

BBC introduces the 2025 City of Little Rock Disparity Study in three parts:

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

A. Background

Equity, which the City defines as “ensuring fair access to resources and opportunities for all without impartiality,” is a core value for the organization. The City has taken a number of steps in recent years to promote equity and equal opportunity for all businesses to participate in its contracts and procurements through the use of *race- and gender-neutral* measures. Race- and gender-neutral measures are designed to increase the participation of all economically disadvantaged businesses, regardless of the race or gender of the owners, in City contracts and procurements. To meet that objective, and through Mayor Frank Scott, Jr.’s OpportUNITY initiative, the City has made various efforts to increase contracting opportunities for small and diverse businesses, including setting up small business technical assistance programs, such as BUILD Academy and EMPRENDE; upgrading the City’s bid portal website; and partnering with local organizations and the private sector. In commissioning the disparity study, the City intends to continue refining its efforts toward improving equity and equal opportunity as part of its contracting and procurement processes.

In contrast to race- and gender-neutral measures, *race- and gender-based* measures are measures specifically designed to encourage the participation of POC- and woman-owned businesses in government contracting (e.g., condition-of-award goals for POC- and woman-owned business participation in awarding individual contracts or procurements). In February 2025, the Arkansas State Legislature passed Arkansas Act 116, which prohibits the use of race- and gender-based measures in government procurement. However, the Act does not prohibit the continued use of race- and gender-neutral contracting measures.

B. Study Scope

The disparity study assessed outcomes for small and diverse businesses in the construction, professional services, and goods and support services contracts and procurements the City awards as well as any economic barriers that POCs, women, veterans, or the businesses they own face in the local marketplace.

1. Definitions of business groups. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC defined POC-, woman-, and veteran-owned businesses in its analyses. We gathered business ownership information from a variety of different sources, including surveys, business listings, certification lists, and Internet research.

a. POC-owned businesses. The study team focused its analyses on the following POC-owned business groups: Asian Pacific-, Black-, Hispanic-, Middle Eastern and North African (MENA)-, Native American-, and Subcontinent Asian-owned businesses. The study team’s definition of POC-owned businesses included businesses owned by men of color and businesses owned by women of color. For example, we grouped results for businesses owned by Black men with results for businesses owned by Black women to present results for Black-owned businesses in general.

b. Woman-owned businesses. Because the study team classified businesses owned by women of color according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *White woman-owned businesses*.

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

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 small and diverse businesses for the contracts and procurements the City awards. Those analyses focused on construction, professional services, and goods and support services contracts and procurements the City awarded between January 1, 2019 and December 31, 2023. The study also includes various analyses related to outcomes for POCs, women, and veterans and the businesses they own throughout the local marketplace. BBC presents those analyses in the report as follows:

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant laws, legal decisions, and other information to guide the methodology for the disparity study and inform our recommendations for refinements to the City’s contracting policies and business programs. BBC presents the legal framework and analysis for the study in **Chapter 2** and **Appendix B**.

b. Data collection. The study team examined contract, procurement, and vendor data from multiple sources to complete the utilization and availability analyses. We present the study team’s data collection process in **Chapter 3**.

c. Marketplace conditions. The study team conducted extensive quantitative analyses of conditions and potential barriers in the local marketplace for small and diverse businesses. In addition, we collected qualitative evidence about potential barriers those businesses face in the Little Rock region through in-depth interviews, focus groups, and public meetings. BBC presents quantitative information about marketplace conditions in **Chapter 4** and qualitative information in **Chapter 5**.

d. Availability analysis. The study team analyzed the percentage of contract and procurement dollars one might expect the City to award to small and diverse businesses based on their availability to perform specific types and sizes of City work. That analysis was based on agency data and surveys the study team conducted with more than 400 local businesses that work in industries related to the types of contracts and procurements the City awards. We present results from the availability analysis in **Chapter 6** and **Appendix C**.

e. Utilization analysis. The study team analyzed contract and procurement dollars the City awarded to small and 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 small and diverse businesses on contracts and procurements the City awarded during the study period. The study team also assessed whether any observed disparities were statistically significant and explored potential explanations for those disparities. We present results from the disparity analysis in **Chapter 8** and **Appendix D**.

g. Analyses of the business community. BBC conducted key analyses of business characteristics, beyond race and gender, of businesses potentially available for the contracts and procurements the City awards and the businesses that performed work for the City during the study period. We present that information in **Chapter 9**.

h. Contracting policies and business programs. The study team reviewed the City’s procurement and contracting policies and the measures the City uses to encourage the participation of small and diverse businesses in its contracting and procurement. We present that information in **Chapter 10**.

i. Recommendations. The study team provided guidance related to changes to current contracting policies and potential business programs the City could consider implementing. We present those recommendations in **Chapter 11**.

C. Study Team Members

The disparity study was conducted by a project team comprised of four firms that, collectively, possess decades of experience related to conducting disparity studies in connection with small and diverse business programs.

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

2. Sankofa Community Strategists (Sankofa). Sankofa is a research firm based in Little Rock that specializes in using community knowledge and data-driven insights to address inequities. Sankofa conducted in-depth interviews, focus groups, and qualitative data analysis for the disparity study.

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

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

CHAPTER 2.

Legal Framework

The City of Little Rock (the City) commissioned a *disparity study* to assess whether there are statistical disparities between the participation and availability of small businesses as well as person of color (POC)-, woman-, and veteran-owned businesses for the contracts and procurements the City awards. One of the primary reasons for those assessments is to determine whether compelling evidence of barriers exists for specific business groups in obtaining work on City projects and efforts the City could consider using to help address those barriers. Chapter 2 summarizes the legal standards that govern the use of race- and gender-neutral and race- and gender-based measures in three parts:

- A. Legal standards;
- B. Court decisions; and
- C. Addressing legal requirements.

A. Legal Standards

There are different legal standards for determining the constitutionality of measures government organizations use as part of contracting inclusion programs, depending on whether they are *race- and gender-neutral* or *race- and gender-based* in nature. Race- and gender-neutral measures are efforts designed to encourage the participation of specific groups of businesses, regardless of the race or gender of the owners, in the contracts and procurements an organization awards. Examples of race- and gender-neutral measures include an organization giving evaluation preferences to small businesses as part of awarding projects or setting aside certain projects for exclusive competition among local businesses. In contrast, race- and gender-based measures are efforts designed to specifically encourage the participation of POC- and woman-owned businesses in the contracts and procurements a government organization awards. Examples of race- and gender-based measures include an organization setting condition-of-award percentage goals for the participation of POC- and woman-owned businesses in projects or soliciting bids or proposals only from POC- and woman-owned businesses for project opportunities.

1. Race- and gender-neutral measures. Because race- and gender-neutral measures are not based on the race, gender, sexual orientation, or other suspect characteristics of business owners, courts apply the *rational basis* test—which is the least restrictive standard for evaluating the constitutionality of contracting measures—to assess whether an organization’s use of such measures is constitutional. To meet the requirements of the rational basis test, an organization must ensure that its use of race- and gender-neutral measures is rationally related to legitimate government interests (e.g., encouraging the participation of small businesses or local businesses in its work).

2. Race- or gender-based measures. In contrast to race- and gender-neutral contracting measures, an organization’s use of race-based or gender-based measures must meet the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

a. Strict scrutiny. An organization's use of race-based contracting measures is subject to the strict scrutiny standard of review, which is the most restrictive standard for evaluating the constitutionality of contracting measures. To meet the strict scrutiny standard, government organizations must show a *compelling governmental interest* in using race-based measures and ensure that their use is *narrowly tailored*.

i. Compelling governmental interest. Government organizations using race-based contracting measures must have evidence that POC-owned businesses face barriers within their own *relevant geographic market areas (RGMAs)*—including statistical and anecdotal evidence—that supports the use of such measures.¹ It is not necessary for organizations themselves to have discriminated against POC-owned businesses for them to demonstrate a compelling governmental interest. If evidence indicates that they are *passive participants* in race-based barriers that exist in their RGMAs, then they could consider using race-based measures to account for those barriers as part of their contracting and procurement processes.² Passive participation in discrimination refers to organizations perpetuating barriers that exist in their marketplaces through the policies and practices they use to award projects (e.g., an organization mandating high insurance requirements to perform work on its projects when demonstrable barriers exist for POC-owned businesses in the local insurance market).

ii. Narrow tailoring. In addition to demonstrating a compelling governmental interest, government organizations that use race-based contracting measures must demonstrate that their use of such measures is narrowly tailored to meet program objectives. There are several factors courts consider in determining whether an organization's use of race-based contracting measures is narrowly tailored:

- 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 for which evidence of discrimination exists 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;
- Whether any numerical, race-based participation goals are related to conditions in the local marketplace; and
- Whether the use of such measures is overly burdensome for businesses not owned by POCs.

b. Intermediate scrutiny. In 1976, the United States Supreme Court (SCOTUS) ruled that a government organization's use of gender-based inclusion measures must adhere to the requirements of the intermediate scrutiny standard, which is less restrictive than the strict scrutiny standard but more restrictive than the rational basis test.³ To meet the requirements of intermediate scrutiny, an organization must demonstrate that its use of gender-based contracting measures serves an important government objective and is substantially related to achieving that objective. Although the use of gender-based measures is technically subject to the requirements of intermediate scrutiny, for

¹ See e.g., *Concrete Works, Inc. v. City and County of Denver* ("Concrete Works I"), 36 F.3d 1513, 1520 (10th Cir. 1994).

² 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).

³ *Craig v. Boren*, 429 U.S. 190 (1976).

simplicity, BBC Research & Consulting (BBC) generally treats both race- and gender-based measures as being subject to strict scrutiny requirements.

B. Court Decisions

Two SCOTUS decisions established strict scrutiny as the appropriate standard for evaluating the constitutionality of race-based measures:

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

SCOTUS' decision in the *Croson* case in particular provides important guidance on the types of evidence organizations must provide to use race-based contracting measures in a constitutional manner.

1. *Croson* and *Adarand*. SCOTUS' landmark decisions in *Croson* and *Adarand* are the most important decisions to date in connection with the use of race-based measures in government contracting and disparity study methodology. In *Croson*, SCOTUS struck down the City of Richmond's race-based subcontracting program as unconstitutional and, in doing so, established various requirements government organizations must meet when considering the use of such measures as part of their contracting inclusion programs:

- Organizations' use of race-based 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 that the use of such measures is narrowly tailored.
- Organizations must assess the availability of local POC-owned businesses for their work and their use of race-based contracting measures must be related to those assessments, and their use of race-based measures must be tailored to such assessments.
- In assessing the availability of POC-owned businesses for their work, organizations must account for various characteristics of the projects they award and the degree to which local POC-owned businesses are *ready, willing, and able* to perform that work.
- If organizations have evidence of statistical disparities between the percentage of dollars they awarded to POC-owned businesses and the percentage of dollars those businesses are available to perform, then *inferences of discrimination* could exist, supporting the use of narrowly tailored, race-based measures.

SCOTUS' decision in *Adarand* expanded its decision in *Croson* to *federal* government contracting inclusion programs. In *Adarand*, SCOTUS ruled that federal contracting programs must also adhere to the requirements of strict scrutiny.

2. Subsequent decisions. Many subsequent decisions in federal courts have refined the requirements for using race- and gender-based contracting measures as part of contracting inclusion programs, including cases in the Eighth Circuit, the federal judicial circuit in which the City operates. Examples of those cases include *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, Northern*

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

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

Contracting v. Illinois, and *Geyer Signal, Inc. v. Minnesota Department of Transportation*.^{6, 7, 8} These cases centered on the constitutionality of the Federal Disadvantaged Business Enterprise (DBE) Program, which can be a race- and gender-based contracting inclusion program transportation agencies that receive United States Department of Transportation (USDOT) funds are required to implement to encourage the participation of certified DBEs in USDOT-funded projects. In both cases, the courts ruled that the Federal DBE Program on the whole was constitutional (i.e., *facially constitutional*) and that the organizations' implementations of the program were constitutional (i.e., *constitutional as applied*). More information about these court cases as well as many others relevant to contracting inclusion programs and disparity study methodology can be found in Appendix B of this report.

3. Act 116 - To Prohibit Discrimination or Preferential Treatment by the State of Arkansas and Other Public Entities. On February 18, 2025, Arkansas Governor Sarah Huckabee Sanders signed into law State Senate Bill 3 (Arkansas Act 116), which amended Arkansas state code to prohibit government organizations that receive state funding from using race- and gender-based preferences as part of their contracting processes. The key provision reads: “[State-funded government organizations] shall not discriminate against, or grant preferential treatment to, an individual or group on the basis of race, sex, color, ethnicity, or national origin in matters of state employment, public education, or state procurement.”⁹ Thus, the law seemingly prohibits the City from using any race- or gender-based measures as part of its contracting processes unless doing so is “necessary to establish or maintain eligibility for a federal program [and prohibiting their use] would ... result in a loss of federal funds”

C. Addressing Legal Requirements with the Disparity Study

Many government organizations have used information from disparity studies to:

- Determine whether different business groups face barriers as part of their contracting processes or in their marketplaces that make it more difficult for those businesses to compete for or obtain organization work;
- Estimate the availability of different groups of businesses in their marketplaces for the contracts and procurements they award;
- Understand the different characteristics—including the race and gender of business owners, business sizes, and business ages—of potentially available businesses in their marketplaces;
- Design tailored efforts to encourage the participation of different business groups in their contracts and procurements; and
- Ensure that their use of any race- or gender-based measures meets the requirements of the strict scrutiny standard.

⁶ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

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

⁸ *Geyer Signal, Inc. v. Minnesota Department of Transportation*, 2014 W.L. 1309092 (D. Minn. 2014).

⁹ arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2025R%2FPublic%2F&file=116.pdf&ddBienniumSession=2025%2F2025R

CHAPTER 3.

Data Collection and Analysis

Chapter 3 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the 2025 City of Little Rock (the City) Disparity Study and the processes we used to collect relevant prime contract, subcontract, and vendor data from the City and other sources. Chapter 3 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 information on contracts and procurements that the City awarded between January 1, 2019 and December 31, 2023 (the *study period*) from the City's Strategic Sourcing Contract Management (SSCM) software. We sought those data regardless of the utilized vendors' statuses as small businesses, person of color (POC)-owned businesses, woman-owned businesses, or veteran-owned businesses (collectively referred to as *small and diverse businesses*). Those data served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses.

1. Prime contract data. The City provided BBC with data from its SSCM software on relevant prime contracts and procurements it awarded during the study period. We requested the following information about each relevant prime contract or procurement:

- Contract number;
- Prime contractor name;
- Contract title;
- Description of work;
- Contract effective date;
- Award amount (including change orders and amendments); and
- Amount paid-to-date.

The City advised BBC on how to interpret the data it provided, including how to best identify unique bid opportunities and how to aggregate related award or payment amounts, where possible.

2. Subcontract data. The City does not collect data on the subcontracts associated with the contracts and procurements it awards. To gather that information, BBC conducted surveys with prime contractors to collect data on the subcontracts associated with the contracts and procurements the City awarded to

them during the study period that we deemed to have likely included subcontract opportunities. We made those determinations based on the work types involved and contract sizes, primarily including relatively large construction and professional services contracts. We requested the following information from prime contractors about each subcontract associated with each relevant contract the City awarded to them:

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

BBC requested subcontract data from 92 prime contractors associated with 219 projects worth \$140.6 million the City awarded during the study period. Thirty prime contractors responded to our requests and submitted subcontract data for 50 of those projects totaling \$24.2 million. These data included information about 238 subcontracts. Because BBC did not receive subcontract data on all relevant prime contracts the City awarded during the study period, we weighted the data we received to represent subcontract dollars associated with all prime contracts likely to have included such opportunities.

3. Prime contract and subcontract amounts. For each prime contract and subcontract (i.e., *contract element*) included in our analyses, BBC examined the dollars the City 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 project's entire award amount to the prime contractor. If a project included subcontracts, we calculated the prime contract amount as the total project award amount less the sum of dollars committed to all subcontractors. For contracts for which we were unable to collect subcontract information, we treated the prime contract amount as the total contract award amount less the sum of simulated dollars committed to all subcontractors.

4. Contracts and procurements included in study analyses. Figure 3-1 presents the number of contract elements and associated dollars BBC included in our analyses.

Figure 3-1.
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:

BBC from City data.

Contract type	Number	Dollars
Construction	416	\$119,039,541
Goods and support services	207	\$18,801,705
Professional services	209	\$22,380,966
Total	832	\$160,222,212

B. Vendor Data

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

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was POC-, woman-, or veteran-owned);
- Race of owners (if POC-owned);
- Primary lines of work; and
- Business size.

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

- City contract and vendor data;
- Surveys the study team conducted with business owners and managers;
- The City's internal tracking of business certifications;
- Certification data from the Arkansas Economic Development Commission, the Arkansas Department of Transportation, and the United States Small Business Administration;
- Data from the Arkansas Contractors Licensing Board and the State Board Of Licensure for Professional Engineers and Professional Surveyors;
- Dun & Bradstreet (D&B) business listings and other business information sources; and
- Business websites and other secondary research.

C. RGMA

The RGMA represents the geographical area in which the businesses to which the City awards the substantial majority of its contract and procurement dollars are located. During the study period, the City awarded approximately 93 percent of relevant contract and procurement dollars to businesses located in the Little Rock-North Little Rock-Conway Metropolitan Statistical Area (MSA). The MSA is defined by the United States Census Bureau and consists of six counties in central Arkansas: Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties. Our analyses focused on this six-county region (referred to as the *Little Rock marketplace*).

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 City 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 3-2 presents subindustry classifications for the construction, professional services, and goods and support services contracts and procurements we included in our analyses as well as the dollars the City awarded related to each subindustry during the study period.

Figure 3-2.
Contract and procurement
dollars by subindustry

Note:

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

Source:

City data.

Industry	Total
Construction	
Road construction and concrete work	\$53,922,367
Building construction	\$13,622,606
Excavation, drilling, wrecking, and demolition	\$9,650,411
Other construction materials	\$7,888,686
Electrical work	\$6,959,692
Water, drainage, and utility lines	\$6,498,112
Other construction services	\$4,291,631
Plumbing and HVAC	\$4,281,537
Painting, striping, and marking	\$4,146,991
Concrete, asphalt, sand, and gravel products	\$2,957,840
Landscaping services	\$1,858,253
Trucking, hauling, and storage	\$1,779,944
Fencing, guardrails, barriers, and signs	\$1,181,470
Total construction	\$119,039,541
Goods and support services	
Vehicle parts and supplies	\$6,731,047
Office equipment and supplies	\$3,099,259
Vehicle maintenance and repair	\$2,372,460
Other goods	\$1,973,717
Security guard services	\$1,701,687
Cleaning and janitorial services	\$984,343
Safety equipment	\$918,420
Other services	\$514,300
Uniforms and apparel	\$306,099
Waste and recycling services	\$200,373
Total goods and support services	\$18,801,705
Professional services	
Engineering	\$8,297,287
Architectural and design services	\$3,218,814
IT and data services	\$2,911,001
Environmental services	\$2,431,941
Human resources and job training services	\$1,935,868
Bookkeeping and accounting	\$1,309,480
Other professional services	\$1,039,465
Landscape architecture	\$421,625
Advertising, marketing, and public relations	\$416,321
Testing and inspection	\$210,763
Business services and consulting	\$188,400
Total professional services	\$22,380,966
GRAND TOTAL	\$160,222,212

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 the City awarded for *heavy construction equipment* represented less than 1 percent of the total dollars we examined as part of the study. So, we combined *heavy construction equipment* with additional, related

work types that also accounted for relatively small percentages of the total dollars into the “other construction materials” subindustry.

There were also various contracts and procurements we classified into subindustries that we did not ultimately include in our analyses:

- Purchases and grants the City made with or awarded to government agencies, utility providers, health care providers, or nonprofit organizations (\$28 million);
- Contracts and procurements that reflected “national markets”—that is, subindustries dominated by large national or international businesses—or subindustries where the City awarded most of the dollars to businesses located outside the RGMA (\$59 million);¹
- Payments for insurance, property leases, or other pass-through dollars (\$56 million);² or
- Types of work not typically included in disparity studies and that account for relatively small percentages of the City’s contract and procurement dollars (\$1 million).³

E. Review Process

The City reviewed contract, procurement, and vendor data throughout the study process. BBC consulted with the City 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, software purchases, and tornado debris removal.

² Examples include health insurance, dental insurance, and property leasing.

³ An example of an industry not typically included in disparity studies is legal services.

CHAPTER 4.

Econometric Analysis of Marketplace Conditions

Throughout the United States, Arkansas, and Little Rock, people of color (POC) and women have and continue to face barriers that impede their ability to start, grow, and sustain successful businesses. Historically, systemic discrimination and barriers including slavery, racial oppression, segregation, race-based displacement, labor market discrimination, and discriminatory government policies have contributed to substantial and durable disparities for POCs and women. The effects of these barriers still impact diverse communities. Those barriers have limited opportunities for POCs and women to obtain quality education, gain workplace experience, and build wealth.^{1, 2, 3, 4, 5}

A. Historical and Current Marketplace Conditions

Since the inception of the country, POCs and women in the United States have experienced political, economic, and social barriers due to discrimination. This section highlights literature about the history of barriers that POCs and women have faced in Arkansas, in Little Rock, and in the United States as a whole. This history helps to explain ongoing disparities in business ownership for POCs and women.

1. Segregation, oppression, and Black-owned businesses. Arkansas' history of slavery and reconstruction provides historical context for economic barriers that Black people and other POC groups continue to face in the Little Rock marketplace today. Following the Civil War, Arkansas re-established a state constitution that, while abolishing slavery on paper, did not entitle Black Americans to all the rights of American citizens. During Reconstruction, Black Americans began to establish more businesses and community institutions in Little Rock. However, ongoing racial terror, labor exploitation, and discrimination continued to impact Black families and impede their abilities to establish wealth and stability.⁶ Mob violence, exploitative sharecropping and tenant farming systems, and, by the 1920s, laws that required physical separation of Black and White people, created pervasive discrimination for Black citizens.

During the early 20th century, there was an increase in the number of Black business owners, politicians, and professionals in Little Rock as more Black residents moved to the city from rural parts of the state.⁷ Despite segregation laws, Black Americans in Little Rock established diverse and prosperous neighborhoods, community centers, and businesses to serve Black residents in their racially segregated neighborhoods. The most well-known of these commercial centers was Little Rock's Ninth Street district, made up predominantly of Black-owned businesses. One former resident described this area in the 1950s as a "safe haven" for Black residents who could openly access "everything we needed in the Black community," from restaurants to pool halls to beauty shops, on Ninth Street.⁸ During the 1960s, as businesses desegregated, White-owned businesses located in downtown Little Rock began to compete with small Black-owned businesses. Black-owned businesses also struggled to obtain capital from White-controlled banks in order to remain competitive. The official end to the Ninth Street district and the businesses and residences that families established there came when the Arkansas Highway and Transportation Department built Interstate 630 through the district, demolishing part of the district and prohibiting parking in what remained of the main urban street. The City of Little Rock's (the City's) "urban renewal" program led to the demolition of all but one building that still remains.^{9, 10}

Other groups of POCs, including people who identified as Hispanic, Asian, and Native American, experienced less formal segregation and exclusion.¹¹ Segregation also extended into the labor market, as POC workers were concentrated in low-wage work in agriculture and other industries with few opportunities for advancement.^{12, 13} Historically, the threat of racially motivated violence was one factor in Little Rock that prevented POCs from acquiring wealth and punished them when they obtained it.¹⁴ Although this violence is less visible today, bias-motivated crimes still represent a form of intimidation that POC business owners may face.¹⁵

2. Native American displacement. Over the past three centuries, the United States has been marked by mass displacement and migration of various groups of POCs. Native American communities in Arkansas, for example, have faced many forms of discrimination and forced displacement. The region around Little Rock is the traditional homeland of the Quapaw tribe, and Arkansas is also home to the Caddo, Osage, and Chickasaw people.¹⁶ In 1834, the United States government forcibly moved many members of the Quapaw tribe to Oklahoma, where the tribe is still based today.¹⁷ This was part of a pattern during the 19th century of the United States government forcibly removing and displacing Native American people from the Southeast United States to Oklahoma, resulting in great loss of life and political and economic disenfranchisement.¹⁸ However, some Native American communities remained in Arkansas and others returned to the state over the following century. Native American people continued to face discrimination, including the intentional divestment from their communities and reservations by the United States government and segregation outside of tribal territory. This history of discrimination resulted in disparities in opportunities for education, income, and wealth-building for Native Americans and likely contributed to contemporary disparities in business success.¹⁹

3. Hispanic and Asian immigration. During the 19th century, Hispanic and Asian immigrants arrived in Arkansas to work in the agricultural industry, often in low-paying jobs. Asian immigrants did not have the right to citizenship or to vote at this time. Some Asian immigrants in Little Rock founded small businesses such as laundromats or grocery stores, which became some of the few businesses that were not segregated by race during the following decades.^{20, 21} During the 19th century, the United States government banned Chinese women from immigrating to the country and later banned Chinese immigration entirely.²² Likewise, in the 20th century, the United States government limited Mexican farm worker migration programs to men only.²³ In both cases, the United States government wanted immigrant men to fill low-wage agricultural jobs but did not want entire families to immigrate or establish communities in the United States. Around the second half of the 20th century, restrictions on immigration decreased. Arkansas also saw a boom in the construction and agricultural processing industries, which led to more immigrants settling in the state, especially starting in the 1980s.²⁴

4. Barriers faced by women. Through the 19th and 20th centuries, White women were often restricted to roles as homemakers, while Black and Native American women, especially, were restricted to agricultural work or gender-specific work such as domestic service with low pay and scarce advancement opportunities.^{25, 26, 27} Until the passage of the 1974 Equal Credit Opportunity Act, women were not legally entitled to apply for credit cards, open bank accounts, or obtain home loans without a male co-signer. Prior to this law, White women's access to credit was determined by the creditworthiness or permission of a male co-signer, while POCs, especially Black men and women, were systematically excluded from participation in loaning and credit systems altogether.²⁸ In 1988, the Women's Business Ownership Act further specified that credit discrimination against women business owners and women-owned businesses is unlawful and entitled women to own a business in their own

name without a male co-owner.²⁹ Another factor that can impact business ownership for women is childcare work. In 2023, Arkansas had the second-youngest average age for becoming a mother (24 years old) in the United States.³⁰ Women continue to disproportionately take on childcare work, which can limit the amount of time they have to spend on owning and operating a business.

5. Reforms. In the middle of the 20th century, many reforms opened up new opportunities for POCs and women in Arkansas and nationwide as a result of Civil Rights movements. 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 and ushered in an era of racial desegregation. In this era, Little Rock took the national stage in 1957 when nine Black high school students desegregated Central High School with a police escort and the Army's 101st Airborne Division to protect them from a White mob and the state national guard. In the spring of 1958, Ernest Green became the first Black student to graduate from Central High School. By the fall of 1958, the governor closed the public schools in Little Rock to prevent further desegregation, and the school board fired over 40 teachers who had supported integration. In December 1959, a Supreme Court ruling reopened the city's schools and ordered that desegregation continue.^{31, 32}

B. Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses to assess whether POCs, women, veterans, and the businesses they own face disparate outcomes in the construction, professional services, and goods and support services industries in the Little Rock metropolitan area. The metropolitan area is defined by the United States Census Bureau to include six counties in central Arkansas: Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties. BBC refers to this metropolitan area as the *Little Rock marketplace*. The study team also examined the potential effects any barriers have on the formation and success of POC-, woman-, and veteran-owned businesses as well as their potential impacts on the availability of those businesses for the contracts and procurements the City awards. We examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs, women, and veterans face barriers related to education, employment, and gaining industry experience;
- **Financial capital**, to assess whether POCs, women, and veterans face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether POCs, women, and veterans own businesses at rates comparable to that of White people, men, and non-veterans, respectively; and
- **Business success**, to assess whether POC-, woman-, and veteran-owned businesses have outcomes similar to those of businesses owned by White people, men, and non-veterans, respectively.

1. 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.^{33, 34, 35, 36} Any barriers in those areas may make it more difficult for POCs and

women to work in relevant industries and may prevent some of them from starting and operating businesses successfully.

a. Education. Barriers associated with educational attainment may make it more difficult for people to enter or advance in certain industries, because many occupations require at least a high school diploma, and some occupations—such as 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.^{37, 38, 39} Nationally, POCs lag behind White people in terms of both educational attainment and the quality of education they receive.^{40, 41, 42} POC students are more likely than White students to attend schools that do not provide access to core classes in science and math.⁴³ In addition, Black students are more likely than White students to be expelled or suspended from high school.⁴⁴ For those and other reasons, POCs are far less likely than people who identify as White to attend college, enroll at selective four-year college institutions, and earn college degrees.⁴⁵

Educational outcomes for POCs in Little Rock are similar to those for POCs nationwide. BBC's analyses of the Little Rock labor force indicate that people who identify with certain POC groups are less likely than people who identify as White to earn college degrees. Figure 4-1 presents the percentage of workers in Little Rock who have earned four-year college degrees. As shown in Figure 4-1, Black (31%), Hispanic (15%), Native American (28%), and other race POC (27%) workers are less likely than White workers (42%) to have four-year college degrees. In contrast, Subcontinent Asian workers (73%) are more likely than White workers (42%) to have a four-year college degree, and women (42%) are more likely than men (34%) to have a four-year college degree. Lastly, veterans (33%) are less likely than non-veterans (38%) to have a four-year degree.

Figure 4-1.
Percentage of all workers aged
25 and older with at least a
four-year degree, Little Rock
marketplace, 2018-2022

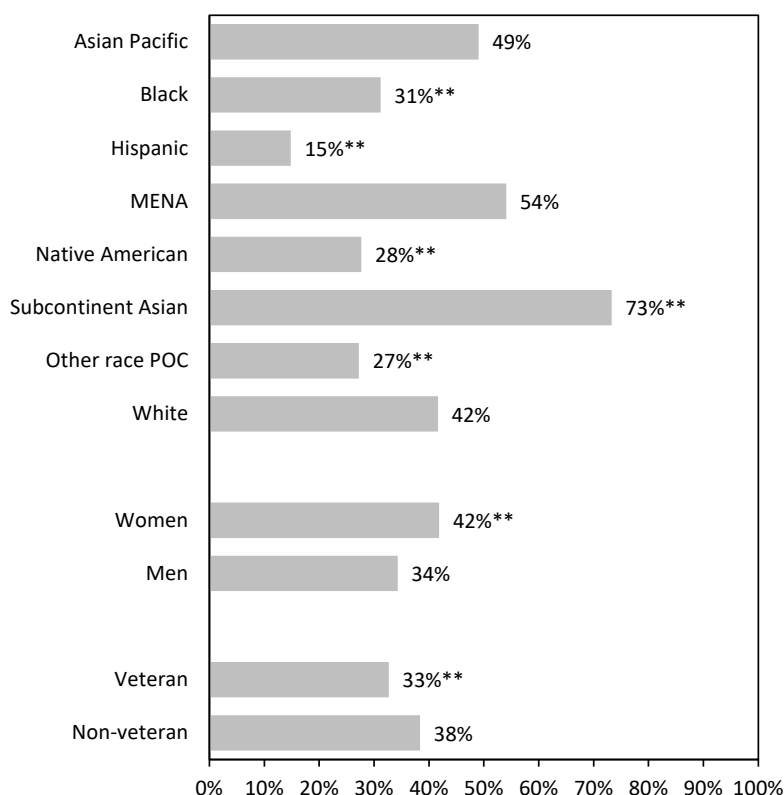
Notes:

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

MENA stands for Middle Eastern and North African

Source:

BBC from 2018-2022 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



b. 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. Historically, Black, Hispanic, and Native American workers were excluded from unionized skilled trades and typically worked low-skill jobs that paid low wages.⁴⁶ These historic barriers may continue to create disparities in employment and management experience among POCs and women.

i. Employment. Nationally, 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.^{47, 48, 49} 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.^{50, 51, 52, 53, 54, 55} In addition, Black, Hispanic, and Native American residents are incarcerated at greater rates than White residents in Arkansas and nationwide, which contributes to difficulties finding jobs and slow wage growth.^{56, 57, 58, 59, 60, 61, 62} BBC assessed the representation of POC and woman workers in the Little Rock construction, professional services, and goods and support services industries compared to their representation in all Little Rock industries considered together. We present those results in Figure 4-2.

Figure 4-2.
Demographic characteristics of workers in study-related contracting industries and all industries, Little Rock marketplace, 2018-2022

Group	All industries (n=13,618)	Construction (n=840)	Professional services (n=625)	Goods and support services (n=435)
Race/ethnicity				
Asian Pacific	1.9 %	1.2 %	2.5 %	0.7 % **
Black	24.8 %	9.4 % **	13.3 % **	20.2 % *
Hispanic	5.4 %	18.8 % **	2.9 % **	9.4 % **
MENA	0.3 %	0.4 %	0.2 %	0.0 %
Native American	0.9 %	1.0 %	1.1 %	0.6 %
Subcontinent Asian	0.6 %	0.0 %	1.5 %	0.0 %
Other race POC	0.7 %	0.7 %	0.9 %	0.6 %
Total POC	34.5 %	31.5 %	22.3 %	31.4 %
White	65.5 %	68.5 %	77.7 % **	68.6 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	49.0 %	9.4 % **	46.6 %	30.7 % **
Men	51.0 %	90.6 % **	53.4 %	69.3 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran-status				
Veteran	6.0 %	6.9 %	5.4 %	6.7 %
Non-veteran	94.0 %	93.1 %	94.6 %	93.3 %
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: *, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

Source: BBC from 2018-2022 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/>.

As shown in Figure 4-2, compared to their representation in all industries considered together:

- Smaller percentages of people who identify as Black (9.4%) and women (9.4%) work in the construction industry. In contrast, a greater percentage of people who identify as Hispanic (18.8%) work in the construction industry, as do a greater percentage of men (90.6%).
- Smaller percentages of people who identify as Black (13.3%) and Hispanic (2.9%) work in the professional services industry. In contrast, a greater percentage of people who identify as White (77.7%) work in the professional services industry.
- Smaller percentages of people who identify as Asian Pacific (0.7%), Black (20.2%), and women (30.7%) work in the goods and support services industry. In contrast, a greater percentage of people who identify as Hispanic (9.4%) work in the goods and support services industry, and a greater percentage of men (69.3%) work in the goods and support services industry.

BBC also examined the relationships between race, gender, veteran status, and unemployment. Figure 4-3 presents unemployment rates among POCs and women compared to those of White people and men, respectively. Compared to White people (4%), Black people (8%) are more likely to be unemployed in

Little Rock. In contrast, Subcontinent Asian people (1%) are less likely to be unemployed relative to White people. Veterans are less likely to be unemployed (3%) compared to non-veterans (5%).

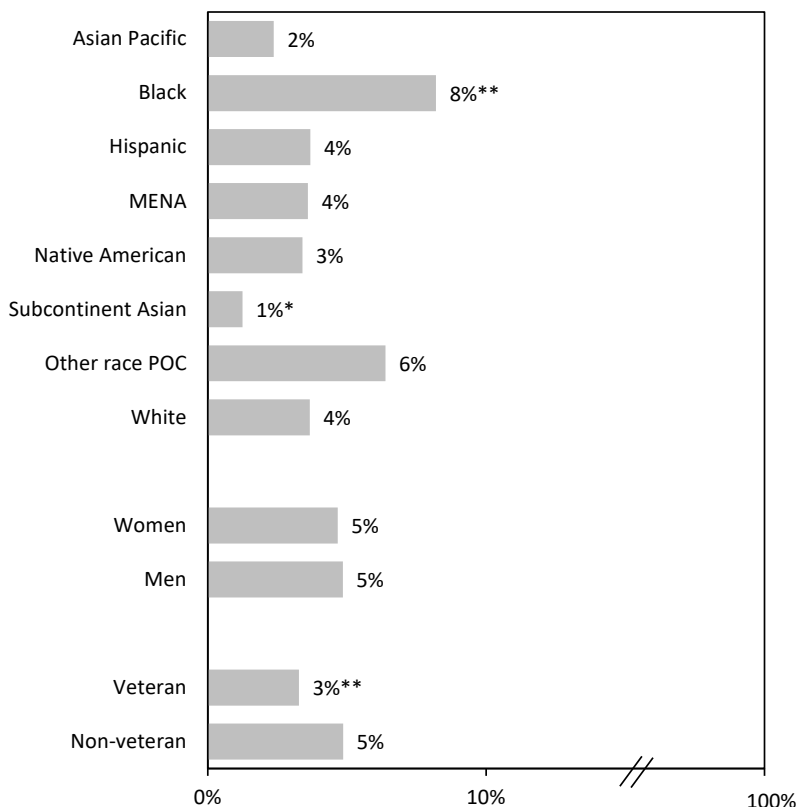
Figure 4-3.
Unemployment rates, Little Rock
marketplace, 2018-2022

Note:

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

Source:

BBC from 2018-2022 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/>.



We also conducted regression analyses to assess whether there are relationships between race, gender, and veteran status even after accounting for various other personal factors such as age, education, family status, and industry. Figure 4-4 presents results of those analyses, which indicated that, even after accounting for such factors, Black people are more likely to be unemployed compared to White people. These results align with national labor market analyses that consistently identify disparities in unemployment between Black and White workers, as well as with field analyses that find that “Black job applicants with equivalent, and sometimes superior, credentials to White applicants are less likely to receive job callbacks,” and point towards the persisting effects of racial discrimination on employment opportunities.⁶³

Figure 4-4.
Predictors of unemployment,
Little Rock marketplace, 2018-2022

Notes:

The regression included 12,386 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, White for the
race variables, and manufacturing for the industry variables.

Source:

BBC from 2018-2022 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	Coefficient
Asian Pacific	-0.3235
Black	0.3235 **
Hispanic	-0.1216
MENA	0.1455
Native American	-0.1102
Subcontinent Asian	-0.1743
Other race POC	0.2931
Women	0.0768
Veteran	0.0403

ii. Management experience. Managerial experience is an important predictor of business ownership and success, but discrimination remains an obstacle to greater diversity in obtaining management positions.^{64, 65, 66, 67} Nationally, POCs and women are generally less likely than White men to work in management positions.^{68, 69, 70} BBC examined the representation of POCs and women in management positions in the Little Rock construction, professional services, and goods and support services industries. As shown in Figure 4-5, 1.6 percent of Hispanic workers in the construction industry work as managers compared to 21.1 percent of White workers. This indicates that there may be substantial barriers for Hispanic workers to go from entry-level construction jobs to management jobs in the construction industry. Additionally, in the professional services industry, 6.1 percent of other race POC workers are managers compared to 19.0 percent of White workers.

Figure 4-5.
Percentage of non-owner workers who worked as managers in
each study-related industry, Little Rock marketplace, 2018-2022

Group	Construction	Professional services	Goods and support services
Race/ethnicity			
Black	16.8 %	11.0 %	11.4 %
Hispanic	1.6 % **	0.0 % †	4.4 %
Native American	17.5 % †	22.4 % †	19.0 % †
Other race POC	12.3 % †	6.1 % **	0.0 % †
White	21.1 %	19.0 %	5.3 %
Gender			
Women	17.2 %	17.6 %	6.6 %
Men	17.0 %	15.8 %	6.4 %
Veteran status			
Veteran	13.4 %	21.0 %	5.6 %
Non-veteran	17.2 %	16.4 %	6.5 %
All individuals	17.0 %	16.7 %	6.5 %

Notes: ** Denotes statistical significance at the 95% confidence level.

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

Source: BBC from 2018-2022 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/>.

We also conducted regression analyses to assess whether there are relationships between race, gender, veteran status and management even after accounting for various other personal factors such as age, family status, whether someone works full time or part time, education, and language spoken. As shown in Figure 4-6, in the construction industry, Hispanic workers are less likely to hold management positions than White workers, even after accounting for other personal factors. In the goods and support services industry, Black workers and Hispanic workers are more likely to hold management positions than White workers after accounting for other personal factors.

Figure 4-6.
Predictors of management in study-related industries, Little Rock marketplace, 2018-2022

Variable	Coefficient		
	Construction	Professional services	Goods and support services
Black	-0.6122	-0.1915	0.8784 *
Hispanic	-1.1855 *	0.0000 †	0.9870 *
Native American	-0.2433	0.4675	1.0933
Other race POC	-0.1365	-0.5353	0.0000 †
Women	-0.4272	0.2266	0.0179
Veteran	-0.1920	0.0950	0.0857

Notes: The construction regression included 516 observations.

The professional services regression included 429 observations.

The goods and support services regression included 281 observations.

* Denotes statistical significance at the 90% confidence level.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and White for the race variables.

Source: BBC from 2018-2022 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

2. Financial capital. In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{71, 72, 73} Individuals can acquire financial capital through many sources, including wages, personal wealth, homeownership, and loans. When barriers exist in financial markets, POCs and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

a. Wages and income. Wage and income gaps between POCs and White people and between women and men exist nationwide, even when researchers account for various other personal factors.^{74, 75, 76, 77} Nationally, on average, non-Hispanic White households earn \$89,050 annually, which is \$32,560 more than Black households and \$23,510 more than Hispanic households.⁷⁸ This income gap presents a substantial barrier to starting and growing a business. Women, especially women of color, also face wage and income gaps relative to men. Nationally, the median earnings of full-time, year-round White woman workers was only 79 percent that of men. Black and Hispanic women face even larger wage gaps, with Black women earning a median of \$0.64 and Hispanic women earning \$0.57 for every \$1.00 earned by White men.⁷⁹ Such disparities make it difficult for POCs and women to use their personal or household wages as a source of business capital.

BBC observed wage disparities in Little Rock consistent with those observed nationally. Figure 4-7 presents mean annual wages for Little Rock workers by race and gender. Black (\$48,140), Hispanic (\$46,549), Native American (\$52,838), and other race POC workers (\$50,119) earn less on average than White workers (\$69,781). In contrast, Middle Eastern and North African (MENA) workers (\$135,908) earn more on average than White workers. Women (\$53,671) earn less on average than men (\$73,671). Lastly, veterans (\$73,890) earn more on average than non-veterans (\$62,956).

Figure 4-7.
Mean annual wages, Little Rock marketplace, 2018-2022

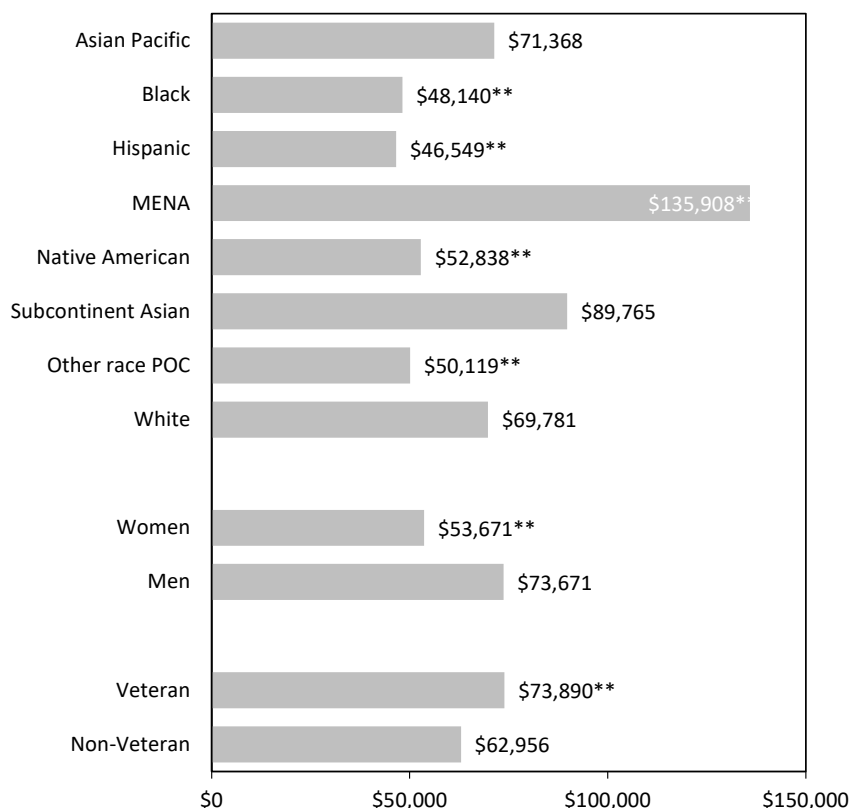
Notes:

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, between women and men, or between disabled veterans and all others is statistically significant at the 95% confidence level.

Source:

BBC from 2018-2022 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/>.



We also conducted regression analyses to assess whether wage gaps for POCs or women exist even after accounting for various other personal factors such as age, family responsibilities, education, industry, and language spoken. Figure 4-8 presents results of those analyses, which indicate that Black workers earn less than White workers even after accounting for personal factors. MENA workers earn more than White workers after accounting for other personal factors. Additionally, women earn less than men even after accounting for personal factors.

b. Personal wealth. Another source of business capital is personal wealth, and there are substantial disparities in personal wealth between POCs and White people and between women and men, even after accounting for various other personal characteristics.^{80, 81, 82, 83} For example, in 2019, Black and Hispanic people across the country exhibited average household net worths that were 14 percent and 17 percent, respectively, that of White residents.⁸⁴ Additionally, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁸⁵ In Arkansas, 28.3 percent of Black residents, 13.5 percent of Hispanic residents, 12.0 percent of Asian residents, and 16.3 percent of Native American residents are living in poverty compared to 12.5 percent of White residents.⁸⁶ Disparities in

personal and household wealth across groups may impact the ability of business owners to finance their own—or their family members’—companies, or to invest in their businesses’ growth.

Figure 4-8.
Predictors of annual wages (regression),
Little Rock marketplace, 2018-2022

Notes:

The regression includes 7,244 observations.

The sample universe is all non-institutionalized, employed individuals aged 25-64 who 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 95% confidence level.

The referent for race variables is White.

Source:

BBC from 2018-2022 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
Asian Pacific	1.051
Black	0.833 **
Hispanic	0.927
MENA	1.605 **
Native American	0.931
Subcontinent Asian	0.890
Other race POC	0.922
Women	0.798 **
Veteran	0.969

c. 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.^{87, 88, 89} Research indicates that POCs continue to be given less information on prospective homes and have their purchase offers rejected because of their races.^{90, 91} In addition, POC homeowners tend to own homes worth less than those of White homeowners and tend to accrue less equity.^{92, 93, 94} Historically, housing discrimination on the basis of race has been common in Little Rock. Newspaper ads for Little Rock housing subdivisions in the early 20th century explicitly advertised that the subdivisions were for White residents only.⁹⁵ Restrictive covenants and redlining by banks limited POC and particularly Black residents to live only in certain neighborhoods in the city. Housing segregation often pushes down home values in predominantly POC neighborhoods.⁹⁶

In the early 2000s, banks disproportionately lent subprime and speculative home loans with high interest rates to Black and Hispanic households. As a result, these households paid higher interest rates and were greatly impacted by the housing crisis of the Great Recession.⁹⁷ Today, observed 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 and to different rates of lost household wealth between racial groups during the Great Recession.^{98, 99, 100, 101}

POCs appear to face homeownership barriers in Little Rock similar to those observed nationally. As shown in Figure 4-9, Black (43%), Hispanic (45%), Subcontinent Asian (37%), and other race POC households (54%) own homes at rates that are less than that of White households (73%).

Figure 4-9.
Homeownership rates,
Little Rock marketplace,
2018-2022

Notes:

The sample universe is all households.

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

Source:

BBC from 2018-2022 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/>.

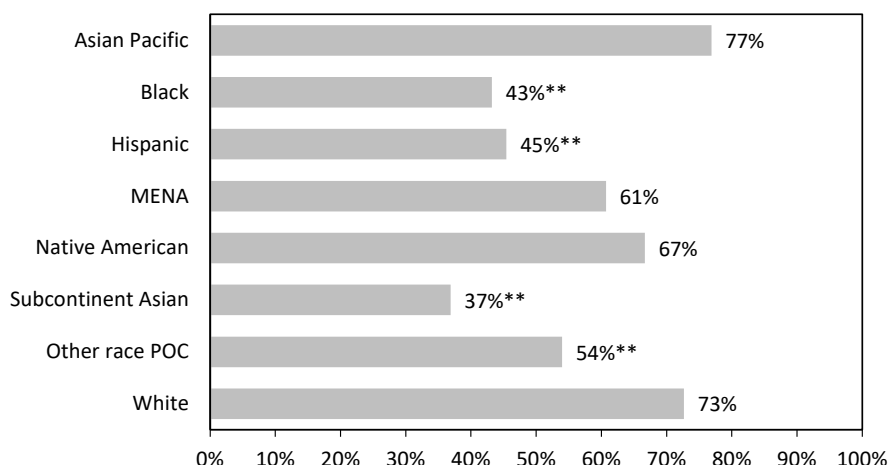


Figure 4-10 presents median home values among homeowners in Little Rock. Those data indicate that Black (\$130,000), Hispanic (\$130,000), Native American (\$150,000), and other race POC (\$165,000) homeowners own homes that, on average, are worth less than those of White homeowners (\$180,000). In contrast, Asian Pacific (\$205,000), MENA (\$250,000), and Subcontinent Asian (\$260,000) homeowners own homes that, on average, are worth more than those of White homeowners (\$180,000). As discussed at the start of this section on homeownership, racial discrimination and segregation in the housing market appear to contribute to lower home values for some groups of POCs and may limit their financial capital for starting and growing a business.

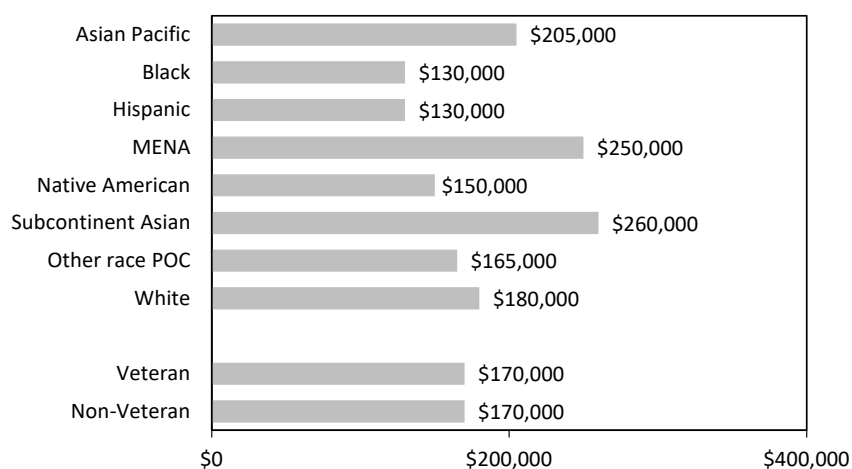
Figure 4-10.
Median home values, Little
Rock marketplace, 2018-
2022

Note:

The sample universe is all owner-occupied housing units

Source:

BBC from 2018-2022 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/>.



d. 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.^{102, 103, 104, 105, 106, 107} BBC assessed barriers POCs and women face in home and business credit markets.

i. 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.^{108, 109} Disparities in home loan denial rates and in mortgage costs may prevent POCs and women from accessing the wealth-building potential of homeownership.^{110, 111, 112, 113, 114} To examine how POC

residents fare in the home credit markets relative to White residents in Little Rock, BBC analyzed home loan denial rates for high-income households by race in Little Rock. As shown in Figure 4-11, Black people (18%) and Hispanic people (17%) in Little Rock are denied home loans at greater rates than White people (8%). In contrast, Asian people (5%) are denied home loans at a lower rate than White people (8%).

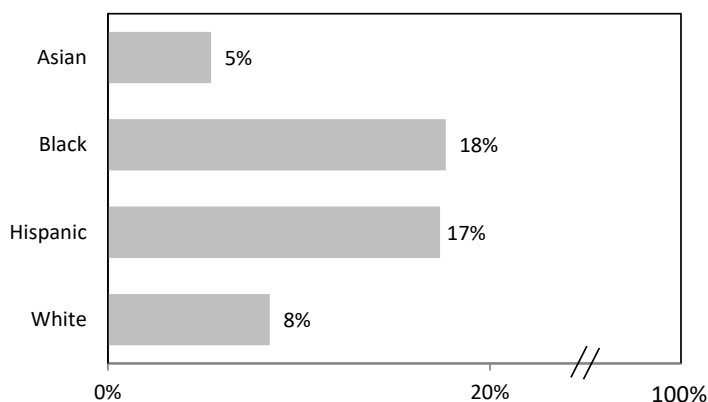
Figure 4-11.
Denial rates of conventional purchase loans for high-income households, Little Rock marketplace, 2023

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 2023. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfbp.gov/data-browser/>.



ii. Business credit. Nationally, POC- and woman-owned businesses 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 White-owned businesses.¹¹⁵ In addition, POC- and woman-owned businesses are more likely to forego submitting business loan applications because of fears of denial.^{116, 117, 118} 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.^{119, 120, 121, 122, 123, 124} Finally, POC and woman business owners show worse loan outcomes even after accounting for creditworthiness.^{125, 126, 127} Without equal access to capital, POC- and woman-owned businesses operate with less capital than White-owned businesses and businesses owned by men, respectively, and must rely more on personal finances.^{128, 129, 130, 131}

BBC analyzed denial rates for loans, lines of credit, and cash advances for POCs and women relative to White people and men, respectively, at a national level. As shown in Figure 4-12, Asian- (31%), Black- (50%), Hispanic- (32%), and Native American-owned businesses (44%) are denied loans at greater rates than White-owned businesses (18%). In addition, woman-owned businesses (25%) are denied loans at greater rates than businesses owned by men (19%).

We also analyzed the degree to which POC- or woman-owned businesses do not apply for loans due to a fear of denial at a national level. Figure 4-13 presents the rates at which those businesses forego loan applications due to fears of denial relative to White-owned businesses and businesses owned by men, respectively. Nationally, Asian- (22%), Black- (40%), Hispanic- (24%), and Native American-owned businesses (25%) are more likely than White-owned businesses (12%) and woman-owned businesses (17%) are more likely than businesses owned by men (13%) to not apply for loans due to fear of denial.

Figure 4-12.
Loan, line of credit, and cash
advance denial rates, United
States, 2022

Source:
BBC from 2022 Small Business Credit Survey.

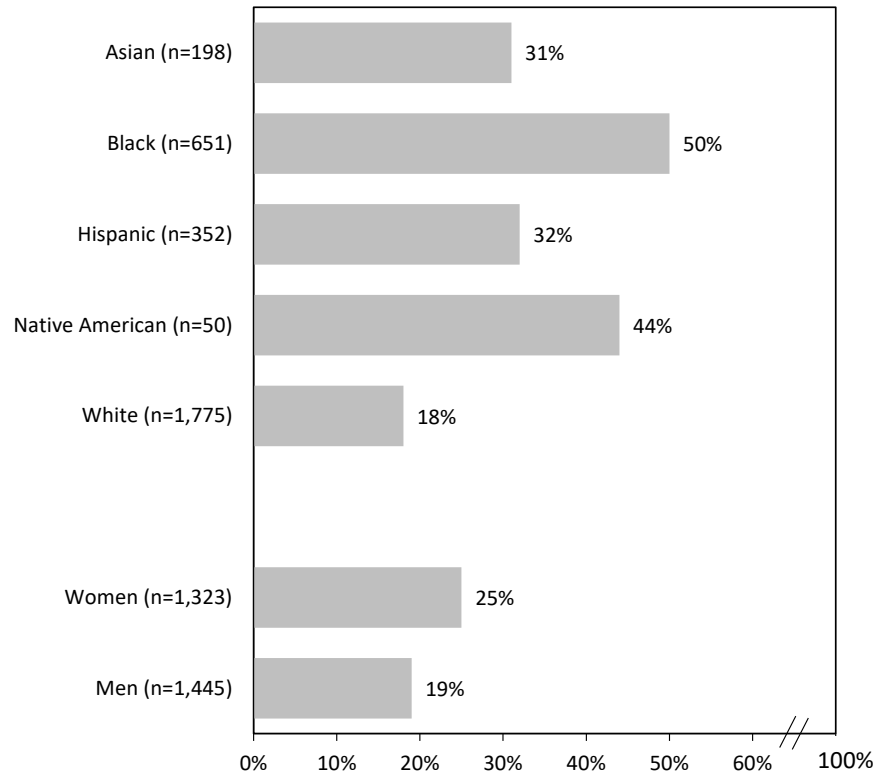
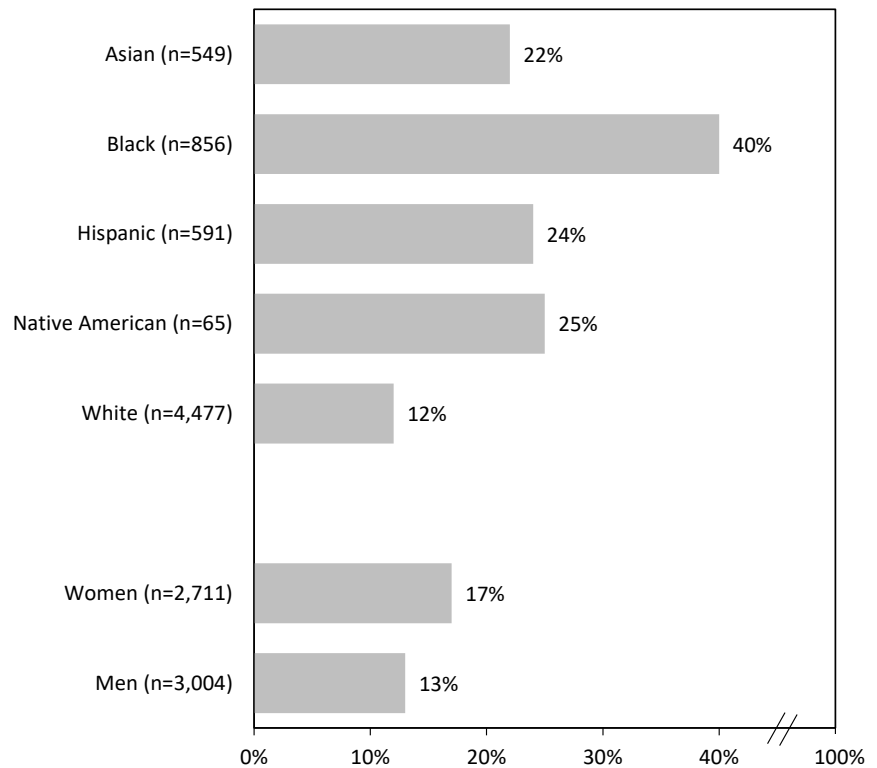


Figure 4-13.
Businesses that did not apply
for loans due to fear of denial,
United States, 2022

Source:
BBC from 2022 Small Business Credit Survey.



3. 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-owned businesses increased by 14 percent, and Hispanic-owned businesses increased by 17 percent.^{132, 133} However, important barriers in starting and operating businesses remain. Black, Hispanic, and woman workers are still less likely to start businesses than White men.^{134, 135, 136, 137, 138} 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.^{139, 140, 141} BBC examined rates of self-employment (i.e., business ownership) in Little Rock for each relevant industry by race and gender. As shown in Figure 4-14, women (16.9%) own construction businesses at rate less than that of men (28.3%), and other race POCs (2.2%) own professional services businesses at a rate less than that of White people (17.8%).

Figure 4-14.
Self-employment rates in study-related contracting industries, Little Rock marketplace, 2018-2022

Group	Construction	Professional services	Goods and support services
Race/ethnicity			
Black	23.2 %	13.9 %	14.1 %
Hispanic	33.0 %	23.1 % †	23.2 %
Native American	34.4 % †	18.8 % †	38.2 % †
Other race POC	4.0 % †	2.2 % **	0.0 % †
White	26.8 %	17.8 %	15.3 %
Gender			
Women	16.9 % **	16.3 %	18.7 %
Men	28.3 %	17.0 %	14.4 %
Veteran status			
Veteran	29.0 %	26.5 %	21.6 %
Non-veteran	27.1 %	16.1 %	15.3 %
All individuals	27.2 %	16.7 %	15.7 %

Notes: ** Denotes statistical significance at the 95% confidence level.

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

Source: BBC from 2018-2022 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 Little Rock exist based on race and gender even after statistically controlling for various other personal factors such as income, education, and familial status. As shown in Figure 4-15, even after accounting for various personal factors, women are less likely to own construction businesses than men.

Figure 4-15.
Predictors of business ownership
in study-related industries
(regression), Little Rock
marketplace, 2018-2022

Notes:

The construction regression included 692 observations.

The professional services regression included 557 observations.

The goods and support services regression included 372 observations.

* Denotes statistical significance at the 90% confidence level.

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

Source:

BBC from 2018-2022 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	Coefficients		
	Construction	Professional services	Goods and support services
Black	-0.2474	0.1910	-0.0531
Hispanic	-0.0023	0.4990	0.3007
Native American	-0.0323	0.3772	0.8598
Other race POC	0.0000 †	-1.0137	0.0000 †
Women	-0.4164 *	0.0508	-0.0139
Veteran	0.1080	0.0012	0.1184

4. Business success. The marketplace barriers BBC describes throughout this chapter impact the success of businesses owned by POCs and women. Research indicates that, nationally, POC- and woman-owned businesses fare worse than businesses owned by White men. For example, POC- and woman-owned businesses are more likely to experience financial challenges relative to those owned by White people and men, respectively, due in part to the challenges these business owners face in obtaining capital.^{142, 143} In addition, POC- and woman-owned businesses have been shown to be less successful than those owned by White people and men, respectively, based on a number of different indicators such as profits and business size.^{144, 145, 146, 147} Research indicates that disparities in the success of businesses owned by men compared to women can be attributed in part to gendered perceptions of woman business owners as less competent than their male counterparts even when they have better qualifications, resulting in greater challenges founding and sustaining their own businesses.¹⁴⁸

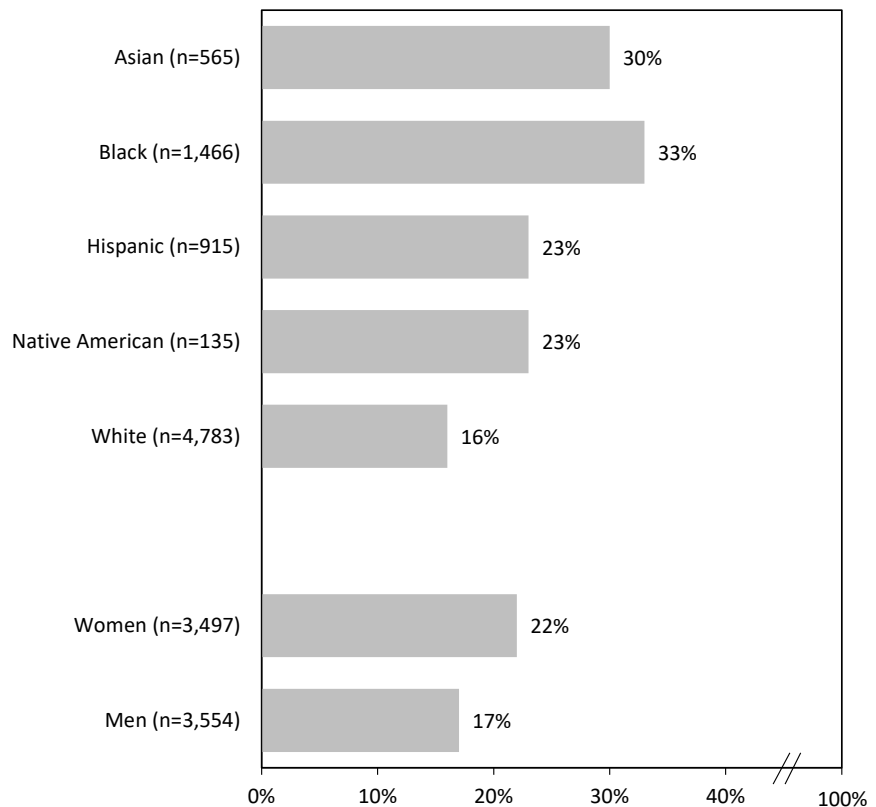
Consistent with those findings, certain groups of POC- and woman-owned businesses are substantially more likely to be small in size compared to businesses owned by White people and men, respectively. According to JP Morgan Chase, Black- and Hispanic-owned businesses are less likely than White- and Asian-owned businesses to earn at least \$1 million in annual revenue within five years of their existence, and woman-owned businesses are less likely to reach that milestone compared to businesses owned by men.¹⁴⁹ In addition, sole proprietorships make up a larger share of Black- (96.3%), Latino- (92.4%), and Native American-owned businesses (92.4%) compared to White- (81.1%) and Asian-owned businesses (80.1%).¹⁵⁰ BBC examined data on business financial conditions, business receipts, and business owner earnings to further explore differences in business success among POC- and woman-owned businesses in Little Rock relative to that of White-owned businesses and businesses owned by men, respectively.

a. 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 indicates 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 4-16, Asian- (30%), Black- (33%), Hispanic- (23%), and Native American-owned businesses (23%) are more likely than White-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. Marketplace barriers faced by POCs and women likely drive such differences in business success.

Figure 4-16.
Businesses in poor
financial condition,
United States, 2022

Source:
BBC from 2022 Small Business Credit
Survey.



b. Business receipts. BBC also examined data on business receipts to assess whether POC-, woman-, and veteran-owned businesses in Little Rock earn on average as much as those owned by White people, men, and non-veterans, respectively. Figure 4-17 indicates that, on average, Asian- (\$1.27 million), Black- (\$719,000), Hispanic- (\$1.04 million), and Native Hawaiian and Other Pacific Islander-owned businesses (\$359,000) have average annual business receipts less than White-owned businesses (\$3.21 million). In addition, woman-owned businesses (\$1.60 million) have average annual business receipts less than businesses owned by men (\$3.66 million). Lastly, veteran-owned businesses (\$2.36 million) have average annual business receipts less than those of businesses owned by non-veterans (\$3.04 million). These outcomes are likely the result of the economic, marketplace, and historical barriers that make it more difficult for businesses owned by POCs and women to succeed compared to their White and male counterparts who face fewer barriers to establishing and sustaining businesses.

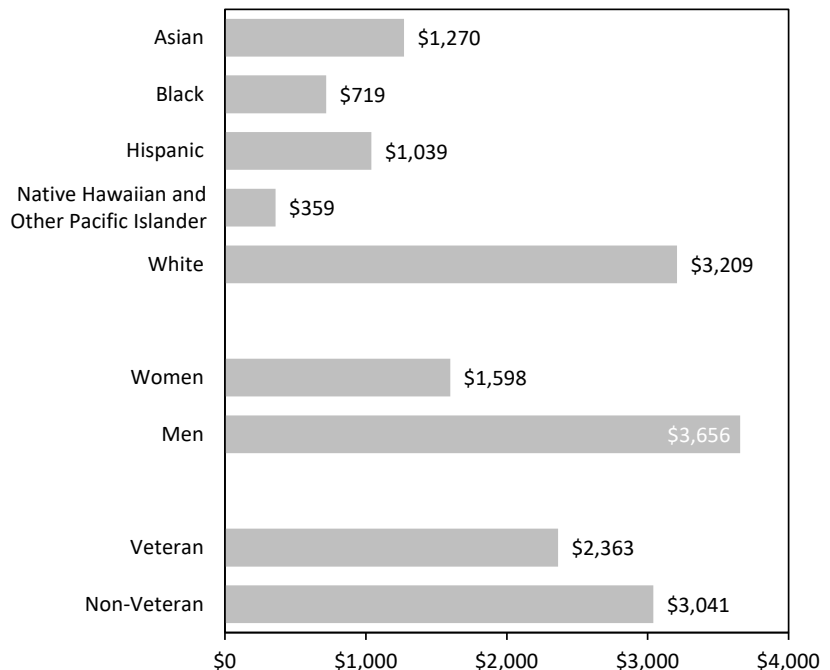
Figure 4-17.
Mean annual business
receipts (in thousands),
Little Rock marketplace,
2022

Note:

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

Source:

BBC from 2022 Annual Business Survey.



c. Business owner earnings. BBC also analyzed the earnings of business owners in Little Rock to assess whether business owners who are POCs, women, and veterans earn as much as business owners who are White, men, and non-veterans, respectively. Figure 4-18 indicates that Black (\$32,154) and Hispanic (\$33,474) business owners earned less on average than White business owners (\$53,175), and woman business owners (\$38,224) earned less on average than business owners who are men (\$54,572). Additionally, business owners who are veterans (\$40,439) earned less on average than business owners who are non-veterans (\$48,678).

BBC also conducted regression analyses to determine whether race- or gender-based differences in business owner earnings in Little Rock exist even after statistically controlling for various personal factors such as age, education, and family responsibilities. Figure 4-19 presents the results of those analyses, which indicate that compared to White business owners, other race POC business owners earn less even after accounting for other factors. Similarly, compared to business owners who are men, woman business owners earn less even after accounting for other factors. These results are consistent with the barriers BBC presents throughout our analyses of marketplace conditions showing that, as a result of the barriers that POC and woman business owners face when establishing and sustaining their businesses, they make less money than their White and male counterparts.

Figure 4-18.
Mean annual business
owner earnings, Little Rock
marketplace, 2018-2022

Notes:

The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2022 dollars.

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

Source:

BBC from 2018-2022 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/>.

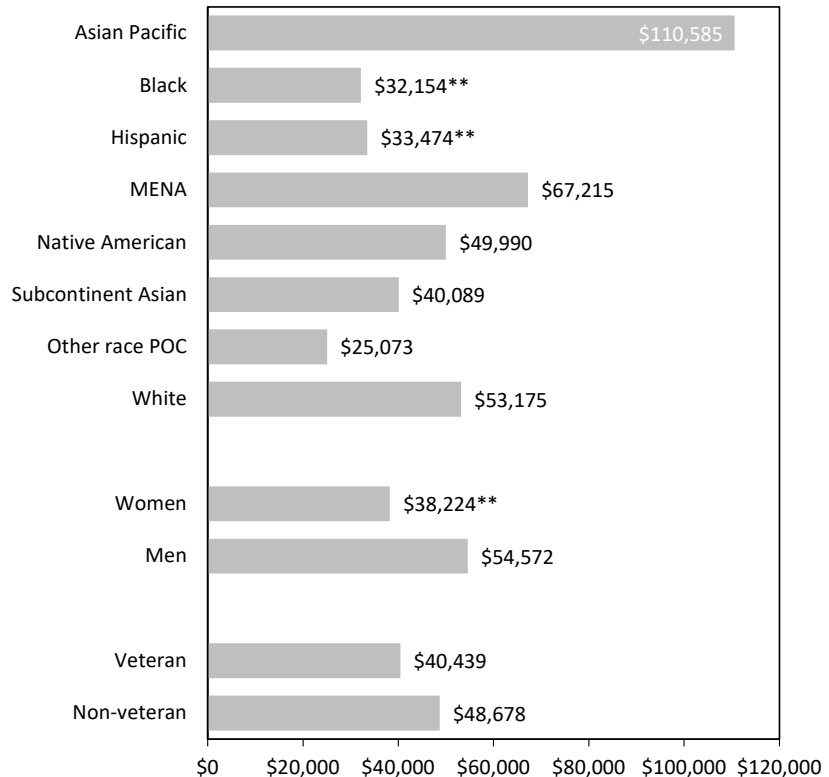


Figure 4-19.
Predictors of business owner earnings
(regression), Little Rock marketplace,
2018-2022

Notes:

The regression includes 665 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 95% confidence level.

The referent for race variables is White.

Source:

BBC from 2018-2022 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
Asian Pacific	1.553
Black	0.661
Hispanic	1.114
MENA	1.847
Native American	0.792
Subcontinent Asian	0.386
Other race POC	0.340 **
Women	0.620 **
Veteran	0.984

C. Summary

BBC's analyses of marketplace conditions indicate that POCs and women face barriers in industries relevant to City projects. 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 goods and support services—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. We find further evidence of such barriers throughout the qualitative analyses we conduct as part of the disparity study, which we present in Chapter 5.

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CHAPTER 5.

Qualitative Evidence of Marketplace Conditions

As part of the disparity study BBC Research & Consulting (BBC) conducted for the City of Little Rock (the City), business owners, trade association representatives, and other stakeholders had the opportunity to share their insights about their experiences and knowledge of working in Little Rock as well as with the City and other government agencies. BBC documented those insights and identified key themes about conditions in Little Rock for small businesses and person of color (POC)-, woman-, and veteran-owned businesses (collectively referred to as *small and diverse 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 small and diverse businesses potentially face as part of City contracting and procurement.

A. Data Collection

The study team collected qualitative insights about marketplace conditions, experiences working with the City, and recommendations for policy implementation. We made various efforts between October 2024 and May 2025 to collect that information:

- **In-depth interviews:** The study team conducted 30 in-depth interviews with owners and other representatives of local construction, professional services, and goods and support services businesses to collect interviewees' perceptions of, and experiences with, the local contracting industry, working or attempting to work with government organizations in Little Rock, the City's implementation of its small business assistance programs, and other relevant topics. BBC identified interview participants primarily from a random sample of businesses contacted during the availability survey process. The study team conducted the interviews with the owner or another high-level representative of each business.
- **Focus groups:** The study team conducted two focus groups with representatives of relevant business organizations, such as chambers of commerce, business assistance organizations, and other business groups. We conducted the focus groups on March 4 and 6, 2025 with a total of 10 participants across the two groups. During each focus group, participants engaged in discussions and shared insights about working in Little Rock with public and private sector organizations.
- **Availability surveys:** As part of the availability analysis, BBC conducted surveys with 450 businesses located and operating in the Little Rock 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 Little Rock, or working with government organizations in Little Rock. A total of 148 survey participants shared comments.
- **Written comments:** Throughout the study, stakeholders and community members had the opportunity to submit written comments directly to BBC regarding their experiences working in Little Rock. Two stakeholders and community members shared such comments, but we do not present any of their comments in this section.

B. Key Themes

Various themes emerged from the qualitative 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. Starting and growing a business;
2. Networking;
3. Experience with discrimination;
4. Working in the public sector;
5. Experience with business programs; and
6. Recommendations.

To protect the anonymity of individuals and businesses, we indicate whether each quotation was from an interviewee, a focus group participant, or an availability survey participant (with the prefix “AV”), either at the beginning of the quotation (in the case of focus group participants) or in parentheses at the end of the quotation. In addition, for quotations from interviews and availability surveys, we identify the interview or survey response with a unique number (e.g., “Interviewee #15” or AV #9”). We also preface them with a brief description of the ownership characteristics of the business and the business’ line of work. We indicate whether each participant represents a Minority Business Enterprise (MBE), a Woman Business Enterprise (WBE), or other relevant business type as certified by a regional certifying body such as the National Minority Supplier Diversity Council or the Woman-owned Business Enterprise National Council.

1. Starting and growing a business. Small business owners face a number of challenges when starting and growing their businesses and trying to compete with larger businesses. Some of these challenges may contribute to any observed disparities in government contracting for small and diverse businesses. Additionally, the availability of workforce training and development assistance in various industries may affect who becomes a business owner in the first place. Business representatives spoke about challenges related to workforce development, starting and growing a business, and accessing financial capital.

a. Workforce development. Before a person can start a business, they must first gain certain skills, certifications, and experience working in their industry. Education and apprenticeship programs may require individuals to commit a substantial amount of time or money, which can limit access to such programs and prevent people from gaining the skills and licenses needed to start a business in that industry. Business owners and representatives shared their experiences with and thoughts about workforce development programs in their industries.

A Native American male owner of a construction business stated, “The apprenticeship program I was in ... it’s a four-year apprenticeship program. ... I think the length of time it takes to get through those is really hard for most people, especially the under-employed and the under-privileged. ... It’s a four-year apprentice program, but I have some guys that have worked for me for 12 years that are still in the apprentice program. ... Ideally, I would love to see a test-out option of that apprenticeship or equivalent education or something like that.” [Interviewee #30]

A participant in a focus group stated, "You have to have workforce development programs to generate a competent workforce, manpower programs. You're not going to get rid of racial disparities in Little Rock, in the construction [industry], unless you have some workforce development projects, apprenticeship, [or] pre-apprenticeship programs."

A woman owner of an MBE- and WBE-certified professional services business stated, "I think the only way to fix [race and gender disparities in the workforce] is for people to be really intentional about bringing on entry-level team members who represent other backgrounds and training them up, teaching them, helping them get to that interim and advanced level." [Interviewee #2]

b. Starting a business. Business owners spoke about the things they needed to learn and the compliance and licensing requirements they had to navigate when first starting their businesses.

A White male veteran owner of a goods and support services business stated, "The biggest advice that I think I could offer is just to make sure you do your homework on what you need to run your business ... [and] doing a whole lot of research on your own. Because I just kind of jumped into it and it's like, 'Oh, I've got to do this,' and then, 'Oh, I've got to do this too,' and 'Oh, here's another thing I have to do.' And you spend a lot of time doing paperwork and not a whole lot of work. ... There's a lot of hoops that you just don't know about when you go to hire an employee as a small business that you just hope that you get right." [Interviewee #22]

An Asian male owner of a goods and support services business stated, "In order to perform their scope of work [on the] project size that we perform, we have to have a state license from the contractors licensing board, which covers the state of Arkansas. In order to obtain that license, ... there still is a two-hour test that has to be taken, and you have to know a little bit about business and construction for that test. Then, once you pass that test, you have to have referrals from people in the industry vouching that you are capable of doing the work, that you're saying that you're going to perform. Once that's approved, then you're off to the races." [Interviewee #14]

c. Challenges to growing a small business. Business owners and representatives highlighted several barriers that small businesses face when trying to compete with larger, more established businesses. These included being outbid on contracts by larger firms, not being able to offer the same competitive salaries as larger firms, and the inability to access certain payment systems.

A participant in a focus group stated, "It's all about the lowest price, the lowest bid, especially with those small dollar contracts. The problem is, only the larger size companies are able to provide that small dollar amount. But how are you going to get a small business to grow? They have to have the opportunities in order to be able to grow to the point where they can provide the lowest bid."

A Black male owner of a construction business stated, "Right now, from the [labor] pool that we have, the loyalty is not there, so you're going to face [the issue of] who can give me the best [value] for what I'm providing? If I have a project manager who is up and coming, if I'm only able to pay them say \$60,000 a year, but that larger company can pay them \$80,000, \$85,000 that's kind of an easy decision [for the employee]." [Interviewee #21]

A representative of a professional services business stated, "Larger businesses can afford the capabilities to accept online payment or to accept EFT [electronic funds transfer] payment, credit cards, and that such thing, and a lot of smaller businesses [can't] afford that opportunity." [Interviewee #8]

d. Financial capital. Access to loans, insurance, and bonds allows businesses to assume risks, take on larger contracts, and grow. Business representatives spoke about challenges small businesses face in proving to bonding and banking institutions that they should qualify for loans or bonds of a certain size. They also discussed challenges related to the high cost of insurance that some organizations require to perform certain contracts.

i. Business loans. Business loans are essential to businesses looking to grow, as they allow businesses to purchase equipment and materials, expand their operations, and take on larger projects. Business representatives discussed challenges small businesses face related to business loans.

A participant in a focus group stated, "In the construction industry, a microloan doesn't get you very far. It might get your business up and running, but when you start to talk about payroll and cash flow projections and stuff like that, if you don't have a significant banking relationship and a line of credit, it's going to be hard for you to carry that payroll for 60 to 90 days. ... Most firms will go broke by then because you got to pay the salary on Fridays. You got to pay your suppliers. If you don't pay them, they cut you off."

A participant in a focus group stated, "Let's say [a business has] a non-traditional type of credit history. Perhaps you don't have credit, maybe you've had a bankruptcy, or some other financial matter, and because of those situations, you're not eligible for traditional financial assistance like you may get in a bank, which is my previous background. So ... getting people capital ready, I think, would really help bridge that disparity gap."

A participant in a focus group stated, "Traditionally, minority-owned businesses don't have traditional capital, like personal capital, to put up [as collateral to a business loan]. ... Maybe more so with minority business owners, they might be renters, they might not be homeowners, they may own their car. ... I fall into that category, where I'm not a homeowner, and the largest possession I have is a used car. I don't have much savings in the bank."

ii. Bonding. Government organizations often require businesses to obtain bonds for construction contracts to safeguard the project against the contractor defaulting or failing to complete the project. Several business owners discussed challenges related to obtaining bonds and how those can impact their ability to take on government work or contracts over a certain size.

A Native American male owner of a construction business stated, "It can be tough depending on what you want to do. When you get up to the contracting side of it and you have to get unlimited bonds, it's all about credit. ... It's tough. You're not going to be able to get a bond big enough to do bigger jobs for sure." [Interviewee #30]

An Asian male owner of a goods and support services business stated, "From what I've gathered, [qualifying for bonds is] more based on your credit score for the individual owner. Depending on what your credit score is, you could get some type of bonding, but

that has been a challenge as well. If you're trying to grow and to do the larger projects, you'll probably have to negotiate with the general contractor or the owner with the bond, because you may not be able to attain a million-dollar bond for a million-dollar project. You're very capable of performing on that million-dollar project, but without that bonding, you won't get the opportunity. Bonding is very important and can be difficult to attain."
[Interviewee #14]

A Black male owner of a construction business stated, "It's more of a relationship-type deal where you get a bond for maybe \$500,000 or \$750,000 and you perform well, you probably have to do two or three of those, maybe four. You have to build that trust and, depending on where you are, you have to have a lot of things in place before that bonding is something that you need to pursue because it does [have a] cost and for the most part, it's not cheap. It can cause difficulties, but it's more of a relationship-building avenue."
[Interviewee #21]

One interviewee said racial discrimination can impact the ability of POC-owned businesses to secure bonds at a fair rate.

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "Most places don't want to give a bond, and then if you're minority, all rates are going to be higher. And they can base it upon, "Well, you haven't had experience," or "You haven't had enough experience," or whatever. Well, the reason we haven't had experience, or enough experience, is that the opportunities were never presented to us, so we were always kept away." [Interviewee #1]

iii. Insurance. Government organizations may require businesses in all industries to carry a certain amount of insurance coverage before performing contracts. Business representatives discussed how insurance rates may be higher for small and emerging businesses than for large businesses and businesses that are more established.

A representative of a professional services business stated, "Our firm is very small, there's only three people in it: two licensed architects and an office administrator. But our insurance is ... \$12,000 a quarter. We're a small firm, our buildings are not huge. So that's a really big barrier and a lot of architects that start out either get the bare minimum [insurance] coverage or don't have coverage at all until they can afford it, which is quite dangerous." [Interviewee #5]

A representative of a goods and support services company stated, "Fleet management companies want us to have a million dollars' worth of insurance. If using a third party, that could create some issues that small businesses have a hard time getting approval."
[AV #29]

e. Payment delays. Business owners and representatives discussed challenges associated with delayed invoice payments on projects they had worked on.

A representative of an Asian-owned construction business stated, "To buy your materials up front and then put all the labor into making it, delivering it and then waiting at least

30, 60, 90 days to get paid on those jobs, puts you in a little bit of a financial crunch."
[Interviewee #17]

A Black male owner of a construction business stated, "I know, as a small business, especially if you're working for someone for the first or second time, you're trying to put on a good face, and you're trying to show that you're capable of doing the scope of work that you presented to them that you can do. You don't necessarily want to go in and say, 'Hey, I can do it, but I'm going to need money every two weeks,' because then, they're going to say, 'Well, we can't do that,' or 'We're not going to do that.' They can go to the next person, and there's no sweat off their back unless in those bidding processes, your number is just that good to where the next lowest bidder is going to be astronomically high, where they're not willing to pay that extra to continue to do business the way they do business."
[Interviewee #21]

A representative of a professional services business stated, "Overall, I'd say that typically we expect that [payments will be delayed], and so, as a company, [we] just prepare for that, and we just know that we're going to run that far behind." [Interviewee #8]

A Native American male owner of a construction business stated, "Well, for a small business, ... it's not easy [to wait on payments]. When you find yourself in that position where you can't collect your money, and we're talking a significant amount, \$85,000 from my standpoint is what we were hit with, we were not paid. Normally, for the size and scope of the business entity, I would have to liquidate equipment, and I was almost there, in order to satisfy my debt obligations. If someone doesn't pay you, that impacts your ability to pay your debtors as well." [Interviewee #11]

2. Networking. Interviewees emphasized that making connections with other businesses and organizations was a primary way that businesses learn about and win new work. Business owners talked about the importance of these networks for finding prime contractors or subcontractors to partner with on a new project. Some business owners expressed their perceptions that the Little Rock marketplace had an insulated group of businesses—or, “good old boys club”—that is difficult to enter and can be discriminatory against POC- and woman-owned businesses. Some business owners also expressed concerns that they need to know the right people to win a contract.

a. Subcontractors finding prime contractors. Owners of businesses that frequently work as subcontractors emphasized the importance of finding the right prime contractor with which to work and building a strong working relationship with them. Interviewees said multiple contracts can stem from an established relationship. Many business owners said they found new work by having prime contractors in their network reach out to them to ask if they wanted to be a subcontractor on a project.

A representative of an Asian-owned construction business stated, "A lot of its word of mouth or just larger construction companies that once you get in their good graces, they like working with you. They tend to send all their projects so you can get them."
[Interviewee #17]

A Hispanic male owner of a construction business stated, "I was working for a different company ... for two years as a regular employee. And then after that, I just decided to move out on my own, ... and they did feel comfortable with me being a subcontractor. ... I became a subcontractor for [that company] for about 12 years." [Interviewee #16]

A Black male owner of a construction business stated, "It's almost like a numbers game, so if [large Arkansas-based construction company] has, let's say 30 jobs that they're doing, well, there's no one sub that can do all 30 of the projects. The numbers game helps out that way where, depending on what you provide, how many people in your specific scope of work can do what you do, can do it the way you do it, and have the personnel to complete it in a timely manner It's incumbent upon me just to be out there more and putting my name out there with as many projects as I can at a time." [Interviewee #21]

An Asian male owner of a goods and support services business stated, "We looked at who's been winning all the contracts in the City of Little Rock and we found a way we could team up with that particular winner. ... Riding the shirt tails of the big boys who've been winning those contracts to gain that experience, gain that past performance." [Interviewee #14]

A woman owner of an MBE- and WBE-certified professional services business stated, "The sub jobs that we've received, [those] have all been personal from our network." [Interviewee #2]

b. Prime contractors finding subcontractors. Business owners who work as prime contractors discussed the importance of having a network of businesses with which they have subcontracted in the past on which they can rely. They also noted that if they are looking for a new subcontractor, they will ask businesses in their network for recommendations.

A Black male owner of a construction business stated, "From doing different projects, we try to develop relationships with the people that we sub out the scope of work to, and we try to use them. In using them, they also know other people that do the same thing. For instance, if [a potential client has] a project in northwest Arkansas, we have a group of people in northwest Arkansas that we've done business with. We contact them, let them know what we're looking at, then we get an agreement in place, and then we go from there. Those same people will also know somebody that's in southern or central Arkansas and I would say, 'Hey, I need somebody in central Arkansas to do X,' and they would say, 'Okay, I know people,' or they have enough people to where they can do both." [Interviewee #21]

A White male owner of a professional services business stated, "I've got enough contacts out in the industry over the years that I can pick up the phone and call various people that I have known from my clients and ask them if they know of anybody that's got certain skills that I'm looking for, and they could make a referral so that I could at least talk to the person and see if they're interested in getting into a contractor relationship." [Interviewee #12]

A representative of a professional services business stated, "If we actively reach out to our contractors and subcontractors to let them know that [a bid is] open and then send them a general advertisement and where they can find the information, there is a bigger response to that, just because I think it draws their attention. It gets seen quicker than if they're just

checking the newspaper or if they're just logging in [to the bid portal] once a week to see if there's any new projects." [Interviewee #8]

c. Exclusion from closed networks. Some business representatives expressed concern that they may not win projects or may be excluded from opportunities if they do not know the right people or are not members of certain networks.

A participant in a focus group stated, "We've gone through all the proper steps, went through all the proper meetings, been here, shook all the proper hands, but then it still feels like you don't get anywhere unless you know somebody. So, regardless of if I have a doctorate, ... no matter what you know, you have to know somebody to get in somewhere, and that's what we realized. It's a sad truth, but regardless of how many certifications, how many degrees, you have to have access, and that's the key."

A Black male owner of a construction business stated, "We have a lot of family-run businesses [in Little Rock], and it's if you're not within that, if you're not in that sphere of people, then it is very hard to break that code or break into that inner circle." [Interviewee #21]

A representative of a woman-owned construction company stated, "Little Rock is very insular, and [has a] lack of transparency when dealing with the good old boy system. They deal with people they know and socialize with." [AV #68]

A woman owner of an MBE- and WBE-certified professional services business stated, "I've definitely seen [business] owners in town who have contracts with our local government [or other] organizations like that who did some kind of handshake deal at a coffee breakfast or something. I also have learned about some financial partnerships that have been formed ... I know that it was kind of like a backroom handshake. 'We'll operate this for you, and you'll pay us this amount.' And now it's an RFP [request for proposals] that never saw the light of day, it just got signed and put into place for eternity. There's no end date, but it's not an opportunity that's available to anyone else." [Interviewee #2]

d. Exclusion of POCs and women from networks. Some business owners and representatives suggested businesses owned by POCs and women may be excluded from spaces where people are discussing business deals and making connections. Several interviewees discussed their experiences of being excluded from certain interactions and networks.

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "If you are going out there and you are playing golf with them, then they're your friends, and you're going to get the business because you've been knowing them. It's a networking thing, and you're discussing business out there on the golf course. And we don't have that opportunity, because they're not going to invite us to play golf." [Interviewee #1]

A participant in a focus group stated, "Trying to find where people are doing business, where people are making connections ... especially as a woman-owned business, as a Black-owned business, if you don't have those organically, it can be very hard to find them."

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "That networking that we don't have... it was uncomfortable as a woman, because

you're not invited to the bars, or you're not invited to this or that, or networking with them or their families, or whatever, and so that is very challenging. ... They can have better pricing because they've always got all the business, and if you've got all the business, then eventually, the suppliers that you're working with are going to give you better pricing. And so then as a minority business, then you got to compete against big businesses that have gotten all the business." [Interviewee #1]

A participant in a focus group stated, "We didn't grow up sitting at the country club around the table having our parents and forefathers tell us how to run businesses and so forth and networking, which they don't call affirmative action, they just call it networking. [When] we do that, they call it affirmative action."

3. Experience with discrimination. Some POC- and woman business owners discussed their experiences with racial and gender discrimination in the marketplace. They also discussed dealing with disrespectful comments and feeling like they were not being given a fair chance because of their race or gender.

a. Racial discrimination. Several Black business owners discussed their experiences with racial discrimination and stereotypical attitudes. These included instances where people did not trust their work, they felt disrespected on a job site, or it seemed like they were not being treated fairly by prime contractors.

A Black male and person with disability owner of a professional services business stated, "In the industry that I work in, a lot of people are very limited in that knowledge of technology ... it is the stereotype, 'Well, if I don't know it, you shouldn't know it. You're not capable of it.' I've run through that in almost my whole career in my industry. ... Let me put it this way. I had to give instances that if I did a diagram or something or developed something, I had to use white papers, industry standards. And it couldn't have been my work. I had to have other things to support what I put across the test. Where my counterparts, ... they come in, they would trust what they put on paper. They would trust their work. My work had to be backed up by documents in industry standards, so it wasn't mine. So, if you're going to argue with my work being accurate, you're going to have to argue with the industry standards, so to speak." [Interviewee #18]

A Black male owner of a construction business stated, "We've experienced everything you can throw at us, from racism to everything. ... I've been a business owner being out here for this many years, I'm still experiencing it, [a] buddy-buddy system, racism on the job. And I think it's time-out for it ... and let these GCs [general contractors] and give the heads-up that this type of behavior is not going to be tolerated, because when I go on a job site with my guys or if I'm right there working with them or not, the respect should be there as a business owner and not look at me like I'm just a boy on the street. And I tend to get that. So I told my wife, 'I'm pulling back off the field' because of that one reason alone, because the respect is just not there when it comes from GCs and other entities as well ... I have been tempted to leave the state because it [has] not been a fair playing ground for us." [Interviewee #25]

A Black male owner of a goods and support services business stated, "A lot of the contractors around the city are not fair with especially minority contractors like ourselves."

We're a small company, but we do medium- to large-size projects, and what we've been running into ... for 20 years. What we've been encountering is that most GCs, they love the fact that we send them quotes, but they shop by price, and [they're] just to try to get a cheaper price. ... We submit bids to them, we win the deal, which is we're the lowest bidder, but a lot of them will not give us a contract." [Interviewee #26]

b. Gender discrimination. Several business owners who were women said men in their industries often preferred to talk to other men about the technical aspects of a project. However, some interviewees said they experience such issues less than they used to.

A woman representative of an Asian-owned construction business stated, "They just want to ask for my husband or they want to talk to a guy in charge or don't really want to talk to me. They'd rather talk to a guy." [Interviewee #17]

A woman representative of a professional services business stated, "I would say there's definitely a gender-based discrimination in the field simply because it is ... male-dominated. Typically, the contractors are male. The subcontractors, at least the foremen, they're male. The engineers are typically male. The draft and designers are typically male. And in our [company], actually there are several women and there are women engineers, but especially around here in Arkansas, you do tend to see quite a bit of [gender-based discrimination]. ... For example, if I were to text a particular client or if I were to reach out and call a particular client, it's not likely that that client would get back with me. That client would just go straight to the engineer. ... A lot of that is just they feel more comfortable as men going to another man. And sometimes I'll just get a response that they flat out just request that he contact them." [Interviewee #8]

A representative of a goods and support services business stated, "A lot of the guys ... that would call here would want to talk to the guy that's in there. And then after a couple of times of that and [our female employee] telling them actually how to fix a 350-power unit, then it got to where [they would say], 'Nope, I just want to talk to her.'" [Interviewee #4]

A representative of a professional services business stated, "I know when I started my first job, there were contractors that wouldn't even speak to me because I was a girl, and I didn't know nothing. ... But over the last 30 years it's really become much more equitable and in terms of gender and race and everything else, it's much more representative of the general population than it used to be." [Interviewee #5]

4. Working in the public sector. Bidding on and performing public sector contracts and procurements presents a set of challenges for businesses that they do not face in the private sector. These challenges can include greater paperwork and documentation when submitting bids and proposals and longer delays in receiving payment for completed work. Business owners and representatives discussed their experiences working in the public sector and the associated challenges.

a. Challenges with bidding and procurement. Business owners and representatives described challenges they experienced with understanding and meeting bid requirements on public sector work.

i. Proposal requirements. Business representatives said the public sector typically requires more forms and paperwork in order to submit a bid or proposal.

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "[In the] private sector, you just email them a quote. [In the] public sector, we had to deliver eight copies of a proposal on paper, mailed or hand-delivered to an office before. It's insane. And then still go through some hoops to interview and discuss any questions and answers, they're all the same. I mean that's definitely a lot. And then all the time you spend on the proposal itself." [Interviewee #1]

A representative of a construction company stated, "The preparation of quotations is 25 times longer with the City municipality than with a private entity. The paperwork is incredibly redundant and often it's more trouble than it's worth." [AV #103]

ii. Past participation. A business' past experience is an important factor that government organizations often consider when evaluating proposals or bids. Demonstrating past experience, particularly when it must be specific to past experience with government organizations, can pose a challenge for new businesses that are nonetheless capable of doing the work.

A participant in a focus group stated, "One thing that we hear from government buyers in the field of procurement is past performance. It's pretty challenging to take a chance on a new business that's just starting out in the field of government procurement. It's taxpayer dollars, past performance goes a long way, but how is a company going to get that past performance if no one's willing to take a chance on them?"

iii. Specifications. Business owners discussed the confusing or stringent specifications that many government organizations have on their contracts that can prevent businesses from winning bids or from successfully performing the work.

A White male owner of a construction business stated, "People don't read [the bid specifications] enough to realize it's very detailed and that's what gets them in trouble. They come in and underbid somebody and theoretically you should all be pretty close or it wouldn't work, but [the public agency will] seem to take the lower bids, but then the [companies that submit the] lower bids are the ones that's not going to complete the project and they have to get someone else to go in and finish it." [Interviewee #29]

An Asian male owner of a goods and support services business stated, "If [small businesses] don't know the rules and regulations that they didn't get [support with] from the SBA [Small Business Administration] or SCORE [Service Corps of Retired Executives] or the UALR [University of Arkansas Little Rock] program, they're stuck in the wind, and so they're constantly throwing bids at the City and never winning anything, because sometimes it's not anything that they've done wrong, but it's just a lack of care or of the rules and regulations from the contracting officer." [Interviewee #14]

b. City staff. Business representatives noted that there is high turnover among City staff, which has made it difficult to know whom they can talk to about a project.

A representative of a woman-owned professional services business stated, "We work with their [the City's] planning department and find it difficult. They have had a lot of staff changing and it is hard to know who to talk to." [AV #40]

The owner of a professional services company stated, "[The City has] turnover [making us] unable to get contract pay requests, paperwork, processed in a timely fashion. New employees do not receive enough training." [AV #101]

c. Business concentration. Many business representatives shared the perception that the same businesses were winning all of the City's contracts, reducing their own chances of obtaining City work.

A representative of a woman-owned professional services company stated, "I just don't think they give anybody a chance. They give the same contracts to the same people." [AV #13]

A representative of a construction company stated, "Sometimes it is hard to get the job through Little Rock. It seems like managers already have contractors they want to use." [AV #4]

An Asian male owner of a goods and support services business stated, "If you go look at all the contracts that the City of Little Rock had, you'll see a pattern of a lot of the same companies are getting all of these different contracts. Which sometimes is the small business owner's fault too, because they're not prepared enough to get the jobs. ... So I see [why] they do go to the preferred [businesses]. They already have a reputation with [the City], they've already had the experience with [the City], but it's like they're shutting the door completely to anybody else who is qualified but is new." [Interviewee #14]

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "I only submit to RFPs if I'm invited because I've just experienced a lot of wasted time applying for the ones that I'm not invited to. From what I found in Arkansas, people usually know their top two or three vendors they want to select. And so if we're not invited, we usually are not going to get the bid." [Interviewee #1]

A representative of a professional services business stated "I think that a lot of the times it's a lot easier for municipalities like the City of Little Rock to pick a bigger engineering firm just because that's one that's around, that they've heard of, that they're familiar with, that's been advertised quite a bit more as opposed to a smaller one who can offer the same services with the customer service deal. But I kind of feel like the smaller ones may not necessarily get that chance just because there's so many hoops to jump through that they're not really afforded the chance to do those things for bigger cities." [Interviewee #8]

5. Experience with business programs. Business owners and representatives discussed their experiences accessing business support resources and how they have benefited from them. They also commented on their experiences with state and federal business certifications, including their perceived benefits and disadvantages.

a. Networking and technical assistance programs. Several business owners highlighted valuable experiences they had with organizations that support woman-owned businesses by connecting them with other businesses or by providing technical assistance.

A woman owner of an MBE- and WBE-certified professional services business stated, "[The] Women's Leadership Network [has] an expo each year [Women's Business Showcase], and they're specifically promoting women-owned businesses, and our board president is a

woman of color and really intentional about promoting a diverse group of women-owned businesses throughout the year and not just at their big expo event. But even at their own events, their vendors are always women-owned and they're always promoting the vendors that they've hired at every event that they host." [Interviewee #2]

A participant in a focus group stated, "I was a little fledgling developer at that point, and I was just trying to find somewhere to land. ... I ended up at that Start Here Little Rock event. Anytime someone's like, 'We're trying to find Black women and women-owned businesses,' I'm going to be there. ... Having that event of someone intentionally being like, 'We are trying to find Black women in Little Rock who want to be a part of companies here.' That intention is so important, because there are people like me that are disconnected, who would only be connected through those things. And I went on to have one of the best career experiences of my life just because someone was looking for me."

A Black woman owner of a professional services business stated, "The Little Rock Power Women Group is running all of our lives here in Central Arkansas, I feel like, offering a lot of guidance and just a lot of opportunities through there. ... It is a really good place where women will go in there and they will use it to find other women-owned businesses so that we can support each other, or they will promote their woman-owned businesses, or just making those connections between women-owned businesses within a community." [Interviewee #23]

A White woman owner of a professional services business stated, "I am a member of an association called the National Association of Women in Construction. We're a group of women involved in all facets of construction. So you can have architects, you can have office managers, contractors, subcontractors, tradeswomen that we meet once a month, and we can talk about what's going on in our industry, if we need help with something, we can network with others. If somebody needs an architect, they know who to call. If I need some construction work or I need some office procurement information or some metal information, that's a great source for getting help." [Interviewee #7]

b. Business certification programs. Business owners shared insights about government business certification programs, including the former Arkansas Minority and Women-Owned Business Enterprise certification and the Federal Disadvantaged Business Enterprise certification.

i. Benefits of certification. One focus group participant shared what they saw as the value of certification.

A participant in a focus group who works for a non-profit focused on advocating for minority contractors stated, "Our organization, for our purpose of certification, it's a rigorous vetting process. When a company applies with us to get certified, they go through a very heavily vetted process to where we can say that if you're certified, you are fully qualified to do business with anybody. And I think that's kind of the value of certification, given what's going on currently in our country with all of these things around DEI [diversity, equity, and inclusion], I think it's kind of important to talk about."

ii. Lack of value to certification. Some interviewees expressed that they did not find business certifications valuable, noting that requirements for prime contractors to use certified subcontractors on certain contracts or make good faith efforts to work with them can lead to prime contractors being

disingenuous about their interest in working with small or diverse businesses or make subcontractors feel like they are only interested in their certification status rather than their qualifications.

A Black woman owner of an MBE- and WBE-certified professional services business stated, "Some of these people that are looking for these contracts have to fulfill the contract's [good faith efforts], they have to at least say that they've used or they've contacted people with my status, a women-, minority-owned businesses. But I didn't realize they do that just to fulfill the need. They've already chosen who they're going to use." [Interviewee #27]

A White woman owner of a professional services business stated, "I am a woman-owned business, and I know that counts for something, but ... I don't want to get [a contract] just because of that. ... I don't want to be selected just because I'm a woman." [Interviewee #7]

iii. Challenges with certification processes. Certifying agencies often require businesses to submit extensive and detailed documentation to prove that they meet the certification requirements. As a result, business owners said becoming certified is often a time-consuming process.

A woman owner of an MBE- and WBE-certified professional services business stated, "I think [becoming certified] was so time-consuming because pulling all the paperwork together and finance reporting and documentation that they needed and then putting it in the right format, they wanted it all in certain formats and they wanted a binder of it and a PDF version that was all one combined PDF. It was really restrictive in terms of how you submitted the documentation. And now that I know them and I am renewing with them every year, and I know their office well enough to know that 'Oh, they would've given me some grace if I didn't submit it perfectly the first time.' But I didn't know that going in, and so I was really stressing about it being perfect." [Interviewee #2]

iv. Frustration with groups included in program. One business owner expressed that when governments implement participation goals when awarding individual contracts, prime contractors may be more likely to work with White woman-owned businesses than with POC-owned businesses to meet the goals.

A Black male owner of a construction business stated, "[In regard to WBEs being selected as subcontractors instead of MBEs when the agency uses contract goals,] they'll place a female there to pick up the difference. And that's something that should never have been created ... [a program that says] because you are a Caucasian woman, that you're still classified as a minority because there's a small group of you that are business owners." [Interviewee #25]

6. Recommendations. Business owners and representatives shared recommendations and ideas for how the City could improve the inclusion of small and diverse businesses in its contracting. These recommendations were related to existing and new City events, resources the City could provide on its website, mentorship programs the City could support, and ideas for implementing a small local business preference program when making contracting decisions.

a. Notifications about upcoming bid opportunities. Interviewees and focus group participants suggested that more advanced notice about bid opportunities would give contractors—especially small businesses—more time to prepare a bid or more time to reach out to prime contractors if they were

interested in working as a subcontractor. They also suggested how the City could improve its outreach to vendors to notify them about upcoming opportunities.

A participant in a focus group stated, "We know what [governments are] going to need to purchase in terms of a big spend construction contract a year or two years ahead of time. Why not start prepping our vendors then, versus putting it out and having a month turnaround? That's a barrier for the smaller businesses."

A participant in a focus group stated, "I think that currently, most procurement law is skewed towards large businesses. Those folks that can reply in a week, or sometimes less than a week, depending on how big of a need that work is or services, especially at the end of the fiscal year."

A representative of a Hispanic-owned goods and support services company stated, "Just knowing when opportunities are available is the most difficult thing. How would one find out who is the purchaser for things like LED lights? We could definitely help the City with products and services like that. It would be great if the City had a liaison office to tell people who to talk to about certain types of services and work offered by citizens."
[AV #19]

b. Technical assistance recommendations. The City currently offers technical assistance to small businesses in the form of two business education programs and resources and information on its website. Business representatives offered recommendations for how the City could improve its technical assistance offerings to small business owners.

i. Step-by-step resources. Business representatives said they would benefit from additional resources and information on the City's website and more guidance for different stages of business development.

A participant in a focus group stated, "If they can just create educational materials. ... Like, 'Hey, this is a video. This is how you do it.' That way people can reference it instead of just always calling about probably the same thing. Or an FAQ page ... And better contacts, like, who are the people that I need to reach out to at different stages of my business?"

A Native American male owner of a construction business stated, "It was simple enough for me to ... go to the SBA and get what I needed. But for most people starting out, it's a really intimidating process to start a business, especially if they're doing retail or products like that. There's just a lot of overhead and a lot of financial backing they need. So yes, if it's a step-by-step process, that would be less intimidating for [new business owners]."
[Interviewee #30]

ii. Ongoing support. Several business owners expressed that while regional business development classes were helpful, they would have benefited from continued support after the class ended.

A participant in a focus group stated, "I went through one [business development program]. It's been over a decade now since I initially went through it, but it was just kind of the general one, where they helped you work through a business plan, ... you did the SWOT analysis, and all of that. And it was a good experience learning, but I do remember just having a very pronounced sense of once it was over, it was done. There wasn't really

anything that happened after. ... You think about going back through it again, but it's like, 'Is this going to yield something?' Because usually it is a time commitment. I'm a business owner, I'm a mom, I'm doing all the things. So I do want to make sure that if I'm in a program, especially where I'm dedicating [time] over weeks, that there's something that yields from it. I usually meet people, I make a connection, ... but in terms of the connection with the City, or just the support network after, I haven't really experienced that."

An Asian male owner of a goods and support services business stated, "They point you in the direction where to go. It is kind of like they dangle ... it out in front of you, but they don't ever get you to the finish line. But yet, when you get a contract, they want to take the credit for it and say, 'Oh wait, you got to report it to our reporting deal, and how we helped you on it.' Well, you really didn't help them. And so all you did was point me to the direction to go, and I had folks still finding me on my own. Whereas a small business owner could be a lot further than what they are if they got a little more engaged, a little more involved. Instead of 'Go to this website, here's a regulation, here's rules. Come back after you've done that.'" [Interviewee #14]

iii. City events. Several business owners and representatives made recommendations about business events the City has hosted or in which the organization has participated.

A Black woman owner of an MBE- and WBE-certified goods and support services business stated, "You're going to have to start introducing people that are coming from the City when you have these types of [meet the buyers] programs, so we'll know who they are, so we can go up to them and talk to them. Why don't you set up and have the departments at a table, and then let us come in, because then we know whoever is at that table, they are authorized to buy, and then this is what they buy. So you can have the buyers out there, but then if you don't have the department heads out there, then you don't establish a real relationship." [Interviewee #1]

A participant in a focus group stated, "The Spanish [language] program, EMPRENDE, could do a better job of just fostering outside collaboration ... it's important to not reinvent the wheel when there is a lot of programs that are kind of doing similar things already and just finding ways to further connect."

A woman owner of an MBE- and WBE-certified professional services business stated, "Any kind of networking event they could have, where ... you can see and interact with the people that are contracting for the City, I feel like can be really valuable." [Interviewee #2]

iv. Mentorship programs. Business owners and representatives said mentorship by other, more established businesses would be valuable to their business development and growth.

A participant in a focus group stated, "Get those who've succeeded ... and bring them into a meaningful mentor-protégé program. Meaningful means the mentor and the protégé signed documents of understanding and commit to do certain things."

A participant in a focus group stated, "[I would recommend being part of] a mentor-protégé [program], where you're partnering as a small business with a large company, and they're taking advantage of maybe your small business certification, but you're taking

advantage of their experience in the field, and you're partnering on government contracting, and maybe that's how you get your foot in the door."

A woman owner of an MBE- and WBE-certified professional services business stated, "I think in general, mentorship is the way [to help small businesses]. Regular, ongoing help with the problems entrepreneurs are facing at that moment. Today, my issue is going to be different than it is next week, and if I had a mentor or somebody ... I can go to. ... For a small business who doesn't [have a mentor], just a generalized nine-week program is not what you need. You need lifetime resources." [Interviewee #2]

c. Certification. Interviewees and focus group participants offered recommendations related to business certifications that the City could consider offering to support local businesses and how a centralized database of such businesses could be useful.

A participant in a focus group stated, "The best thing that right now could happen legislatively in Little Rock is to have the City Council, which has control over folks like me, put in a local preference covering all aspects of procurement. If you're going to take our hard-earned taxpayer money, we want to see the community represented in procurement."

A participant in a focus group stated, "I would like to see more intention when it comes to large procurement opportunities go to Arkansas-based businesses, and then to subcontract them to Arkansas-based businesses. Within the federal government, they are, like, 'You have to subcontract X amount to small businesses.' It would be amazing if we could make that a requirement in state and local solicitations."

A participant in a focus group stated, "We've gone through the state database [from the] Arkansas Department of Transportation, because that's all we have. We would much prefer to get a database of small disadvantaged business enterprises from the municipality, which would include the City of Little Rock and North Little Rock and so forth."

Business representatives offered recommendations on how to make certification easier.

A woman owner of an MBE- and WBE-certified professional services business stated, "Maybe an online application where you can upload one document at a time and save your progress. Maybe that would help people to get it done in a way that's not overwhelming. They can take their time, see their progress, upload one thing at a time." [Interviewee #2]

A White male veteran owner of a professional services business stated, "You have to be willing to accept the fact that the documentation [to become certified] isn't so airtight that it makes it ridiculously hard for a company that is a legitimate company to apply. But on the other end, if somebody does apply and is illegitimate and you can investigate and find that out, then that punishment bill needs to be very high. ... If we don't do that, then the legitimate businesses like mine will not go through that burden because they're already being cheated by the individuals in companies that don't really have, or in that case, veteran ownership or certain credentials or certain minority status." [Interviewee #15]

CHAPTER 6.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of person of color (POC)-, woman-, and veteran-owned businesses *ready, willing, and able* to perform work on the construction, professional services, and goods and support services contracts and procurements the City of Little Rock (the City) awards.¹ Chapter 6 describes the analysis in four parts:

- A. Purpose;
- B. Approach
- C. Methodology; and
- D. Availability analysis results.

Appendix C provides more information about the analysis and the methodology we used to conduct it.

A. Purpose

BBC examined the availability of POC-, woman-, and veteran-owned businesses for City prime contracts and subcontracts to use as benchmarks against which to compare the actual participation of those businesses in its work to assess whether any disparities exist between participation and availability. Assessing disparities between the participation and availability of POC-, woman-, and veteran-owned businesses allowed us to determine whether certain business groups were *substantially underutilized* during the study period.

B. Approach

BBC's availability analysis focused on specific areas of work, or *subindustries*, associated with the contracts and procurements the City awarded between January 1, 2019 and December 31, 2023 (the *study period*), which serves as a proxy for the work it might award in the future. We began the analysis by identifying the specific subindustries in which the City awarded most of its contracting dollars as well as the geographic area in which most of the businesses to which it awarded those dollars are located (i.e., the *relevant geographic market area*, or *RGMA*). Based on the volume of dollars the City spent with businesses in various geographical areas, we determined that the RGMA for the study was the six-county Little Rock metropolitan area of Pulaski, Faulkner, Grant, Lonoke, Perry, and Saline Counties in Arkansas (collectively referred to as the *Little Rock marketplace*).

1. Availability surveys. After identifying the RGMA, BBC conducted extensive surveys with 485 businesses in the marketplace to develop a representative and unbiased database of businesses located in the RGMA that perform types of work relevant to City 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

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.

the entire relevant business population in a statistically valid manner. BBC worked with Davis Research to conduct telephone and online surveys with business owners and managers to collect specific characteristics about their companies and identify local businesses potentially available for City prime contracts and subcontracts.

a. Business directory. BBC and Davis Research began the survey process by compiling a directory of all types of businesses—regardless of ownership characteristics—that perform relevant work and are located in the RGMA, based primarily on lists of businesses from Dun & Bradstreet (D&B) Marketplace. We also collected a list of businesses from the Arkansas Contractors Licensing Board and a list from the Arkansas State Board Of Licensure for Professional Engineers and Professional Surveyors. BBC categorized the City’s contracts and procurements into 8-digit Standard Industry Classification (SIC) codes. We obtained listings on 2,981 local businesses that perform work related to those SIC codes from D&B and the State of Arkansas’ business listings. We did not have working phone numbers for 474 of those businesses, but we attempted surveys with the remaining 2,507 businesses.

b. Survey information. The study team conducted availability surveys with businesses listed in our 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;
- Location of business headquarters (if the business had multiple locations);
- 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 the Little Rock marketplace;
- Business size in terms of revenue and number of employees;
- Race of the owner(s);
- Gender of the owner(s); and
- Veteran status of the owner(s).

c. Availability database. After conducting availability surveys, BBC compiled an availability database that included information about businesses potentially available for relevant City projects. We included businesses in the database if they reported possessing the following characteristics as part of surveys:

- Being a private sector business that is active and operational;
- Having primary lines of work relevant to City projects;
- Being able to perform work or serve customers in the Little Rock marketplace; and
- Being interested in working for government organizations.

After those exclusions and reconciliations, BBC compiled a database of 409 businesses we considered potentially available for City work. Figure 6-1 presents the percentage of businesses in the availability database that were POC-, woman-, and veteran-owned. As shown in Figure 6-1, 21.8 percent of the businesses in the database were POC-owned and 10.3 percent were White woman-owned. In addition, 8.6 percent were veteran-owned. The businesses that were counted as veteran-owned were not exclusive of other business categories. For example, if a business was owned by a Black person who was also a veteran, that business would have been counted as both a Black-owned business and a veteran-owned business.

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

Source:
BBC availability database.

Business group	Percentage
Race and gender	
POC	21.8 %
Asian Pacific	1.0 %
Black	13.7 %
Hispanic	4.6 %
MENA	0.2 %
Native American	1.5 %
Subcontinent Asian	0.7 %
White woman	10.3 %
Veteran	
Veteran	8.6 %

C. Methodology

BBC used a custom census approach—which accounts for specific business and project characteristics such as work type, role, size, capacity, location, and interest—to estimate the availability of POC-, woman-, and veteran-owned businesses for City 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 the City awards. Those estimates represent the percentage of project dollars one would expect it to award to POC-, woman-, and veteran-owned businesses based on their availability for the specific types and sizes of the contracts and procurements included in the analysis.

1. Calculations. BBC only considered a portion of the businesses in the availability database as potentially available for any given prime contract or subcontract Little Rock awarded during the study period (referred to generally as a *contract element*). Figure 6-2 provides an example of how we estimated availability for a subcontract associated with a project the City awarded during the study period.

BBC began the process by identifying the type of work, contract size, and contract role for each contract element, and then took the following steps to estimate the availability of POC-, woman-, and veteran-owned businesses for each one:

1. We identified businesses in the availability database that reported that they:
 - Perform work in that particular role (i.e., as a prime contractor or a subcontractor);

- Perform that type of work; and
 - Can perform work of that size or larger.
2. We then counted the number of POC-, woman-, and veteran-owned businesses as well as all other businesses that met the criteria in step 1.
 3. We translated the counts of businesses in step 2 into percentages for each relevant business group relative to all businesses we identified as available for the contract element.

BBC repeated the above steps for each contract element the City awarded within a particular project set (e.g., construction projects), and then multiplied the percent availability of POC-, woman-, and veteran-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 dollars the City awarded as part of the project set, resulting in estimates of the percent of relevant project dollars one would expect the City to award to POC-, woman-, and veteran-owned businesses based on their availability for the specific types and sizes of the projects included in the set.

**Figure 6-2.
Example of calculating
availability for a City subcontract**

On a contract the City awarded during the study period, the prime contractor awarded a subcontract worth \$128,556 for road construction work. To determine the overall availability of POC-owned businesses for the subcontract, BBC identified businesses in the availability database that indicated they:

- a. Perform road construction work;
- b. Perform work as subcontractors; and
- c. Are able to perform work of equal size or larger than \$128,556.

We found 23 businesses in the availability database that met those criteria, six of which were POC-owned. Thus, the availability of POC-owned businesses for the subcontract was 26 percent (i.e., $6/23 \times 100 = 26$).

2. Markov Chain Monte Carlo (MCMC). With any survey effort where the survey sample does not represent the entire population and the response rate is less than 100 percent, there is some amount of random error or potential for unintended bias associated with the survey process itself. BBC used MCMC simulations to adjust our observed availability estimates to help account for any such issues as part of the availability survey process. For the simulations, we specified a *prior* for the MCMC model, which represented any initial knowledge we had about the population of local businesses potentially available for relevant projects the City awarded. Such knowledge was available to us from the United States Census Bureau, which provides percentages of POC-, woman-, and veteran-owned businesses located in the Little Rock Metropolitan Statistical Area that work in the local construction, professional services, and goods and support services industries. We specified data from the United States Census Bureau as a prior in our model so we could better estimate business availability for each contract element included in the analysis.

Once we specified the prior, we ran two MCMC models each with six sequential chains of Monte Carlo simulations for each contract element in our analysis: one model for simulating the availability of POC- and woman-owned businesses and one for simulating the availability of veteran-owned businesses. Each chain included 4,000 simulations, so in total, we ran 24,000 Monte Carlo simulations for each model for each contract element.² Essentially, the model generated estimated availability for each contract element if we had repeatedly run our availability survey process 24,000 times, resulting in less random error and mitigating any unintended bias in the survey process. The availability estimates we

² Across the 832 contract elements included in the analyses, there were 129 unique sets of combinations of business and project characteristics (i.e., availability sets). For computational efficiency, we ran MCMC simulations on each unique availability set and then applied them to each appropriate contract element.

report in the next section and in subsequent analyses are the availability estimates we observed adjusted for results from the MCMC process.

D. Availability Analysis Results

BBC estimated the overall availability of POC-, woman-, and veteran-owned businesses for the construction, professional services, and goods and support services work the City awards as well as separately for various subsets of that work. For each set of projects, we present availability estimates for all POC-owned businesses together and separately for each relevant race group: Asian Pacific-owned businesses, Black-owned businesses, Hispanic-owned businesses, Middle Eastern and North African (MENA)-owned businesses, Native American-owned businesses, and Subcontinent Asian-owned businesses. We based availability estimates on the prime contracts and subcontracts the City awarded during the study period. A key assumption of the availability analysis is that the work an organization awarded during the study period is representative of the work that the City will award in the future. If the types and sizes of the projects the organization awards in the future differ substantially from the work it awarded during the study period, then the City should adjust availability estimates accordingly.

1. Overall. Figure 6-3 presents dollar-weighted estimates of the overall availability of POC-, woman-, and veteran-owned businesses for City work. As shown in Figure 6-3, the availability of POC-owned businesses considered together for all City work is 18.3 percent, indicating that one might expect the City to award approximately 18.3 percent of its project dollars to POC-owned businesses based on the availability of those businesses for that work. The POC-owned business groups that exhibit the greatest availability for City work are Black-owned businesses (9.8%), Hispanic-owned businesses (5.9%), and Asian Pacific-owned businesses (1.3%). The overall availability of White woman-owned businesses for City work is 13.3 percent. In addition to estimating the availability of POC- and woman-owned businesses for City work, BBC also estimated the availability of veteran-owned businesses for that work. As shown in Figure 6-3, the availability of veteran-owned businesses for City work is 6.0 percent.

Figure 6-3.
Availability estimates for
City work

Source:
BBC availability analysis.

Business group	Percentage
Race and gender	
POC	18.3 %
Asian Pacific	1.3 %
Black	9.8 %
Hispanic	5.9 %
MENA	0.1 %
Native American	0.8 %
Subcontinent Asian	0.4 %
White woman	13.3 %
Veteran	
Veteran	6.0 %

2. Industry. BBC also examined the availability of POC-, woman-, and veteran-owned businesses separately for City construction, professional services, and goods and support services work to assess whether the availability of those businesses differs by industry. As shown in Figure 6-4, POC-owned businesses considered together exhibit greater availability for the City's goods and support services (19.5%) and construction work (19.2%) than for its professional services work (12.9%). White woman-

owned businesses also exhibit greater availability for the City's goods and support services work (23.9%) than for its professional services (20.0%) and construction work (10.4%). The availability of individual POC- and women-owned business groups differs across industries:

- The groups that exhibit the greatest availability for construction work are White woman-owned businesses (10.4%), Black-owned businesses (9.3%), and Hispanic-owned businesses (7.4%).
- The groups that exhibit the greatest availability for professional services work are White woman-owned businesses (20.0%), Black-owned businesses (8.3%), and Subcontinent Asian-owned businesses (1.8%).
- The groups that exhibit the greatest availability for goods and support services work are White woman-owned businesses (23.9%), Black-owned businesses (14.6%), and Hispanic-owned businesses (2.3%).

Veteran-owned businesses exhibit greater availability for the City's professional services work (11.7%) than for its construction (5.3%) and goods and support services work (4.2%).

Figure 6-4.
Availability estimates for construction, professional services,
and goods and support services work

Business group	Industry		
	Construction	Professional services	Goods and support services
Race and gender			
POC	19.2 %	12.9 %	19.5 %
Asian Pacific	1.3 %	1.1 %	1.6 %
Black	9.3 %	8.3 %	14.6 %
Hispanic	7.4 %	1.1 %	2.3 %
MENA	0.2 %	0.1 %	0.1 %
Native American	0.9 %	0.5 %	0.4 %
Subcontinent Asian	0.1 %	1.8 %	0.4 %
White woman	10.4 %	20.0 %	23.9 %
Veteran			
Veteran	5.3 %	11.7 %	4.2 %

Source: BBC availability analysis.

3. Contract role. Many POC-, woman-, and veteran-owned businesses are small businesses, and thus, often work as subcontractors, City 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-, woman-, and veteran-owned businesses for agency work (i.e., the larger the project, the less the availability of POC-, woman-, and veteran-owned businesses). As shown in Figure 6-5, the availability of POC-owned businesses considered together for City subcontracts (21.7%) is greater than for its prime contracts (16.7%). In contrast, the availability of White woman-owned businesses for City subcontracts (10.8%) is less than for its prime contracts (14.5%). The availability of individual POC- and woman-owned business groups differs between prime contracts and subcontracts:

- The groups that exhibit the greatest availability for prime contracts are White woman-owned businesses (14.5%), Black-owned businesses (9.1%), and Hispanic-owned businesses (4.9%).
- The groups that exhibit the greatest availability for subcontracts are Black-owned businesses (11.1%), White woman-owned businesses (10.8%), and Hispanic-owned businesses (7.8%).

The availability of veteran-owned businesses for City subcontracts (5.2%) is less than for its prime contracts (6.5%).

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

Source:
BBC availability analysis.

Business group	Role	
	Prime contracts	Subcontracts
Race and gender		
POC	16.7 %	21.7 %
Asian Pacific	1.4 %	1.2 %
Black	9.1 %	11.1 %
Hispanic	4.9 %	7.8 %
MENA	0.1 %	0.2 %
Native American	0.6 %	1.2 %
Subcontinent Asian	0.4 %	0.2 %
White woman	14.5 %	10.8 %
Veteran		
Veteran	6.5 %	5.2 %

4. Prime contract size. BBC examined the availability of POC-, woman-, and veteran-owned businesses separately for *large* prime contracts—that is, contracts worth more than \$3 million for construction work, more than \$7 million for professional services work, and more than \$750,000 for goods and support services work—than for *small* prime contracts—that is, contracts worth less than the large contract size thresholds. That analysis helped assess whether prime contract size was related to the availability of POC-, woman-, and veteran-owned businesses for their work. As shown in Figure 6-6, the availability of POC-owned businesses considered together is greater for small prime contracts (18.1%) than large prime contracts (13.6%). In contrast, the availability of White woman-owned businesses for City small prime contracts (14.0%) is less than the availability for its large prime contracts (15.7%). The availability of individual POC- and woman-owned business groups differs between large and small prime contracts:

- The groups that exhibit the greatest levels of availability for small prime contracts are White woman-owned businesses (14.0%), Black-owned businesses (10.2%), and Hispanic-owned businesses (5.1%).
- The groups that exhibit the greatest levels of availability for large prime contracts are White woman-owned businesses (15.7%), Black-owned businesses (6.8%), and Hispanic-owned businesses (4.5%).

The availability of veteran-owned businesses for City small prime contracts (7.0%) is greater than for its large prime contracts (5.3%).

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

Source:

BBC availability analysis.

Business group	Prime Contract Size	
	Small contracts	Large contracts
Race and gender		
POC	18.1 %	13.6 %
Asian Pacific	1.3 %	1.6 %
Black	10.2 %	6.8 %
Hispanic	5.1 %	4.5 %
MENA	0.1 %	0.1 %
Native American	0.8 %	0.4 %
Subcontinent Asian	0.6 %	0.2 %
White woman	14.0 %	15.7 %
Veteran		
Veteran	7.0 %	5.3 %

CHAPTER 7.

Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of person of color (POC)-, woman-, and veteran-owned businesses in the construction, professional services, and goods and support services contracts and procurements the City of Little Rock (the City) awarded between January 1, 2019 and December 31, 2023 (the *study period*).¹ We measured participation in terms of *utilization*—the percentage of project dollars the City awarded to those businesses during the study period. Chapter 7 presents the analysis in two parts:

- A. Purpose; and
- B. Utilization analysis results.

A. Purpose

Calculating the percentage of dollars the City awarded to POC-, woman-, and veteran-owned businesses during the study period is useful in determining whether certain business groups face barriers related to the City's contracting and procurement processes. Moreover, this calculation is useful in assessing whether any business groups are *substantially underutilized* relative to their availability for that work.

B. Utilization Analysis Results

BBC calculated the overall participation of POC-, woman-, and veteran-owned businesses located in the *relevant geographic market area (RGMA)* in the construction, professional services, and goods and support services projects the City awarded during the study period as well as separately for various subsets of those projects.²

1. Overall. Figure 7-1 presents the overall participation of POC-, woman-, and veteran-owned businesses in City work. Overall, the City awarded 9.6 percent of relevant project dollars to POC-owned businesses considered together. The POC-owned business groups that exhibited the greatest participation in City work were Black-owned businesses (6.1%), Hispanic-owned businesses (3.0%), and Subcontinent Asian-owned businesses (0.4%). In addition, the City awarded 2.0 percent of relevant project dollars to White woman-owned businesses. BBC also calculated the participation of veteran-owned businesses in City work. Overall, the City awarded 2.0 percent of relevant project dollars to veteran-owned businesses.

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 BBC identified the RGMA for the study as Faulkner, Grant, Lonoke, Perry, Pulaski, and Saline Counties in Arkansas. We focused disparity study analyses on that region.

Figure 7-1.
Utilization results for City projects

Source:

BBC utilization analysis.

Business group	Percentage
Race and gender	
POC	9.6 %
Asian Pacific	0.1 %
Black	6.1 %
Hispanic	3.0 %
MENA	0.0 %
Native American	0.0 %
Subcontinent Asian	0.4 %
White woman	2.0 %
Veteran	
Veteran	2.0 %

2. Industry. BBC also examined the participation of POC-, woman-, and veteran-owned businesses separately in construction, professional services, and goods and support services work to assess whether the participation of those businesses differed by industry. As shown in Figure 7-2, the participation of POC-owned businesses considered together was greater in the City's goods and support services work (12.4%) than in its construction (10.5%) and professional services work (2.7%). The participation of White woman-owned businesses was greater in the City's professional services work (7.6%) than in its goods and support services (2.4%) and construction work (0.8%). The POC- and woman-owned business groups that exhibited the greatest levels of participation differed across industries:

- The groups that exhibited the greatest levels of participation in construction work were Black-owned businesses (6.1%), Hispanic-owned businesses (4.0%), and White woman-owned businesses (0.8%).
- The groups that exhibited the greatest levels of participation in professional services work were White woman-owned businesses (7.6%), Subcontinent Asian-owned businesses (1.5%), and Black-owned businesses (1.1%).
- The only groups that exhibited participation in goods and support services work were Black-owned businesses (12.4%) and White woman-owned businesses (2.4%).

Veteran-owned businesses only exhibited participation in the City's goods and support services work (16.6%).

Figure 7-2.
Utilization analysis results by industry

Business group	Industry		
	Construction	Professional services	Goods and support services
Race and gender			
POC	10.5 %	2.7 %	12.4 %
Asian Pacific	0.1 %	0.0 %	0.0 %
Black	6.1 %	1.1 %	12.4 %
Hispanic	4.0 %	0.0 %	0.0 %
MENA	0.0 %	0.0 %	0.0 %
Native American	0.0 %	0.0 %	0.0 %
Subcontinent Asian	0.2 %	1.5 %	0.0 %
White woman	0.8 %	7.6 %	2.4 %
Veteran			
Veteran	0.0 %	0.0 %	16.6 %

Source: BBC utilization analysis.

3. Contract role. Many POC-, woman-, and veteran-owned businesses are small businesses, so in some cases, they may be more likely to work as subcontractors. However, as shown in Figure 7-3, the participation of POC-owned businesses considered together was actually *greater* in the prime contracts (10.8%) the City awarded during the study period than in its subcontracts (7.3%). Similarly, the participation of White woman-owned businesses was slightly greater in the City’s prime contracts (2.0%) than in its subcontracts (1.9%). The POC- and woman-owned business groups that exhibited the greatest levels of participation were the same for prime contracts and subcontracts: Black-owned businesses (prime contracts: 7.1%; subcontracts: 4.3%), Hispanic-owned businesses (prime contracts: 3.3%; subcontracts: 2.3%), and White woman-owned businesses (prime contracts: 2.0%; subcontracts: 1.9%). The participation of veteran-owned businesses was also greater in City prime contracts (2.9%) than in its subcontracts (0.1%).

Figure 7-3.
Utilization analysis
results by contract role

Source:

BBC utilization analysis.

Business group	Role	
	Prime contracts	Subcontracts
Race and gender		
POC	10.8 %	7.3 %
Asian Pacific	0.1 %	0.2 %
Black	7.1 %	4.3 %
Hispanic	3.3 %	2.3 %
MENA	0.0 %	0.0 %
Native American	0.0 %	0.0 %
Subcontinent Asian	0.3 %	0.6 %
White woman	2.0 %	1.9 %
Veteran		
Veteran	2.9 %	0.1 %

4. Prime contract size. BBC examined the participation of POC-, woman-, and veteran-owned businesses separately in *large* prime contracts—that is, contracts worth more than \$3 million for construction work, more than \$7 million for professional services work, and more than \$750,000 for goods and support services work—than for *small* prime contracts—that is, contracts worth less than the large contract size thresholds. That analysis helped us assess whether prime contract size was related to the participation of POC-, woman-, and veteran-owned businesses in that work. As shown in Figure 7-4, the participation of POC-owned businesses considered together was greater in small prime contracts (14.1%) than in large prime contracts (3.9%). White woman-owned businesses only exhibited participation in small prime contracts (3.0%). The POC- and woman-owned business groups that exhibited the greatest levels of participation differed across industries:

- The groups that exhibited the greatest levels of participation in small prime contracts were Black-owned businesses (8.6%), Hispanic-owned businesses (4.9%), and White woman-owned businesses (3.0%).
- The only group that exhibited participation in large prime contracts was Black-owned businesses (3.9%).

In contrast, the participation of veteran-owned businesses was less in small prime contracts (1.0%) than in large prime contracts (7.0%).

Figure 7-4.
Utilization analysis
results by contract size

Source:

BBC utilization analysis.

Business group	Prime Contract Size	
	Small contracts	Large contracts
Race and gender		
POC	14.1 %	3.9 %
Asian Pacific	0.1 %	0.0 %
Black	8.6 %	3.9 %
Hispanic	4.9 %	0.0 %
MENA	0.0 %	0.0 %
Native American	0.0 %	0.0 %
Subcontinent Asian	0.5 %	0.0 %
White woman	3.0 %	0.0 %
Veteran		
Veteran	1.0 %	7.0 %

CHAPTER 8.

Disparity Analysis

BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars the City of Little Rock (the City) awarded to person of color (POC)-, woman-, and veteran-owned businesses during the study period (i.e., *utilization* or *participation*) with the percentage of contract and procurement dollars one might expect the City to award to those businesses based on their availability for that work.¹ The analysis focused on construction, professional services, and goods and support services work the City awarded between January 1, 2019 and December 31, 2023 (the *study period*).

A. Overview

BBC used the following formula to calculate a *disparity index* to help compare utilization and availability for relevant business groups and different sets of contracts the City awarded during the study period:

$$\text{Disparity Index (\$)} = \frac{\text{\$ of participation}}{\text{\$ of availability}}$$

The disparity index indicates the proportion of the City’s project dollars it awarded to a business group for every \$1.00 of that group’s availability for that work. A disparity index of \$1.00 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 \$1.00 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 \$0.80 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-based measures*—to address corresponding barriers.²

B. Disparity Analysis Results

BBC measured overall disparities between the participation and availability of POC-, woman-, and veteran-owned businesses for all relevant contracts and procurements the City awarded during the study period considered together. We also measured disparities separately for various subsets of contracts and procurements it awarded during the study period for POC-, woman-, and veteran-owned businesses. For all of the results figures presented in this chapter, higher bars indicate better outcomes for business groups and lower bars indicate worse outcomes. There is a red box at the disparity index

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).

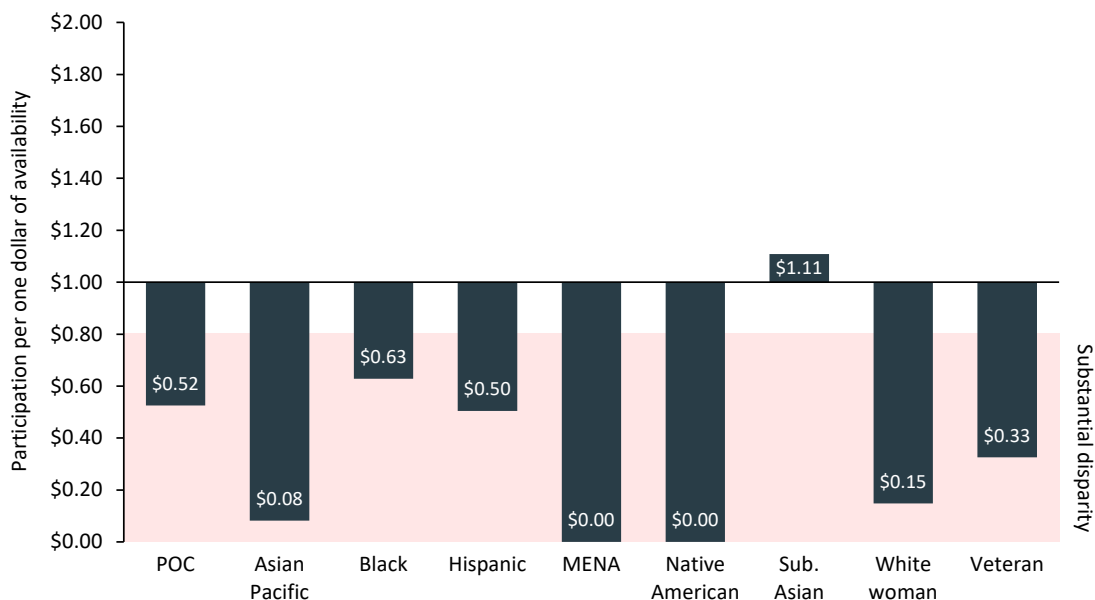
level of \$0.80 and below, which indicates a substantial disparity. We provide detailed disparity analysis results in Appendix D.

1. Overall. Figure 8-1 presents disparity indices for POC-, woman-, and veteran-owned businesses for all relevant prime contracts and subcontracts the City awarded during the study period. As shown in Figure 8-1, POC-owned businesses considered together exhibited a disparity index of \$0.52 for all relevant contracts and procurements the City awarded during the study period, indicating a disparity where it awarded \$0.52 to POC-owned businesses for every dollar one might expect it to award to those businesses based on their availability for City work. There were some differences in disparities when considering each POC-owned business group separately:

- Asian Pacific-owned businesses (disparity index of \$0.08), Black-owned businesses (disparity index of \$0.63), Hispanic-owned businesses (disparity index of \$0.50), Middle Eastern and North African (MENA)-owned businesses (disparity index of \$0.00), and Native American-owned businesses (disparity index of \$0.00) exhibited substantial disparities for City work.
- In contrast, Subcontinent Asian-owned businesses did not exhibit a disparity for City work (disparity index of \$1.11).

Figure 8-1 also shows that White woman-owned businesses (disparity index of \$0.15) and veteran-owned businesses (disparity index of \$0.33) exhibited substantial disparities for all relevant contracts and procurements the City awarded during the study period.

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



Note: For more detail, see Figure D-1 in Appendix D.

Source: BBC disparity analysis.

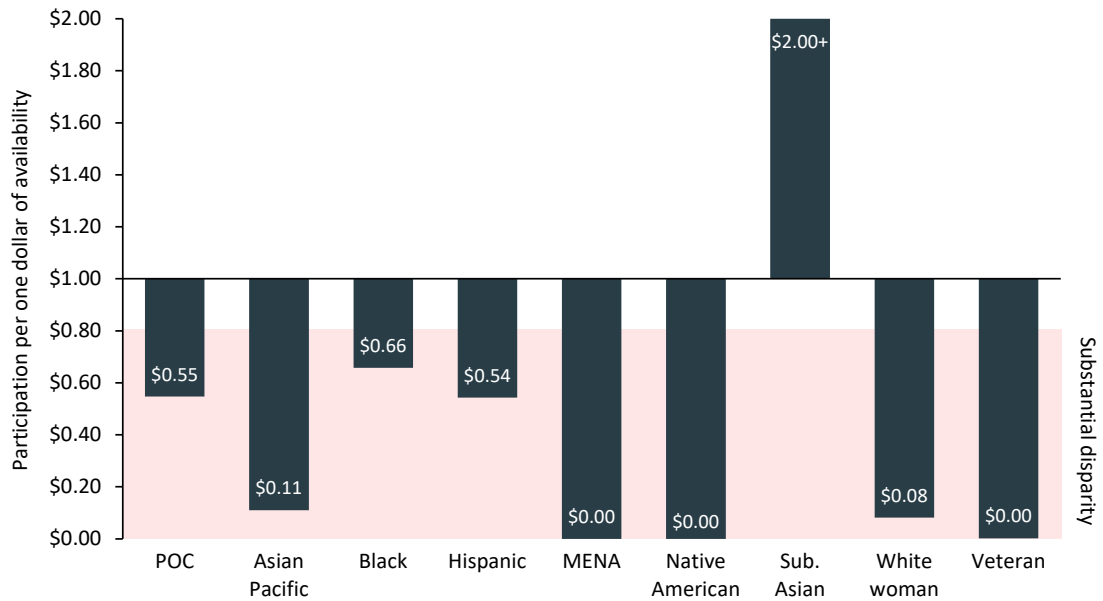
2. Industry. BBC examined disparity analysis results separately for the construction, professional services, and goods and support services work the City awarded during the study period to determine whether outcomes for POC-, woman-, and veteran-owned businesses differed by industry. As shown in Figure 8-2, POC-owned businesses considered together exhibited substantial disparities for construction (disparity index of \$0.55), professional services (disparity index of \$0.21), and goods and support services work (disparity index of \$0.63). Disparity indices varied by POC-owned business group and industry:

- Asian Pacific-owned businesses (disparity index of \$0.11), Black-owned businesses (disparity index of \$0.66), Hispanic-owned businesses (disparity index of \$0.54), MENA-owned businesses (disparity index of \$0.00), and Native American-owned businesses (disparity index of \$0.00) exhibited substantial disparities for construction work. Subcontinent Asian-owned businesses were only awarded one construction contract during the study period, but it was enough to result in a disparity index greater than \$2.00, because their availability for Little Rock's construction work is notably low.
- Asian Pacific-owned businesses (disparity index of \$0.00), Black-owned businesses (disparity index of \$0.13), Hispanic-owned businesses (disparity index of \$0.00), MENA-owned businesses (disparity index of \$0.00), and Native American-owned businesses (disparity index of \$0.00) exhibited substantial disparities for professional services work. Subcontinent Asian-owned businesses (disparity index of \$0.87) exhibited a disparity for professional services work, but that disparity was not substantial.
- Asian Pacific-owned businesses (disparity index of \$0.00), Hispanic-owned businesses (disparity index of \$0.00), MENA-owned businesses (disparity index of \$0.00), Native American-owned businesses (disparity index of \$0.00), and Subcontinent Asian-owned businesses (disparity index of \$0.00) exhibited substantial disparities for goods and support services work. Black-owned businesses (disparity index of \$0.85) exhibited a disparity for goods and support services work, but that disparity was not substantial.

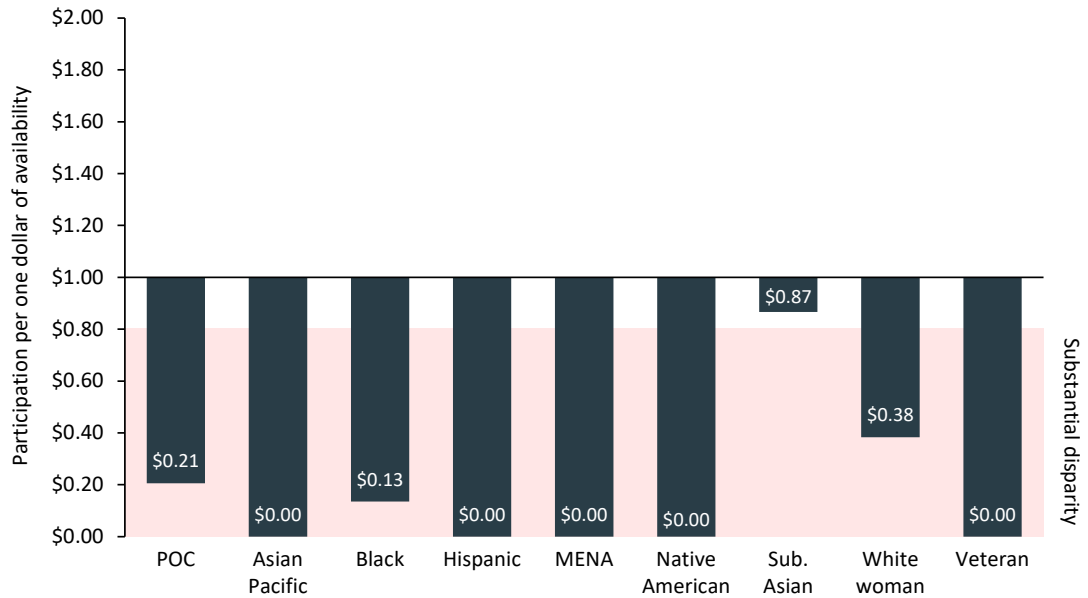
Figure 8-2 also shows that White woman-owned businesses exhibited substantial disparities for construction (disparity index of \$0.08), professional services (disparity index of \$0.38), and goods and support services work (disparity index of \$0.10). Veteran-owned businesses exhibited substantial disparities for construction (disparity index of \$0.00) and professional services work (disparity index of \$0.00). Although veteran-owned businesses did not exhibit a disparity for goods and support services work, two veteran-owned businesses were awarded two notably large construction contracts during the study period, which resulted in a disparity index greater than \$2.00.

Figure 8-2.
Disparity analysis results by industry

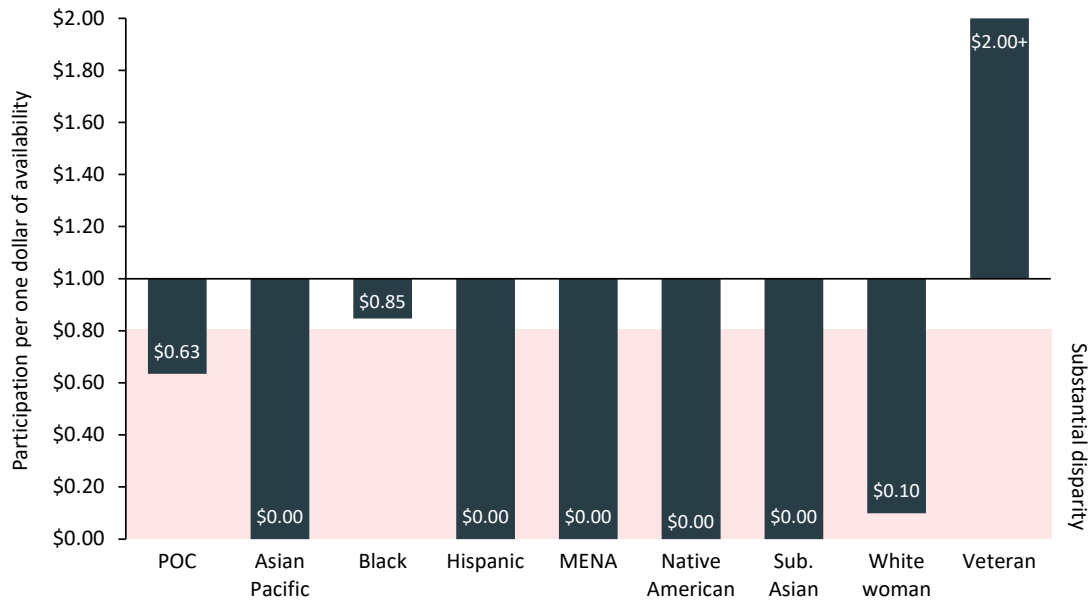
a) Construction



b) Professional services



c) Goods and support services



Note: For more detail, see Figures D-2, D-3, and D-4 in Appendix D.

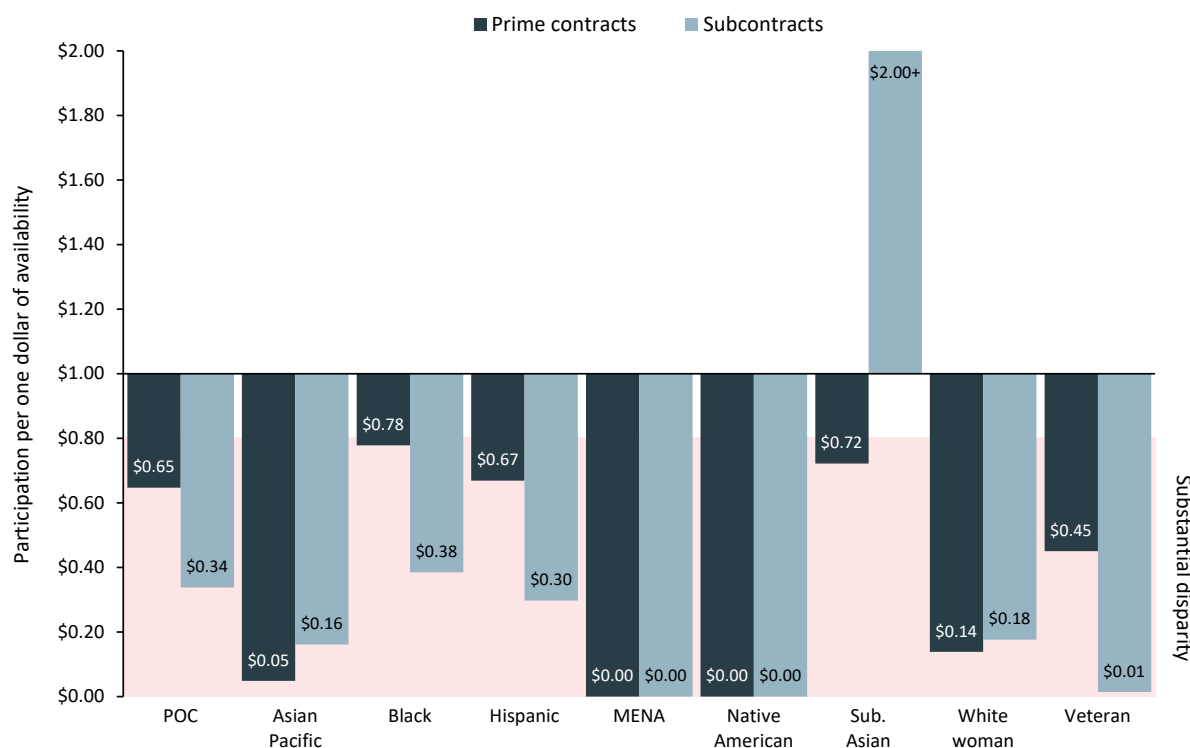
Source: BBC disparity analysis.

3. Contract role. Many POC-, woman-, and veteran-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 the City awarded during the study period. As shown in Figure 8-3, POC-owned businesses considered together exhibited substantial disparities for prime contracts (disparity index of \$0.65) and subcontracts (disparity index of \$0.34). Disparity indices differed by POC-owned business group and contract role:

- Asian Pacific-owned businesses (disparity index of \$0.05), Black-owned businesses (disparity index of \$0.78), Hispanic-owned businesses (disparity index of \$0.67), MENA-owned businesses (disparity index of \$0.00), Native American-owned businesses (disparity index of \$0.00), and Subcontinent Asian-owned businesses (disparity index of \$0.72) exhibited substantial disparities for prime contracts.
- Asian Pacific-owned businesses (disparity index of \$0.16), Black-owned businesses (disparity index of \$0.38), Hispanic-owned businesses (disparity index of \$0.30), MENA-owned businesses (disparity index of \$0.00), and Native American-owned businesses (disparity index of \$0.00) exhibited substantial disparities for subcontracts.

Figure 8-3 also shows that White woman-owned businesses exhibited substantial disparities for prime contracts (disparity index of \$0.14) and for subcontracts (disparity index of \$0.18), as did veteran-owned businesses (prime contracts: disparity index of \$0.45; subcontracts: disparity index of \$0.01).

Figure 8-3.
Disparity analysis results by contract role



Note: For more detail, see Figures D-5 and D-6 in Appendix D.

Source: BBC disparity analysis.

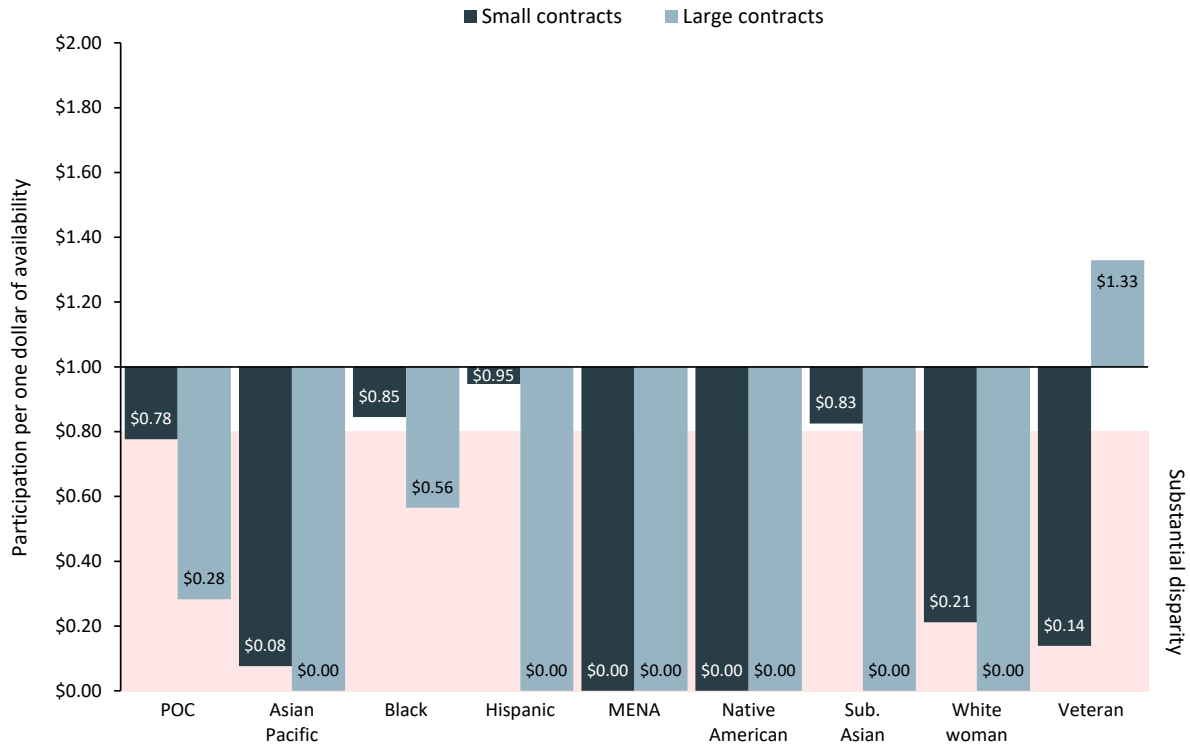
4. Prime contract size. BBC examined disparity analysis results for POC-, woman-, and veteran-owned businesses separately for *large* prime contracts—that is, contracts worth more than \$3 million for construction work, more than \$7 million for professional services work, and more than \$750,000 for goods and support services work—than for *small* prime contracts—that is, contracts worth less than the large contract size thresholds. It is instructive to examine these size categories to see whether prime contract size is related to outcomes for POC-, woman-, and veteran-owned businesses. As shown in Figure 8-4, POC-owned businesses considered together exhibited substantial disparities on both small (disparity index of \$0.78) and large prime contracts (disparity index of \$0.28), although the disparity for small prime contracts was notably closer to parity. Disparity analysis results differed by POC-owned business group and contract size:

- Asian Pacific-owned businesses (disparity index of \$0.08), MENA-owned businesses (disparity index of \$0.00), and Native American-owned businesses (disparity index of \$0.00) exhibited substantial disparities for small prime contracts. Black-owned businesses (disparity index of \$0.85), Hispanic-owned businesses (disparity index of \$0.95), and Subcontinent Asian-owned businesses (disparity index of \$0.83) exhibited disparities for small prime contracts, but those disparities were not substantial.
- Asian Pacific-owned businesses (disparity index of \$0.00), Black-owned businesses (disparity index of \$0.56), Hispanic-owned businesses (disparity index of \$0.00), MENA-owned businesses (disparity index of \$0.00), Native American-owned businesses (disparity index of \$0.00), and

Subcontinent Asian-owned businesses (disparity index of \$0.00) exhibited substantial disparities for large prime contracts.

Figure 8-4 also shows that White woman-owned businesses exhibited substantial disparities on both small (disparity index of \$0.21) and large prime contracts (disparity index of \$0.00). Veteran-owned businesses exhibited a substantial disparity on small prime contracts (disparity index of \$0.14) but did not exhibit a disparity on large prime contracts (disparity index of \$1.33).

Figure 8-4.
Disparity analysis results by contract size



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

Source: BBC disparity analysis.

CHAPTER 9.

Analysis of the Business Community

BBC Research & Consulting (BBC) collected information about businesses potentially available for the contracts the City of Little Rock (the City) awards and about the businesses that performed work on City contracts during the study period.¹ That information can be valuable to the City in tailoring its contracting processes and contracting inclusion measures to the specific characteristics of businesses operating in the *relevant geographic market area (RGMA)*.² Moreover, developing an extensive understanding of the characteristics of the local business community can also help the City tailor its program measures to the specific needs of small and economically disadvantaged businesses—including many businesses owned by people of color (POCs), women, and veterans—in the Little Rock marketplace. The City could use the information in this chapter to design contracting processes or business program measures targeted at small businesses (based on business revenue), *emerging businesses* (based on business age), or contract size.

A. Available Businesses

BBC conducted surveys with hundreds of businesses in the RGMA to understand the different types of businesses potentially available for the contracts the City awards. As part of the surveys, we collected extensive information on the characteristics of each business and then used that information to develop a better understanding of the businesses in the marketplace *ready, willing, and able* to compete for and perform work on City contracts.

1. General characteristics. Figure 9-1 presents descriptive characteristics of all the businesses that BBC considered potentially available for City work.³ We present the following information for all available businesses considered together as well as separately for non POC-/non woman-owned businesses and for POC- and woman-owned businesses:

- Percentage of businesses that are POC- and woman-owned;
- Median annual revenues;
- Median business age;
- Median *bid capacity* (i.e., the largest contracts businesses report being able to perform);
- Percentage of businesses interested in prime contracting work;
- Percentage of businesses interested in subcontracting work;
- Percentage of businesses that participated in City contracts during the study period; and

¹ The study period for the disparity study was January 1, 2019 through December 31, 2023. Contracts the City awarded during that time period were included in disparity study analyses.

² The RGMA for the study was the six-county region of Faulkner, Grant, Lonoke, Perry, Pulaski, and Saline Counties in Arkansas (collectively referred to as the *Little Rock marketplace*).

³ For some survey questions, businesses had the option to answer with “don’t know” or “refuse,” so sample sizes vary across analyses of different characteristics based on how many businesses responded to each corresponding question.

- Percentage of businesses located in Little Rock in particular.

Figure 9-1.
General characteristics of potentially available businesses

Characteristic	Business Group		
	All	Non POC-owned/ Non woman-owned	POC-owned/ Woman-owned
POC-/woman-owned (%)	32.0%	-	-
Revenue (median)	\$600 K	\$816 K	\$390 K
Age (median)	17	20	12
Capacity (median)	\$500 K	\$750 K	\$375 K
Prime contractor (%)	91.9%	90.3%	95.4%
Subcontractor (%)	95.6%	94.6%	97.7%
Participated in City of Little Rock work (%)	9.0%	11.2%	4.6%
Located in Little Rock (%)	35.9%	35.6%	36.6%

Note: $n = 409$ for race/gender, prime contract interest, and subcontract interest; $n = 355$ for capacity; $n = 286$ for age; $n = 291$ for revenue.

As shown in Figure 9-1:

- Overall, a larger percentage of businesses potentially available for City work are non POC-/non woman-owned (68.0%) than are POC- or woman-owned (32.0%).
- Non POC-/non woman-owned businesses generally earn more in annual revenue (median of \$816,000) than POC- and woman-owned businesses do (median of \$390,000), and that difference is statistically significant ($t = 4.80$; $p < 0.01$).⁴
- Non POC-/non woman-owned businesses are generally older (median of 20 years old) than POC- and woman-owned businesses (median of 12 years old), and that difference is statistically significant ($t = 4.54$; $p < 0.01$).
- Non POC-/non woman-owned businesses can perform work on contracts that are generally larger (median of \$750,000) than those on which POC- and woman-owned businesses can perform work (median of \$375,000), and that difference is statistically significant ($t = 3.09$; $p < 0.01$).
- A substantial majority of available businesses, regardless of the race or gender of the owners, are interested in prime contract work (non-POC/non-woman = 90.3%; POC and woman = 95.4%) as well as subcontract work (non-POC/non-woman = 94.6%; POC and woman = 97.7%).
- A larger percentage of non POC/non woman-owned businesses (11.2%) potentially available for City contracts participated in City work during the study period than POC- and woman-owned businesses (4.6%), but that difference was not statistically significant.

⁴ For continuous variables, BBC transformed each raw data point into its natural log before conducting two-tailed t -tests.

- Overall, 35.9 percent of available businesses are located in Little Rock. The percentage is slightly higher for POC- or woman-owned businesses (36.6%) than for non POC-/non woman-owned businesses (35.6%), but that difference is not statistically significant.

2. Business size. An important aspect of most contracting inclusion programs is to support socially and *economically* disadvantaged businesses as part of organizations' contracting and procurement processes. A common indicator of economic disadvantage is business revenue, on which BBC collected information from businesses potentially available for City work. This information could be useful to the City if it decides to set revenue thresholds for businesses to be eligible to participate in its business inclusion programs. As presented in Figure 9-1, among potentially available businesses, POC- and woman-owned businesses tend to earn less in annual revenues than non POC-/non woman-owned businesses do. We explored the annual revenues among businesses potentially available for City work further by examining the distribution of available businesses based on their annual revenues. We analyzed that information for all available businesses considered together and separately for available POC- and woman-owned businesses.

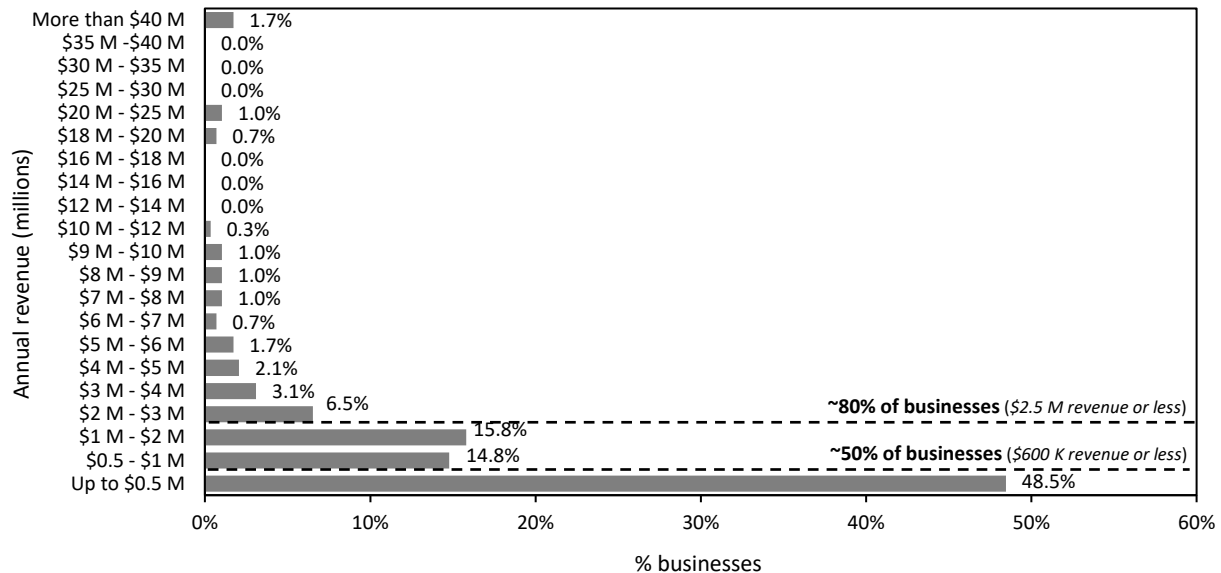
a. All businesses. Figure 9-2 presents the distribution of the 291 available businesses that provided raw data on annual revenues as part of availability surveys.⁵ The two horizontal dashed lines in the figure represent the points at which 50 percent and 80 percent of those businesses reported revenues of that amount or less. As shown in Figure 9-2, approximately 50 percent of all businesses potentially available for City work reported annual revenues of \$600,000 or less, and approximately 80 percent of them reported annual revenues of \$2.5 million or less.

b. POC- and woman-owned businesses. BBC separately examined the distribution of the 101 available POC- and woman-owned businesses that provided raw revenue data as part of availability surveys. As shown in Figure 9-3, approximately 50 percent of POC- and woman-owned businesses available for City work reported annual revenues of \$390,000 or less (compared to \$600,000 or less for all businesses), and approximately 80 percent of them reported annual revenues of \$1.4 million or less (compared to \$2.5 million or less for all businesses). Moreover, a larger percentage of POC- and woman-owned businesses reported annual revenues of \$500,000 or less (59.4%)—the smallest revenue category shown in Figure 9-3—than did non POC-/non woman-owned businesses (42.6%), and that difference is statistically significant ($\chi^2 = 6.77$; $p < 0.01$).⁶

⁵ The remaining businesses that completed availability surveys provided information on their annual revenues in the form of ranges of values. BBC decided not to include those responses in our analyses, because raw revenue data were more precise.

⁶ Note that this is a different group than the one shown in Figure 9-2, which shows results for all available businesses

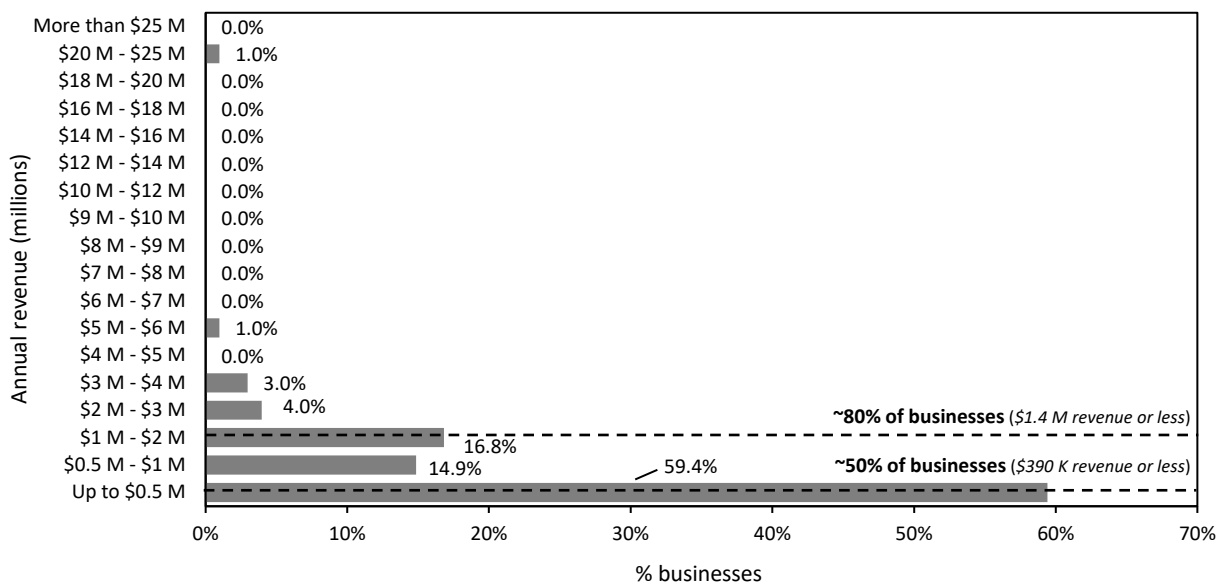
Figure 9-2.
Distribution of potentially available businesses based on their reported raw revenue



Notes: $n = 291$.

Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

Figure 9-3.
Distribution of potentially available POC- and woman-owned businesses based on their reported raw revenue



Notes: $n = 101$.

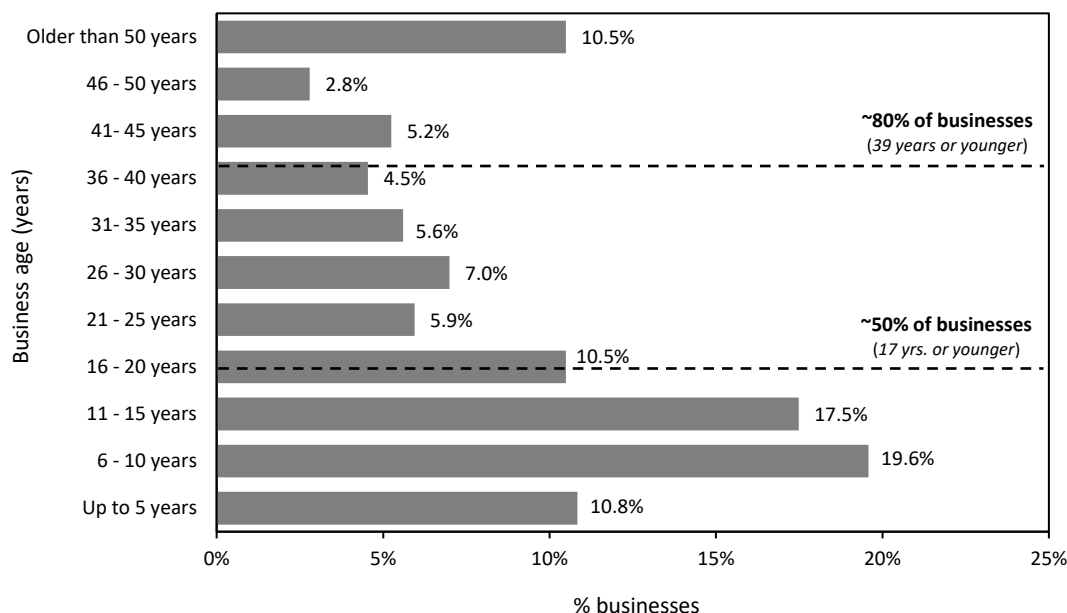
Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

3. Business age. Businesses can vary considerably in age, and it is likely that younger businesses need more support to compete for or perform work on government contracts than older businesses. Information about business age could be useful to the City if it were to consider developing a program to support emerging businesses. Among available businesses, POC- and woman-owned businesses tend to be younger than non POC-/non woman-owned businesses, as presented in Figure 9-1 above. To further

explore the age of businesses potentially available for City contracts, we examined the distribution of available businesses based on how many years they had been in business. We analyzed that information for all available businesses considered together and separately for available POC- and woman-owned businesses.

a. All businesses. Figure 9-4 presents the distribution of the 286 available businesses for which BBC collected age information. As shown in Figure 9-4, approximately 50 percent of businesses available for City work are 17 years or younger, and approximately 80 percent of them are 39 years or younger.

Figure 9-4.
Distribution of potentially available businesses based on their age

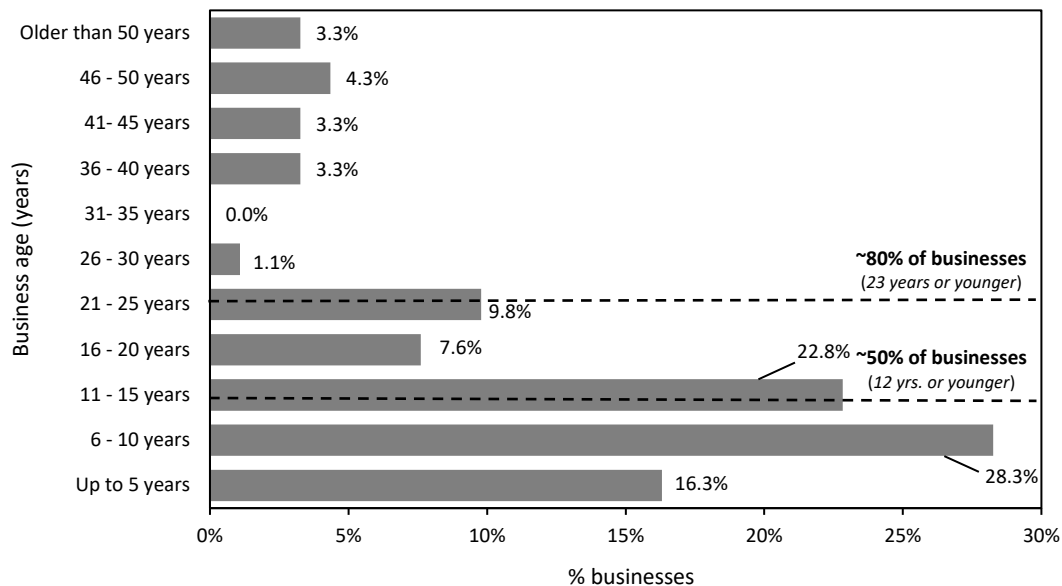


Notes: $n = 286$.

Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

b. POC- and woman-owned businesses. Figure 9-5 presents the distribution of businesses among the 92 POC- and woman-owned available businesses for which BBC collected age information. As shown in Figure 9-5, approximately 50 percent of POC- and woman-owned businesses available for City work are 12 years or younger (compared to 17 years or younger for all businesses), and approximately 80 percent of them are 23 years or younger (compared to 39 years or younger for all businesses). Moreover, a larger percentage of POC- and woman-owned businesses are 5 years or younger (16.3%)—the youngest age category shown in Figure 9-5— than non POC-/non woman-owned businesses (10.8%), but that difference was not statistically significant.

Figure 9-5.
Distribution of potentially available POC- and woman-owned businesses based on their age



Notes: $n = 92$.

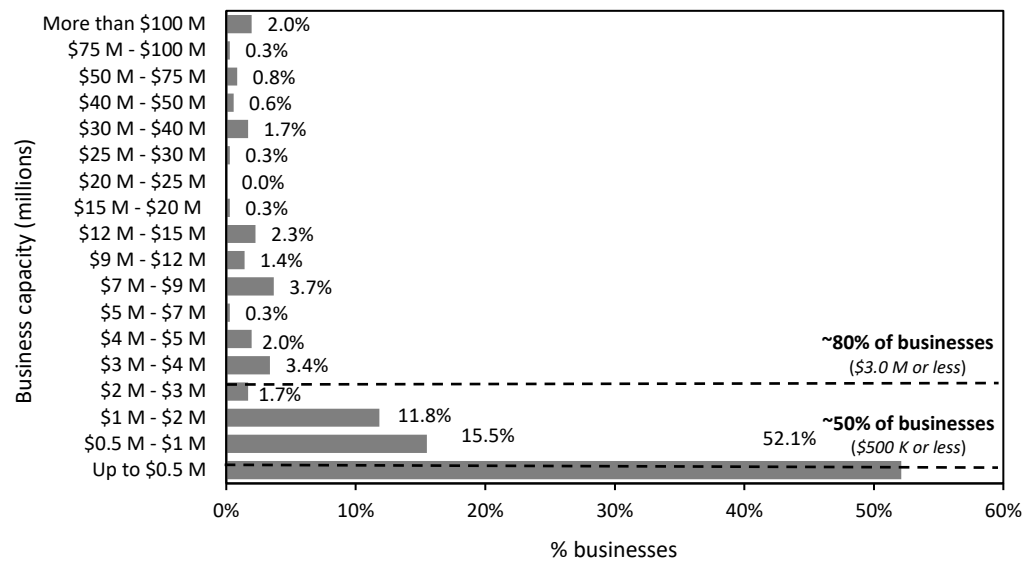
Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

4. Business capacity. As part of availability surveys, potentially available businesses reported the largest prime contract, subcontract, or other piece of work for which they are able to perform (i.e., capacity). This information could be useful to the City in developing program measures tailored to the capacities of small and diverse businesses. BBC observed a correlation of 0.60 between annual revenue and capacity, indicating that businesses with greater revenues tend to report greater capacities ($t = 12.01$, $p < .01$). However, among available businesses, POC- and woman-owned businesses tend to have less capacity than non POC-/non woman-owned businesses, as presented in Figure 9-1 above. We explored that finding further by examining the distribution of the businesses available for City contracts based on their capacities.

a. All businesses. Figure 9-6 presents the distribution of business capacity among the 355 businesses that provided capacity information as part of availability surveys. As shown in Figure 9-6, approximately 50 percent of businesses potentially available for City work reported that they could compete for or perform work on contracts worth \$500,000 or less, and approximately 80 percent of them reported that they could compete for or perform work on contracts worth \$3.0 million or less.

b. POC- and woman-owned businesses. Figure 9-7 presents the distribution of the 119 POC- and woman-owned businesses that reported capacity information. As shown in Figure 9-7, approximately 50 percent of available POC- and woman-owned businesses reported capacities of \$375,000 or less (compared to \$500,000 or less for all available businesses), and approximately 80 percent of them reported capacities of \$1.5 million or less (compared to \$3 million or less for all available businesses). Moreover, a larger percentage of POC- and woman-owned businesses reported capacities of \$500,000 or less (63.0%)—the smallest capacity category shown in Figure 9-7—than did non POC-/non woman-owned businesses (46.6%), and that difference was statistically significant ($\chi^2 = 7.90$; $p < 0.10$).

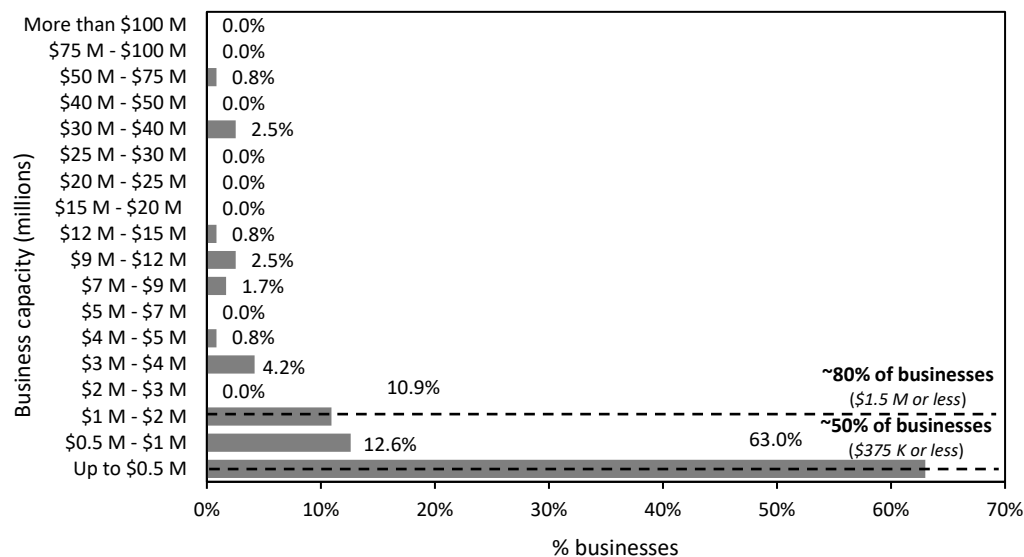
Figure 9-6.
Distribution of potentially available businesses based on their reported capacities



Notes: $n = 355$.

Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

Figure 9-7.
Distribution of potentially available POC- and woman-owned businesses based on their reported capacities



Note: $n = 119$.

Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

B. Utilized Businesses

BBC also assessed characteristics for businesses located in the RGMA that participated in City contracts. This included 293 businesses that participated in 722 contracts the City awarded to businesses in the RGMA during the study period. Analyses in this chapter are limited to businesses located in the RGMA in order to align with the analyses of available businesses and to give an accurate picture of utilized

businesses in the region. Figure 9-8 presents descriptive characteristics of those businesses. We present the following information for all businesses that participated in City work considered together as well as separately for non POC-/non woman-owned businesses and for POC- and woman-owned businesses:

- Percentage of businesses that are POC-/woman-owned;
- Median annual revenues;
- Number of contracts awarded;
- Volume of contract dollars awarded;
- Average volume of contract dollars awarded to each business; and
- Percentage of businesses located in Little Rock in particular.

Figure 9-8.
Characteristics of businesses in the Little Rock RGMA to which the City awarded contracts during the study period

Characteristic	Business Group		
	All	Non POC-owned/ Non woman-owned	POC-owned/ Woman-owned
POC-/woman-owned (%)	23.5%	-	-
Contracts awarded (%)	-	77.8%	22.2%
Contract dollars awarded (%)	-	87.4%	12.6%
Dollars per business (avg.)	\$520 K	\$594 K	\$279 K
Revenue (median)	\$1.7 M	\$2.2 M	\$500 K
Located in Little Rock (%)	53.9%	51.8%	60.9%

Notes: $n = 293$.

Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

As shown in Figure 9-8:

- During the study period, 23.5 percent of businesses in the RGMA to which the City awarded work were POC- and woman-owned.
- The City awarded a larger percentage of its contracts to non POC-/non woman-owned businesses (77.8%) than to POC- and woman-owned businesses (22.2%).
- The City awarded 87.4 percent of the dollars associated with its contracts to non POC-/non woman-owned businesses and 12.6 percent to POC- and woman-owned businesses.
- On average, the City awarded \$279,000 in contract dollars to each POC- and woman-owned business that participated in its work during the study period compared to \$594,000 to each non POC-/non woman-owned business, but that difference was not statistically significant.

- On average, non POC-/non woman-owned businesses that participated in City contracts exhibited greater annual revenues (median = \$2.2 million) than POC- and woman-owned businesses that did so (median = \$500,000), and that difference was statistically significant ($t = 8.79$; $p < 0.01$).
- A greater percentage of POC- and woman-owned businesses that participated in City work were located in Little Rock (60.9%) than non POC-/non woman-owned businesses (51.8%) that participated in City work, but that difference was not statistically significant.

1. Business concentration. During the study period, 293 businesses located in the RGMA participated in City contracts in construction, professional services, and goods and support services across 722 contracts that totaled \$147 million. A common finding in disparity study research is that government organizations tend to award a disproportionate percentage of their contracts and contract dollars to relatively few businesses. BBC conducted a concentration analysis of the contracts and contract dollars the City awarded during the study period to assess whether they were awarded to a relatively large number of businesses or whether they were heavily concentrated among a relatively small number of businesses.

BBC began the concentration analysis by identifying all contracts the City awarded during the study period that were worth less than \$1 million and were awarded to businesses in the RGMA. We reasoned that there may only be certain vendors that have the capacity to obtain and perform contracts worth \$1 million or more, and most of those businesses are non POC-/non woman-owned businesses. Thus, by considering relatively large contracts in the analysis, we might have observed relatively high levels of business concentration, particularly for non-POC/woman-owned businesses, when business concentration may in fact be much lower for more typically sized contracts.⁷ After limiting the dataset to contracts worth less than \$1 million awarded to businesses in the RGMA, we ordered all businesses in descending order based on how many contracts and contract dollars the City awarded to them. We then assessed how many different businesses accounted for 50 percent and 80 percent of the contracts and contract dollars the City awarded.

a. Contracts. Figure 9-9 presents a cumulative distribution of the 688 contracts worth less than \$1 million the City awarded to 288 different businesses located in the RGMA during the study period. The elements of Figure 9-9 represent the following information:

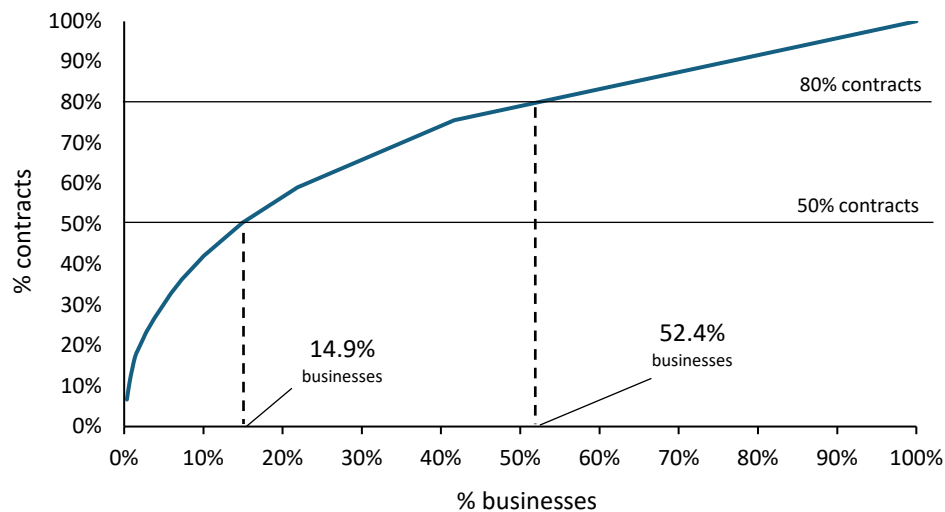
- The **horizontal axis** represents the percentage of the different businesses to which the City awarded contracts during the study period.
- The **vertical axis** represents the percentage of contracts the City awarded to different businesses.
- The **curve** represents the cumulative percentage of different businesses that accounted for the cumulative percentage of contracts the City awarded during the study period after BBC ordered businesses from the one that was awarded the largest number of contracts to the one that was awarded the least number of contracts.

⁷ Compared to when we limited the analysis to contracts worth less than \$1 million, including all contracts in the analysis did in fact indicate greater levels of business concentration regardless of whether we based the analysis on contracts or project dollars.

- The **horizontal lines** indicate the number of contracts that represent 50 percent and 80 percent of the contracts the City awarded during the study period.
- The **vertical dashed lines** indicate the percentage of businesses that accounted for 50 percent and 80 percent of the contracts the City awarded during the study period.

As shown in Figure 9-9, during the study period, the City awarded approximately 50 percent of its contracts worth less than \$1 million (346 contracts) to just 14.9 percent of businesses (43 businesses) and approximately 80 percent of them (551 contracts) to 52.4 percent of businesses (151 businesses).

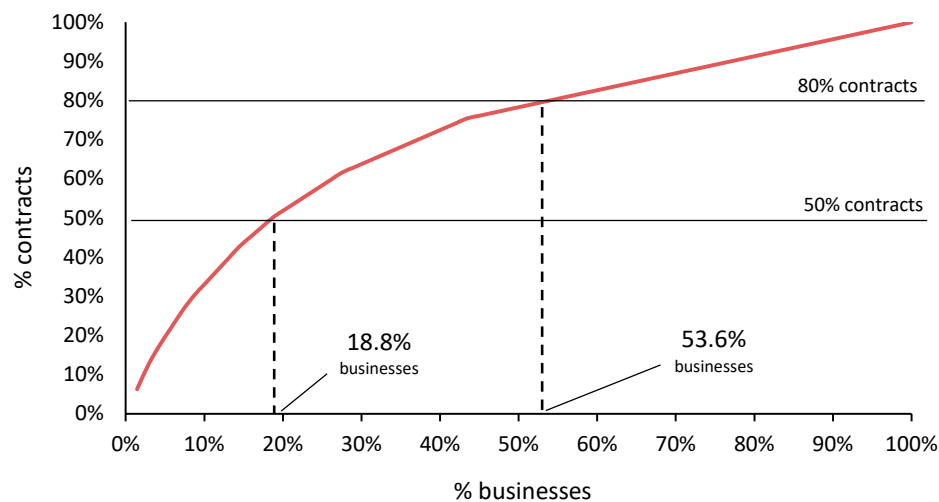
Figure 9-9.
Cumulative distribution of businesses based on the number of contracts worth less than \$1 million the City awarded to them



Note: $n = 688$ contracts.

BBC conducted the same analysis separately for the 159 contracts worth less than \$1 million the City awarded to 69 POC- and woman-owned businesses located in the RGMA. Figure 9-10 presents those results. As with all businesses considered together, the concentration analysis indicated that most of the contracts worth less than \$1 million that the City awarded to POC- and woman-owned businesses were awarded to relatively few businesses. It awarded approximately 50 percent of them (80 contracts) to just 18.8 percent of POC- and woman-owned businesses (13 businesses), and approximately 80 percent of them (127 contracts) to 53.6 percent of POC- and woman-owned businesses (37 businesses).

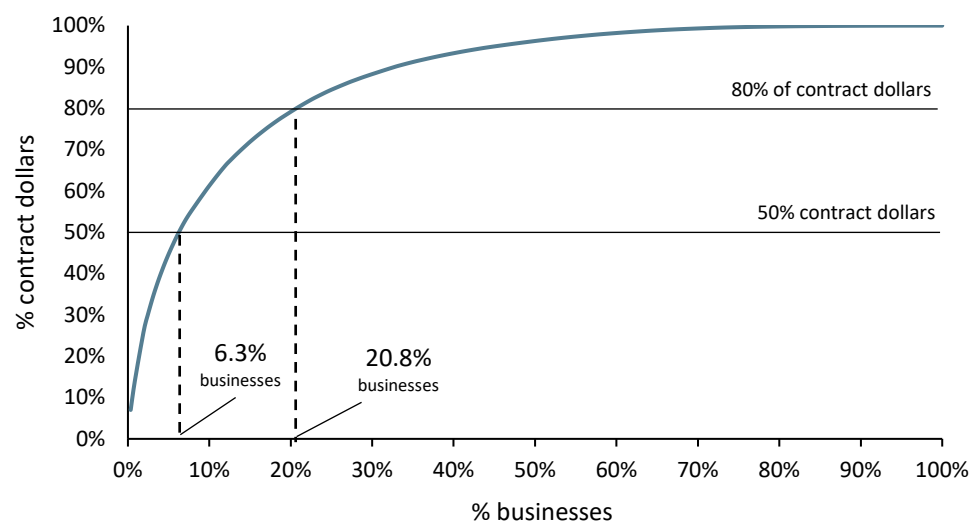
Figure 9-10.
Cumulative distribution of POC- and woman-owned businesses based on the number of contracts worth less than \$1 million the City awarded to them



Note: n = 159 contracts.

b. Contract dollars. Because contract sizes can vary so widely, BBC also assessed business concentration based on the contract *dollars* the City awarded during the study period. As with the contracts-based concentration analysis, BBC limited the contract dollars-based analysis to the \$65.2 million worth of contracts the City awarded during the study period that were worth less than \$1 million and were awarded to businesses in the RGMA. Figure 9-11 presents a cumulative distribution of the percentage of contract dollars the City awarded to all businesses during the study period. As shown in Figure 9-11, during the study period, the City awarded 50 percent of its contract dollars (\$32.6 million) to just 6.3 percent of businesses (18 businesses), and 80 percent of its contract dollars (\$52.3 million) to just 20.8 percent of businesses (60 businesses).

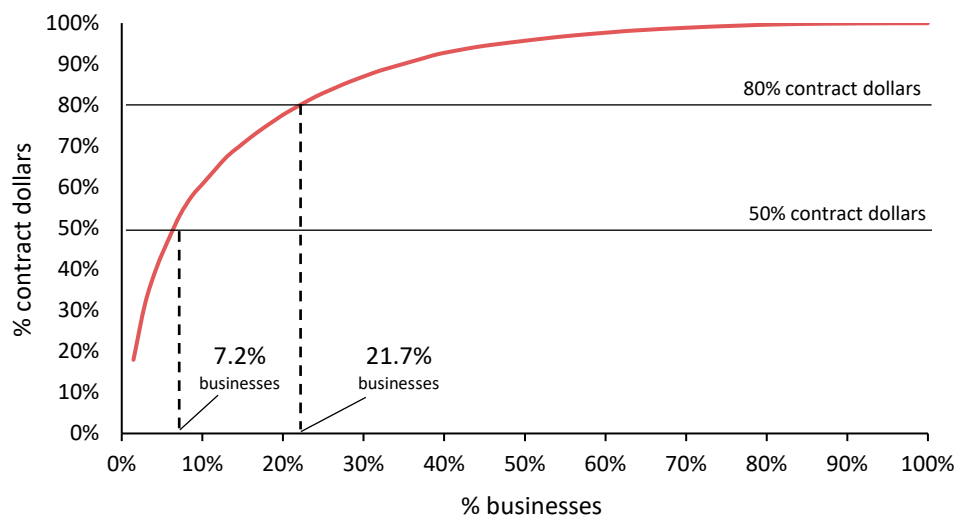
Figure 9-11.
Cumulative distribution of businesses based on the dollars associated with contracts worth less than \$1 million the City awarded to them



Note: n = 688 contracts.

BBC conducted the same analysis separately for the POC- and woman-owned businesses located in the RGMA to which the City awarded dollars on contracts worth less than \$1 million during the study period, totaling \$17.9 million. As shown in Figure 9-12, as with all businesses considered together, the concentration analysis indicated that most of the contract dollars the City awarded to POC- and woman-owned businesses during the study period were awarded to relatively few businesses. It awarded approximately 50 percent (\$9.6 million) of those contract dollars to just 7.2 percent of those businesses (5 businesses), and 80 percent of them (\$14.3 million) to just 21.7 percent of those businesses (15 businesses).

Figure 9-12.
Cumulative distribution of POC- and woman-owned businesses based on the dollars associated with contracts worth less than \$1 million the City awarded to them



Note: $n = 159$ contracts.

CHAPTER 10.

Contracting Policies and Business Programs

Chapter 10 provides an overview of the relevant regulations and policies that governed the City of Little Rock's (the City's) public contracting and procurement processes from January 1, 2019 through December 31, 2023 (the *study period*) as well as the business programs the City uses to encourage the participation of small and diverse businesses in its contracting and procurement.

A. Regulations and Policies

The City's Procurement Division facilitates and supports the procurement process for most departments within the City. The two exceptions are the Information Technology Department and the Public Works Department, which have their own internal procurement staff. The Procurement Division administers and manages bids and proposals; City-wide operating procurements; and vendor and community outreach to ensure that City Departments make purchases efficiently and in a manner that complies with all City regulations and policies, as set forth in the City Purchasing Manual. While the Procurement Division leads and supports the City's procurement process, the departments making the purchases ultimately decide which vendors to award contracts. City departments identify the goods or services they need and work with the Procurement Division to advertise and collect quotes or bids for the resulting contracts.

1. Procurement thresholds. The City Purchasing Manual describes requirements for soliciting quotes or bids from prospective vendors for different contract sizes. The procurement categories range in size from petty cash or petty charges (\$1,000 or less) to formal purchases (\$20,000 or more). This section outlines the process for each procurement category.

a. Petty cash or petty charge. Authorized City employees may make purchases worth up to \$1,000 at their discretion at the best available price. City employees must first check to ensure that the City does not have pre-existing contracts to procure the goods or services they need.

b. Buyer discretion. For purchases worth between \$1,000 and \$2,499, the City department must collect at least one quote from a prospective vendor and request the Purchasing Division to issue a purchase order for the purchase. Although departments are only required to collect one quote for these types of purchases, they are encouraged to collect multiple quotes for price comparison whenever possible.

c. Quotes. For construction purchases worth between \$2,500 and \$20,000 and purchases worth between \$2,500 and \$25,000 for all other industries, departments must collect at least three written quotes from prospective vendors, and the Purchasing Division must issue a purchase order. The department making the purchase then selects the lowest quote among the quotes that the vendors submitted.

d. Formal purchases. Construction purchases worth between \$20,000 and \$49,999 and purchases worth between \$25,000 and \$49,999 for all other industries are considered formal purchases that require a bid process and City Manager approval. The Procurement Division formally advertises solicitations for such purchases on the City's online procurement portal, where businesses can submit sealed bids or

proposals. For purchases worth \$50,000 or more, the requirements are the same as for other formal purchases, but the City Board must approve the purchase. Once the department making the purchase has selected a vendor, the City Board reviews and votes on a resolution to authorize the purchase. The resolution contains information about the type of goods or services the City is procuring, the total cost, and the bid solicitation process the City used.

Departments making formal purchases review the bids the City receives and ensure that bidders are responsive and qualified for the work. For construction contracts, the department making the purchase selects the lowest bid as long as that contractor is able to meet all the specifications of the project. For professional services contracts, the department making the purchase typically forms a panel to review and score proposals in order to determine which consultant is most qualified to conduct the work.

2. Other contracting procedures. There are a number of exceptions to the City's typical procurement regulations and policies. For example, if a purchase receives federal funding, the City must follow relevant regulations the federal agency has set forth. Additionally, the City may enter into a cooperative purchasing agreement with another government agency, and rules from the other agency may apply. Lastly, there are exceptions to the City's bid processes, such as for emergency contracts or for unique work that only a single vendor can provide (i.e., sole source contracts).

3. Prospective vendors. To submit bids, prospective vendors must first register using the City's Bonfire procurement portal. Vendors are required to create an account and provide details about their business. Vendors are encouraged to update their profiles, including adding their commodity codes and listing any relevant certifications, on a regular basis.

B. Business Programs

The City has taken a number of steps to make its contracts and procurements more accessible to small and diverse businesses. For example, in 2021, Mayor Frank Scott Jr. launched the OpportUNITY Little Rock initiative, which created small business development programs and events to promote small businesses and entrepreneurs throughout Little Rock. The City also recently created the position of Small Business Development Officer, who is responsible for facilitating technical assistance activities and small business development programs on behalf of the City and works with the Procurement Division to plan efforts to increase the participation of small businesses in City contracts. The City's Small Business Development Officer also conducts trainings with small businesses participating in City programs to help them understand the City's procurement process and connects them to other City resources and outside resources, such as those at the University of Arkansas at Little Rock.

1. Events. In 2023, the City hosted an Economic OpportUNITY Summit that featured a series of discussions with members of the public about ways to foster inclusive economic development and collaboration between local policymakers and business leaders. The City also hosts its Annual Vendor Expo and is a primary participant in the Arkansas Economic Development Commission (AEDC)'s Annual Small Business Matchmaking Event.

a. Vendor Expo. The City’s Procurement Division hosts the Annual Vendor Expo. Participating businesses are assigned a table where they can advertise themselves to attendees. Procurement Division staff and staff from other City departments attend the event to meet with the businesses and talk to them about upcoming procurement opportunities.

b. AEDC Matchmaking Event. The City participates in AEDC’s Annual Small Business Matchmaking Event, at which staff from the Procurement Division and other City departments meet with small businesses interested in contracting with government agencies. The goal of the event is for small businesses to “match” with government agencies looking to buy the types of goods or services that they provide. City staff also share information about the procurement process with businesses at the event.

2. BUILD Academy and EMPRENDE. As part of the OpportUNITY Little Rock initiative, the City operates the BUILD Academy and its Spanish language counterpart, EMPRENDE. BUILD Academy/EMPRENDE is a 12-week program that provides business owners and new entrepreneurs with technical assistance across myriad topic areas, including business registration and legal compliance, managing business financials, succeeding during the first year in business, and how to navigate the City’s procurement process. The programs also provide assistance related to developing and refining business plans, networking in Little Rock, accessing online resources, and making connections with local organizations with which businesses can connect once their participation in the program ends. The program culminates in a pitch competition where businesses are given 60 seconds to pitch their businesses to prospective customers and investors.

3. Unbundling. The City has a policy to break up certain contracts, such as those for janitorial or landscaping services, into multiple, smaller contracts so they are more accessible to small businesses (e.g., a separate janitorial contract for each City building).

CHAPTER 11.

Recommendations

The 2025 City of Little Rock (the City) Disparity Study provides substantial information the City should use as it considers efforts to encourage the participation of small businesses as well as person of color (POC)-, woman-, and veteran-owned businesses in its contracts and procurements. Such efforts could take the form of a comprehensive *contracting inclusion* program comprising various policies and procedures aimed at reducing barriers small and local businesses face in the local marketplace and expanding opportunities for them in City work. Based on our analysis of City policies and programs, qualitative information we collected from stakeholders, disparity study results, and best practices in the industry, BBC Research & Consulting (BBC) presents recommendations for specific contracting policies and programs the City could consider refining or developing to help increase the participation of small and local businesses in its work.

Although BBC analyzed POC-, woman-, and veteran-owned businesses as part of the disparity study, it is important to note that, in February 2025, the State of Arkansas enacted a law that prohibits the use of *race- or gender-based* measures in contracting and procurement decisions, unless the resulting contracts and procurements include federal funds. As a result, the City must consider only *race- and gender-neutral* contracting inclusion measures that support economically disadvantaged businesses regardless of the race or gender of the business owner. We therefore focus our recommendations on measures that support small businesses and local businesses.

A. Framework for an Effective Contracting Inclusion Program

Many government organizations across the country operate contracting inclusion programs that promote the participation of small and local businesses in their contracts and procurements by implementing policies and procedures designed to meet the following goals:

- Cultivating growth among small and local businesses and creating contracting and procurement opportunities for them;
- Supporting small and local businesses at different stages of development, from emerging businesses to established prime contractors; and
- Ensuring the success of the program through strong tracking and enforcement mechanisms.

Encouraging the participation of small businesses is critical in any marketplace, because nearly all the businesses available for government work are small in size, according to United States Small Business Administration (SBA) standards as well as those of other organizations (for information about the size of businesses available for the City's work, see Chapter 9). In addition, there are important benefits for the local economy by supporting local businesses. Local businesses are more likely than non-local businesses to spend money with local shops and suppliers, so by contracting with one local business, a government organization may be funneling its contracting dollars to multiple local businesses. Because

local businesses are also more likely to have employees who live in the locality, contracting with local businesses supports both local job creation and local tax revenue.¹

1. Cultivating growth and creating opportunities. An effective contracting inclusion program includes several elements that support the growth and development of small and local businesses along with elements that create contracting and procurement opportunities for those businesses within the organization. Such support can come in many forms, including:

- Technical assistance, such as training, hands-on support, and other resources for businesses to learn how to work with the organization and operate successful companies;
- Subcontracting minimums requiring prime contractors to subcontract out a certain percentage of the total project work;
- Right-sizing relatively large contracts into smaller pieces of work that are more accessible to smaller businesses;
- Setting aside bid opportunities for small and local businesses to compete for exclusively; and
- Awarding incentives or preferences to small and local businesses when evaluating bids and proposals.

By providing such support, government organizations can make their contracting opportunities more accessible to small and local businesses and help them grow their capacity to compete for and perform on those contracts.

2. Supporting different stages of development. Government organizations often have tiered contracting inclusion programs that are designed to support businesses at all phases of growth and development. These tiered programs may rely on business certifications that verify businesses as belonging to certain categories—such as emerging businesses, microbusinesses, and small businesses—and allow organizations to tailor their procurement policies and programs to businesses in different categories. For example, an organization could designate a particular contract as a set aside contract for microbusinesses, meaning only businesses certified as microbusinesses are permitted to bid on that contract. An organization can also tailor technical assistance resources to businesses of different sizes and stages of development depending on their needs.

An effective contracting inclusion program also provides resources and assistance to help businesses access the financial capital they need to grow. For example, some government organizations offer bonding assistance and support with filing loan applications to small and local businesses. This type of assistance can help address existing inequities and discrimination in the marketplace, which in turn results in a greater number of small and local businesses having the opportunity to compete for organization contracts (see Chapters 4 and 5 for additional information).

3. Tracking and enforcing program outcomes and objectives. Government organizations with effective contracting inclusion programs typically have policies in place to ensure that program rules are

¹ Rodriguez, Heather, and Dan Houston. 2007. *Procurement Matters: The Economic Impact of Local Suppliers*. Civic Economics. November. <https://nebula.wsimg.com/e2f7bcae9f68a9d06a5e5d96e99e2f62?AccessKeyId=8E410A17553441C49302&disposition=0&alloworigin=1>

enforced and that the program measures are applied fairly to all eligible contractors. For example, if the organization implements subcontracting minimums on its contracts, it should have a system in place to verify that prime contractors follow through on their subcontract commitments during the life of the contract. Additionally, if an organization has a business certification program, it should include processes to verify the accuracy of the information businesses submit to obtain certification, requirements for businesses to renew certification on a regular basis, and de-certification processes if a business' information is found to be false or if they no longer meet program requirements. Contracting inclusion programs should also incorporate regular staff training to ensure that relevant department staff understand the program and its rules.

Organizations with effective programs also engage in ongoing tracking of program success and regular reporting of program outcomes. They may use a range of key performance indicators (KPIs) to measure program success, which can include measuring the number of contracts they awarded to specific types of businesses, the number of businesses that grow into working as prime contractors, the percentage of their contracts that are under certain size thresholds, and the percentage of contract dollars that they awarded to small or local businesses. Quantitative KPIs can also be enhanced with qualitative information. For example, organizations can collect information from small and local business owners via focus groups or interviews to gain a broader understanding of how their contracting inclusion programs are working for the business community or highlight businesses that represent success stories resulting from their programs.

B. Recommendations

Disparity study analyses indicated substantial disparities between the participation of POC-, woman-, and veteran-owned businesses in City contracts and procurements and their availability for that work. We present recommendations for the City's consideration to further encourage the participation of small and local businesses in its work effectively and in a legally defensible manner. The recommendations we present below are all race- and gender-neutral in nature—that is, they are designed to make it easier for small and local businesses to participate in City work, regardless of the race or gender of their owners.

1. Subcontracting opportunities and support. Subcontracting opportunities are important for small businesses because they are generally smaller, both in terms of work scope and dollar value, than prime contracts and are easier for businesses with fewer resources and less experience to bid on and perform. By creating additional subcontracting opportunities and providing more support to subcontractors bidding and performing on those subcontracts, the City can help small and emerging businesses gain experience with government contracting and gradually grow their capacities over time. Of note is that results from the disparity study indicated that POC-owned businesses showed a larger disparity between participation and availability on City subcontracts than on prime contracts. However, we also found that the availability of POC-owned businesses was higher on City subcontracts than on prime contracts, partly because POC-owned businesses are more likely to be small than other businesses. Those results suggest that providing additional support to subcontractors would not only help all small businesses but could be of particular benefit to POC-owned businesses as well.

a. Subcontracting minimums. To increase the number of available subcontracting opportunities, the City could consider implementing a policy that requires prime contractors to subcontract out a minimum amount of the project work they are awarded. For certain types of projects that typically have

subcontracting opportunities (e.g., construction and engineering projects worth over \$100,000), the City could set a minimum percentage of work to be subcontracted (e.g., 20 percent and increasing gradually based as the project size increases). Prime contractors would have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If the City were to implement such a program, it should include good faith efforts (GFE) provisions so that a prime contractor that is unable to meet the subcontracting minimum could instead document its efforts to identify and include potential subcontractors in its bid or proposal and explain why it was unable to meet the required minimum subcontracting percentage.

b. Subcontractor directory. The City should consider creating a searchable vendor directory that is available to prime contractors looking for potential subcontractors with which they could partner on City projects. To start developing the database, the City could distribute a form for businesses to opt in to be listed as potential subcontractors and provide information on their work types, business characteristics, certifications, and contact information. The City could also collaborate with regional non-profit business development organizations and other government agencies (e.g., Pulaski County) that could support business development and share in the development and use of the vendor directory. The City could host the directory on its website, or make it available only to businesses that are registered in its vendor bid portal.

c. Networking assistance. Qualitative evidence from the disparity study indicated that having strong relationships with prime contractors can help a subcontractor generate business. For example:

A representative of an Asian-owned construction business stated, "A lot of [how we get business is by] word of mouth or just larger construction companies that once you get in their good graces, they like working with you. They tend to send all their projects so you can get them."

A representative of a construction business stated, "[Many of the jobs we get] are just through the actual contractor themselves. We've done work for them before or something like that."

At the same time, qualitative evidence also indicated that all businesses do not have equal access to connections to other businesses with which they could partner on contracts. For example:

A Black woman business owner who participated in a focus group stated, "Trying to find where people are doing business, where people are making connections ... especially as a woman-owned business, as a Black-owned business, if you don't have those organically, it can be very hard to find them."

A Black male owner of a construction business stated, "We have a lot of family-run businesses [in Little Rock], and if you're not within that, if you're not in that sphere of people, then it is very hard to break that code or break into that inner circle."

The City should consider additional efforts aimed at connecting subcontractors with prime contractors in their industry. For example, the City could host matchmaking events to facilitate networking between prime contractors and subcontractors working in the same industry. The City should also consider policies to incentivize prime contractors to attend these matchmaking events. For example, if the City implements small business contract goals requiring prime contractors to subcontract a percentage of

the dollars associated with the projects on which they bid to small businesses, participating in a matchmaking event could be counted as sufficient GFEs as part of meeting contract goal requirements.

d. Technical assistance for subcontractors. The City should consider offering training sessions for businesses interested in working as subcontractors to provide them with more skills and knowledge related to navigating the process of working with prime contractors to perform work on City projects. The City could walk businesses through how to access and monitor the City's bid portal website to find bid opportunities and to find out what prime contractors have expressed interest in a bid opportunity with which the business might be able to work. Additional topics could include reviewing project specifications, creating a quote, negotiating with prime contractors, and navigating changes in project scope. The training could also provide information on subcontractor bonding on construction projects and common stipulations in subcontract agreements.

e. Subcontractor data collection. The City does not currently maintain data on the subcontractors that participate in its projects. Gathering subcontractor data would improve the City's monitoring of the participation of small businesses in its work and would also help the City identify future subcontracting opportunities for those businesses as part of its projects. The City should consider collecting comprehensive subcontract data on all the projects it awards at the time of bid, including:

- Subcontractor names, addresses, phone numbers, and email addresses;
- Subcontractor work type or role on project; and
- Dollar amount committed to subcontractor.

In order to collect these data, the City should include a subcontractor information form with each bid opportunity posted to its bid portal website. The City should require bidders to report whether they plan to work with subcontractors on the project, and if they are planning to do so, provide the above information about each subcontractor as part of their bid submissions.

In addition to collecting subcontract data at the time of bid, the City should consider collecting subcontract payment data with each invoice prime contractors submit. Doing so would help to ensure that the prime contractors are actually working with the subcontractors with which they indicated they would work at the time of bid.

2. Small and Local Business Enterprise (SLBE) Program. Developing and implementing an SLBE Program would be one of the most effective ways for the City to increase the participation of small and local businesses in its contracts. Several focus group participants suggested that a preference for small businesses and a preference for local businesses would be beneficial to City contracting inclusion. For example:

A participant in a focus group stated, "The best thing that right now that could happen legislatively in Little Rock is to have the City Council put in a local preference covering all aspects of procurement. If you're going to take our money, our hard-earned taxpayer money, we want to see the community represented in procurement."

A participant in a focus group stated, "Within the Federal Government, there are, like, 'You have to subcontract X amount to small businesses.' It would be amazing if we could make that a requirement in local solicitations."

The City should consider certifying businesses as SLBEs, regardless of the race, gender, or veteran status of their owners, which would then allow the City to introduce program measures for those businesses, such as SLBE bid discounts or preference points, SLBE set aside contracts, or SLBE contract goals.

a. Certifications. In order to implement an SLBE Program, the City should first consider developing a certification program that is tailored to the sizes of businesses in its marketplace. The City would need to establish an application process for businesses seeking to become SLBE certified as well as a recertification process to ensure that the information the City maintains on businesses remains accurate and up to date. The City would also need to develop eligibility criteria for SLBE certification, including those related to business size and location. SLBE programs typically establish criteria around business' annual revenue, business owners' personal net worth, and business' locations.

Alternatively, the City may be able to collaborate with the Arkansas Economic Development Commission (AEDC) to certify small businesses, if the AEDC transitions its former Minority and Women-Owned Business Enterprise Certification program to a small business certification program. If AEDC were to start certifying small businesses, the City could consider whether that certification meets its needs. Regardless of whether the City chooses to develop its own certification processes or to collaborate with the AEDC, it should consider both business size and business location when determining what businesses would be eligible for SLBE certification.

i. Size standards. If the City were to implement its own small business certification program, data from the disparity study can be useful in helping determine size standards. Although many government organizations base their definitions of small businesses on revenue limits the SBA has set forth, those limits are quite high. For example, businesses working in certain types of construction work can make \$47 million in annual revenue and still qualify as small businesses. In contrast, BBC's analyses indicate that approximately 80 percent of businesses potentially available for City work reported annual revenues of \$2.5 million or less, and approximately 50 percent of them reported annual revenues of \$600,000 or less. If the City decides to establish an SLBE Program, then it should consider using this information to set revenue limits so they are tailored to the local marketplace.

One approach the City could use in establishing small business size standards is to establish multiple tiers of SBEs. For example, the organization could consider creating two tiers of SBE certification:

- SBE-1 for businesses that earn up to \$500,000 in annual revenue; and
- SBE-2 for businesses that earn more than \$500,000 and up to \$3 million in revenue.

The City could then consider tailoring the various measures it would use as part of the SLBE Program to different tiers of SBE certification, with measures such as SBE contract goals, SBE set asides, and bid preferences specific to businesses certified as SBE-1s and SBE-2s.

ii. Location requirements. Data from the disparity study also provides insights on where businesses that participate in City contracts are located. During the study period, approximately 93 percent of contract dollars went to businesses located in the relevant geographic market area (RGMA) for the study, which consists of the six counties surrounding Little Rock.² Among those businesses, approximately 54 percent

² The RGMA consists of the following six Arkansas counties: Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties.

of them were located within Little Rock city limits. If the City desires to increase the number of businesses within city limits that participate in its contracts, it could require that a business must be headquartered or have a location within Little Rock to be certified as an SLBE, in addition to meeting designated size standards for small businesses. The City could also consider a larger area for the location requirement such as Pulaski County or the six county Little Rock Metropolitan Area as defined by the U.S. Census Bureau.³

b. Bid discounts or preference points for SLBEs. To encourage the participation of small and local businesses in City contracts, the organization could consider offering bid discounts or preference points to incentivize the participation of small and local businesses as subcontractors in the contracts it awards. For both bid discounts and preference points, the City would need to select which contracts to which these policies would apply, as some types of contracts may not be appropriate for such measures (e.g., because of limited subcontracting opportunities).

i. Bid discounts. The City could award bid discounts on contracts to incentivize the participation of small and local businesses in its work. For example, the organization could award a 1 percent bid discount for every 5 percent of total contract dollars prime contractors commit to SLBE subcontractors. In this example, if a prime contractor submitted a bid of \$100,000 and committed 5 percent of the contract value to SLBE certified subcontractors the prime contractor would receive a 1 percent bid discount. The City would evaluate the bid as if it were \$99,000 which is 1 percent less than the actual bid of \$100,000. Applying the discount could result in the prime contractor's bid being the lowest bid after the discount is applied. This discount would only be used for comparing bids to each other. The contractor would still receive the full amount of its bid price for performing the work (\$100,000 in the example). The City could set a maximum bid discount of 5 percent (i.e., 25 percent subcontract commitment to SLBEs in the example).

ii. Preference points. Similar to bid discounts, the City could award SLBE preference points on contracts it awards through a Request for Proposals process. For example, the City could award 1 evaluation point discount for every 5 percent of total contract dollars prime contractors commit to SLBE subcontractors, with a maximum of 5 evaluation points (i.e., 25 percent subcontract commitment to SLBEs).

c. SLBE set aside contracts. Set aside contracts provide an opportunity for small businesses interested in working as prime contractors to compete for that work exclusively against other businesses that are similar in size (and location) to their own. The use of SLBE set asides could help small businesses work directly with the City and build the technical skills and capacity to perform work as prime contractors on larger projects over time. The City could consider setting aside certain prime contracts under a certain value threshold exclusively for SLBE bidding. BBC found that approximately 50 percent of businesses reported that the maximum size of contracts on which they can bid is \$500,000, and 80 percent of them reported that the maximum size of contracts on which they can bid is \$3.0 million. If the City decides to use SLBE set asides, it should consider those results, the types of work involved in its contracts, and other factors to establish a set aside program that is tailored to the businesses in its marketplace.

³ This is the same as the RGMA for the study and consists of the following six Arkansas counties: Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties.

d. SLBE contract goals. As part of the SLBE Program, the City could set percentage goals for the participation of SLBE-certified businesses on the individual contracts and procurements it awards. By setting SLBE contract goals, the City would be encouraging prime contractors to reach out to more subcontractors and expand their network of small businesses, while also providing more work to small and local businesses. For example, it could set a goal that 25 percent of dollars on a contract should go to certified SLBEs. Prime contractors submitting bids or proposals would have to either be SLBE-certified themselves or would have to commit scopes of work to SLBE-certified subcontractors that collectively account for 25 percent of the prime contractors' total bid amounts.

If a prime contractor fails to meet the goal through work commitments, it would have to submit GFE documentation describing the efforts it took to reach out to SLBE subcontractors about the bid opportunity. Examples of GFEs could include emailing certified subcontractors to notify them about the bid opportunity, advertising subcontract opportunities online, and hosting meetings for subcontractors where they answer questions about the bid opportunity. The City could evaluate GFEs using a points system where each effort or engagement with an SLBE counts for points, and prime contractors must receive a certain number of points for their GFEs to be considered sufficient.

3. De-concentration of awards. Concentration of awards occurs when a large percentage of a government organization's contracts are awarded to a small number of businesses. Concentration can be indicative of a lack of competition and few opportunities for new businesses to compete for the organization's work. Increasing the number of businesses that are able to compete for an organization contracts can help the organization diversify the businesses that receive contracts. Over time, as more businesses are able to win government contracts and grow their businesses, competition for contracting opportunities grows, which can lead to lower costs and greater quality of work.⁴

BBC's analyses indicated there was substantial concentration in the road construction and concrete work contracts the City awarded during the study period, in which one prime contractor accounted for 46 percent of the contract dollars the City awarded in that subindustry. Moreover, the City's contracts exhibited concentration across all industries. For all contracts the City awarded valued at less than \$1 million, 50 percent of the associated contract dollars went to just 6 percent of businesses.

Qualitative information from the disparity study also indicated that some business owners feel that the same businesses are repeatedly winning City contracts and that small businesses may feel they do not have a realistic chance to compete against them. For example:

A representative of an Asian-owned goods and support services business stated, "If you go look at all the contracts that the City of Little Rock had, you'll see a pattern of a lot of the same companies are getting all of these different contracts. A lot of times, small businesses who are just getting started are outside their lane... So I see where they do go to the preferred ones. They already have a reputation with [the City], they've already had the experience with [the City], but it's like they're shutting the door completely to anybody else who is qualified but is new."

⁴ Fairchild, Denise, and Kalima Rose. 2018. "Inclusive Procurement and Contracting: Building a Field of Policy and Practice." PolicyLink. February. <https://www.policylink.org/resources-tools/inclusive-procurement-and-contracting>.

One of the fundamental objectives of a contracting inclusion program is to diversify the pool of businesses to which an organization awards work. The City should consider exploring different ways to engage with more businesses as part of its contract and procurement processes, including businesses with which it has not worked previously. Some of these efforts could include:

- Introducing bid or proposal incentives to prime contractors that team with businesses with which they have never worked (or at least not in the recent past). The City could implement bid discount or proposal preference points similar to those we describe in the SLBE Program section above to incentivize prime contractors to commit to working with at least one subcontractor with which they have not worked with previously.
- If the City decides to set SLBE goals on contracts, it could stipulate that working with at least one new subcontractor could be a way to meet the goal.
- The City could also consider creating a set aside program where contracts are set aside for exclusive competition among businesses that have not worked with the organization in the past (or at least not in the recent past).
- The City could consider de-emphasizing past experience with the organization when evaluating qualifications for contracts it awards. For example, City departments could shift their evaluation criteria to place less weight on a business' past participation on similar contracts with the organization and more weight on other factors, such as the business's proposed approach to the work and qualifications performing similar work for other organizations.

4. Technical assistance. The City currently has several programs to provide technical assistance to business owners. These include BUILD Academy and EMPRENDE along with small business outreach from the Small Business Development Officer. Alongside these programs, the City should consider additional ways to strengthen technical assistance offerings to help emerging, small, and local businesses grow their skills, capacities, and ability to compete for and perform work on City contracts. These efforts could include:

- Improving its coordination with local organizations, chambers of commerce, education providers, and neighboring government agencies that provide business development services. For example, the City could partner with regional community colleges or start-up incubators that would provide training and certificates to businesses indicating that they are "bid ready." Chambers of commerce may also offer business technical assistance classes or networking events that the City could sponsor or advertise;
- Creating technical assistance programs tailored to particular industries. Businesses may be more likely to attend technical assistance classes that are targeted toward their industries and relevant to their work;
- Providing businesses with comprehensive information about loan applications, bonding, and insurance requirements to support business owners' financial knowledge; and
- Promoting mentorship opportunities between emerging businesses and established businesses. The City should consider creating a mentor-protégé program. Established businesses that spend time providing mentorship to an emerging business could receive bid preferences if they partner with the emerging business on a contract.

5. Streamlining policies and operations. The City can strengthen its contracting inclusion efforts by collecting more vendor data and tracking KPIs related to its contracting.

a. Data collection. The City currently maintains contact information for most but not all vendors. The organization should use its new vendor portal to collect data on all vendors and keep that information up to date. Additionally, the City should start collecting contact information for subcontractors along with subcontract data collection efforts. By collecting and maintaining these data, the City could more easily conduct outreach to more vendors, including promoting business networking events and notifying vendors of upcoming bid opportunities. Collecting contact information would also provide the City with insight about how many of its vendors have locations in Little Rock city limits or elsewhere in the region. Lastly, the City could consider requiring vendors to report work types, which would allow it to target its outreach efforts to vendors in particular industries.

b. KPIs. The primary metric most organizations use to assess the effectiveness of their contracting inclusion efforts is to track the percentage of contract dollars they spend with small and local businesses relative to all contract dollars they award. Because of the sheer amount of dollars organizations award each year, it would typically require them to award relatively large volumes of work to small and local businesses to meaningfully increase the overall percentage of dollars they award to those businesses in aggregate. Although doing so is important, focusing exclusively on the percentage of dollars an organization awards to small and local businesses may incentivize organizations to repeatedly award work to small and local businesses that are already successful or encourage them to pursue large contracts or procurements they might not be ready to perform. In addition, focusing exclusively on the percentage of dollars an organization awards to small and local businesses can obscure some of the value that contracting inclusion programs provide.

In addition to the overall percentage of dollars the City awards to small and local businesses, it should also consider tracking other KPIs that better reflect all the value that its contracting inclusion measures provide and encourage internal staff to support businesses in the marketplace that need the most help. Examples of such metrics could include:

- The number of different small and local businesses to which the City awards work;
- The number of contracts and procurements the City awards to those businesses;
- The volume of work the City awards to businesses that have never worked with the City in the past;
- Various characteristics of the small and local businesses to which the City awards work, including business size, location, age, industry, and average contract size; and
- Success stories of individual businesses that the City's contracting inclusion measures have helped.

The City could compile these KPIs in an annual report that features success stories and areas for improvement. It could also consider creating a performance dashboard on its website with the information from annual reports.

APPENDIX A.

Definitions of Terms

Appendix A defines terms useful to understanding the 2025 City of Little Rock 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.

City of Little Rock (City)

Little Rock is the capital city and most populous city in Arkansas. The City provides numerous services to its more than 200,000 residents, including police and fire protection, road construction and maintenance, water and sewage services, waste disposal, maintenance of parks and recreation facilities, and a variety of other social and economic services.

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-based measures. That is, an agency that uses race-based 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.

Construction

Construction refers to the construction, alteration, or repair of buildings, structures, or other real property. “Buildings, structures, or other real property” includes bridges, dams, plants, highways, parkways, streets, tunnels, sewer mains, power lines, cemeteries, pumping stations, railways, 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 Element

A contract element is either a prime contract or subcontract.

Contract Goal

A contract goal is a percentage goal that an organization sets for the participation of certified businesses in an individual contract or procurement the organization awards. For example, the organization could set a small business goal of 17 percent in awarding a particular contract. As a condition of award, prime contractors have to meet the goal as part of their bids, quotes, or proposals by making a minimum participation commitment of 17 percent with eligible, certified small businesses, or if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so.

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 relevant geographic market area to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of contracts and procurements an organization actually awarded during the study period to assess the percentage of dollars one might expect the organization to award to specific groups of businesses. A custom census approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes myriad factors into account, including businesses' primary lines of work and their capacities to perform work on an organization's contracts and procurements.

Disability-owned Business

A disability-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.

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 City of Little Rock 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 is computed by dividing the percentage of contract and procurement dollars an organization awarded to a specific group of businesses (*participation* or *utilization*) by the dollars one would expect the organization to award to those businesses based on their availability for that work. A disparity index is expressed as a dollar amount that represents how many dollars (or cents) the organization awarded to the group of businesses relative to every dollar of the organization's work for which those businesses are available.

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).

Goods and Support Services

A goods and support services business engages in providing goods, supplies, or services that typically do not require a specific educational background or license to perform. Examples of goods and support services work types 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; and vehicle repair services.

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 as people of color or women suffer discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations sometimes use race- or gender-based measures to address barriers affecting those businesses. Courts have generally considered substantial disparities between the participation and availability of a particular group of businesses for an organization's contracts and procurements as an inference of discrimination that supports the use of race- and gender-based contracting measures.

Intermediate Scrutiny

Intermediate scrutiny is the legal standard an organization's use of gender-based 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-based program to comply with intermediate scrutiny, it must serve an important government objective, and it must be substantially related to achieving that objective.

Marketplace Conditions

Marketplace conditions refer to various factors that potentially affect outcomes for certain workers and businesses operating in that marketplace (e.g., people of color, women, and the businesses they own).

The study team assessed conditions in the Little Rock marketplace related to four primary areas: human capital, financial capital, business ownership, and business success.

Middle Eastern and North African (MENA)

MENA describes individuals who descend from countries in the Middle East and North Africa. Examples include persons whose origins are from Afghanistan, Algeria, Armenia, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen. MENA-owned businesses are considered as a group of person of color-owned businesses in the study.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate its use of race-based 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.

Participation

See utilization.

Passive Participation

Passive participation in discrimination refers to government organizations perpetuating discrimination in their contract and procurement processes by operating in marketplaces where such barriers exist and unintentionally perpetuating them as part of their contracting processes.

Person of Color (POC)

A POC is an individual who identifies with one of the following race groups: Asian Pacific, Black, Hispanic, Middle Eastern and North African, Native American, Subcontinent Asian, or other non-White race group.

Person of Color (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, Black, Hispanic, Middle Eastern and North African, Native American, Subcontinent Asian, or other POC race group. The study team considered businesses owned by POC men or POC women as POC-owned businesses.

Prime Consultant

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

Prime Contract

A prime contract is a contract between a prime contractor or prime consultant and an end user, such as the City of Little Rock.

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for an end user, such as the City of Little Rock.

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, individuals who perform professional services are required to have a license or specific educational background. Examples of professional services include engineering; architectural and design services; information technology and data services; environmental services; human resources and job training services; bookkeeping and accounting; transportation planning services; and other professional, scientific, and technical services.

Project

A project refers to a construction, professional services, or goods and support services 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 of experiences—including any incidents of discrimination—shared by individual interviewees, public meeting participants, focus group participants, and other stakeholders shared with the study team.

Race- and Gender-based Measures

Race- and gender-based measures are contracting measures designed to increase the participation of person of color (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 women might be eligible for such measures whereas businesses owned by men would not. An example of race- and gender-based 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 address potential barriers for businesses 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. An agency's use of race- and gender-neutral measures must meet the requirements of the rational basis test to be considered constitutional.

Rational Basis

Government organizations that operate contracting programs that rely solely on race- and gender-neutral measures to encourage the participation of businesses in their work must show a rational basis for their programs. Showing a rational basis requires organizations to demonstrate their contracting programs are rationally related to legitimate government interests. 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 2025 City of Little Rock disparity study consists of six counties in central Arkansas: Pulaski, Grant, Saline, Lonoke, Faulkner, and Perry Counties (sometimes collectively referred to as the *Little Rock marketplace*). These six counties also comprise the metropolitan statistical area for Little Rock as defined by the United States Census Bureau.

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 organization's use of race-based 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 government interest in remedying past 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-based 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 January 1, 2019 to December 31, 2023. The City 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

Substantial disparities are disparities of \$0.80 or less, indicating that an organization awarded \$0.80 or less of its contract and procurement dollars to a particular business group for every dollar of the group's availability for that work. Substantial disparities are considered inferences of discrimination in the relevant geographic market area against particular business groups. Government organizations sometimes use substantial disparities as support for the use of race- or gender-based measures to address barriers affecting certain groups of person of color- and woman-owned businesses.

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts or procurements the City 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 business is a business with at least 51 percent ownership and control by individuals who are veterans of the United States military.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by White women. (BBC considered businesses owned by women of color as person of color-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-owned, woman-owned, and disadvantaged 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 City of Little Rock.

The appendix also discusses recent informative cases regarding the Federal Disadvantaged Business Enterprise (Federal DBE) Program, its implementation by local and state governments, and references guidance regarding the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program.^{1, 2} In this connection, the appendix provides an analysis regarding the implementation of the Federal DBE Program by local and state governments that is instructive to the study, local and state MBE/WBE/DBE programs, addressing the strict scrutiny standard, and disparity studies.

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 Federal Aviation Administration (FAA) Reauthorization Act.⁴ 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

The appendix reviews the landmark United States Supreme Court (SCOTUS) decision in *City of Richmond v. J.A. Croson* (*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 SCOTUS decision in *Adarand Constructors, Inc. v. Peña*, (*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.⁷ SCOTUS' decisions in

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).

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 disparity study, the Federal DBE Program and its implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. The City of Little Rock is in the United States Court of Appeals for the Eighth Circuit. In particular, this analysis discusses and references Eighth Circuit Court of Appeals decisions, which followed the *Croson* decision and applied the strict scrutiny standard, that are instructive to the study, including the decisions in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation (DOT)* and *Gross Seed v. Nebraska Department of Roads*; *Geyer Signal, Inc. v. Minnesota DOT*; *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*; and district court decisions in the Eighth Circuit regarding MBE/WBE/DBE programs.^{8, 9, 10}

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, focusing on the application by those courts of the strict scrutiny standard and disparity studies, including: *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. United States Department of Transportation (USDOT)*, et. al.; *Associated General Contractors of America (AGC), San Diego Chapter, Inc. v. California Department of Transportation (Caltrans)*, et al.; *Western States Paving Co. v. Washington State DOT*; *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, USDOT*, et al.; *Mountain West Holding Co. v. Montana, Montana DOT*, et al.; *M.K. Weeden Construction v. Montana, Montana DOT*, et al.; *Adarand Constructors, Inc. v. Slater (Adarand VII)*; *United States v. Taylor*; *Geod Corporation v. New Jersey Transit Corporation*; *South Florida Chapter of the AGC v. Broward County Florida*; *Midwest Fence Corp. v. USDOT, Federal Highway Administration (FHWA), Illinois DOT, Illinois*

⁸ *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).

⁹ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹⁰ *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*, 2022 WL 3350525 (8th Cir. 2022).

State Toll Highway Authority, et al.; Dunnet Bay Construction Co. v. Illinois DOT; and Northern Contracting, Inc. v. Illinois DOT.^{11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23}

The analysis also references and discusses 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.

The analyses of these and other recent cases discussed below, including the Eighth Circuit decisions, are instructive to the disparity study because they are 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 USDOT funds, disparity studies, social and economic disadvantaged business programs, and construing the validity of government programs involving MBE/WBE/DBEs and socially and economically disadvantaged businesses. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of narrowly tailored local or state government MBE/WBE/DBE programs.

The appendix notes in Section C. 4. below significant pending and very recent cases instructive and informative to the study and MBE/WBE/DBE and socially and economically disadvantaged business type programs.

B. United States Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, SCOTUS 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.²⁴ J.A. Croson Co. (Croson) challenged the City

¹¹ *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et al.* 2024 WL 4267183 (Sept. 23, 2024); U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23-cv-00072-GFVT.

¹² *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013)

¹³ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005)

¹⁴ *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, U.S. DOT, et al.*

¹⁵ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017).

¹⁶ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*, 2013 WL 4774517 (D. Mont. 2013).

¹⁷ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

¹⁸ *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017).

¹⁹ *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).

²⁰ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²¹ *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).

²² *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).

²³ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

²⁴ 488 U.S. 469 (1989).

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 (MBEs). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

SCOTUS 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."²⁵ 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.²⁶ 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.²⁷

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.²⁸ 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."²⁹

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 MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction

²⁵ 488 U.S. at 500, 510.

²⁶ 488 U.S. at 480, 505.

²⁷ 488 U.S. at 507-510.

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

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

projects.”³⁰ “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.”³¹

SCOTUS 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.”³² 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.”³³

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.”³⁴ “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.”³⁵

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.”³⁶

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

The cases interpreting *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.

3. *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*), SCOTUS 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

³⁰ 488 U.S. at 502.

³¹ *Id.*

³² 488 U.S. at 509.

³³ *Id.*

³⁴ 488 U.S. at 509.

³⁵ *Id.*

³⁶ 488 U.S. at 492.

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.

This decision focused on university admissions and diversity as the basis for a race-conscious type program. It did not involve a federal, local, or state government contracting program. Recent cases, including as noted in Section C.4 below, have referenced and cited the *SFFA* decision in connection with challenges to federal, local, or state government MBE/WBE/DBE contracting programs.

It is noteworthy that subsequent to the SCOTUS decision in *SFFA*, 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.” The State of Arkansas Attorney General was among the state Attorneys General signing the July 13, 2023 letter.

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.”

C. 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. 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 socially and economically 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, an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local and state government recipients of federal financial assistance (USDOT funds) based on 49 Code of Federal Regulations (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.

1. The Federal DBE Program (and ACDBE Program) implemented by state and local governments. The Congressional Acts noted above are informative as they are based on recent Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal DBE Program, which set forth Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence. Congress passed legislation in November 2021 (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021) that 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.

The United States Department of Justice (USDJ) 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 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 USDJ’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

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.³⁷

It is noteworthy that a federal district court in *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et al.*, which is noted below in Section C.4. (viii), recently has considered a challenge to the Federal DBE Program.³⁸ Plaintiffs sought 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 United States Constitution. Plaintiffs’ Motion for Preliminary Injunction was granted that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups regarding its contracts impacted by DBE goals. See Section C.4. (viii), below.

2. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.³⁹ The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and

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

³⁸ 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024); 2024 WL 4267183 (Sept. 23, 2024), U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFV

³⁹ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (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).

- The program must be narrowly tailored to achieve that compelling government interest.⁴⁰

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.⁴¹ 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.⁴² 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.⁴³

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state and local governments, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁴⁴ 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).⁴⁵

⁴⁰ *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 I”)*, 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).

⁴¹ *Id.*

⁴² *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁴³ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁴⁴ *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.

⁴⁵ *Id. But, see, Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. DOT*, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024) (Holding USDOT evidence insufficient to support Federal DBE Program). In the case of *Rothe Dev. Corp. v. United States Dept. of Defense (DOD)*, 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 DOD program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Court 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 DOD regulations. 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’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Dev. 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. Small Business Administration*, 836 F.3d 57 (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).

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁴⁶ 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).⁴⁷

As noted above, a federal district court in Kentucky in *Mid-America Milling v. USDOT* [see section C.4. (viii) below] granted Plaintiffs’ Motion for Preliminary Injunction that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined the USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups. The court considered in part the evidence presented by the federal defendants, including certain evidence presented to Congress. This case is pending, currently on stay, at the time of this report.

The evidentiary basis on which Congress relied to support its finding of discrimination, which multiple federal Courts of Appeal and district courts have considered and found among other evidence sufficient to satisfy the strict scrutiny standard (see, pages 2-3 above and citations below) includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified MBEs 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 enterprises.⁴⁸
- **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 MBEs 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 an MBE on a government contract not using that MBE 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.⁴⁹

But, see, 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)(Holding unconstitutional the rebuttable presumption of groups included in the Section 8(a) program).

⁴⁶ *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.

⁴⁷ 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.

⁴⁸ *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.

⁴⁹ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between the utilization and availability of minority-owned firms, raising an inference of discrimination.⁵⁰
- **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.⁵¹
- **Infrastructure Investment and Jobs Act of 2021, FAA Reauthorization Act of 2018, FAST Act, and the Moving Ahead for Progress in the 21st Century Act (MAP-21).** In November 2021, October 2018, December 2015, and July 2012, Congress passed the Infrastructure Investment and Jobs Act of 2021, the FAA Reauthorization Act, the FAST Act, and MAP-21, respectively, which made "findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in "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.⁵² Congress also found in the Infrastructure Investment and Jobs Act of 2021, the FA. 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.⁵³

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.⁵⁴ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁵⁵ The challenger bears the ultimate burden of

⁵⁰ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵¹ *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.

⁵² 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.

⁵³ *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).

⁵⁴ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (Adarand VII)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁵⁵ *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.

showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁵⁶

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.⁵⁷ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.⁵⁸ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁵⁹

Since the decision by SCOTUS in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁶⁰ "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.'"⁶¹ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁶²

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁶³ Once the governmental entity has shown acceptable proof of a compelling interest and remediating past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the

⁵⁶ 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.

⁵⁷ *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.

⁵⁸ *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).

⁵⁹ *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.

⁶⁰ *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).

⁶¹ 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).

⁶² *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶³ *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).

ultimate burden of proving that the plan is unconstitutional.⁶⁴ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE program to demonstrate the unconstitutionality of an affirmative-action type program.⁶⁵

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.⁶⁶ 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.⁶⁷ Conjecture and unsupported criticisms of the government's methodology are insufficient.⁶⁸ 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.⁶⁹

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.'"⁷⁰ 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."⁷¹

⁶⁴ *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).

⁶⁵ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁶⁶ 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.

⁶⁷ 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).

⁶⁸ *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.

⁶⁹ *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).

⁷⁰ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

⁷¹ *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).

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.”⁷² The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.⁷³ 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.⁷⁴ 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.⁷⁵

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.”⁷⁶ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”⁷⁷

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.⁷⁸

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.⁷⁹ “Where gross statistical disparities can be shown, they alone

⁷² *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷³ *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).

⁷⁴ *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).

⁷⁵ *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).

⁷⁶ 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.

⁷⁷ 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).

⁷⁸ 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).

⁷⁹ 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;

in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”⁸⁰

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.⁸¹ 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.⁸² However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁸³

Other considerations regarding statistical evidence include:

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.⁸⁴ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered.⁸⁵ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”⁸⁶

Adarand VII, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *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.

⁸⁰ *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).

⁸¹ *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).

⁸² 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).

⁸³ *Western States Paving*, 407 F.3d at 1001.

⁸⁴ 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).

⁸⁵ *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).

⁸⁶ *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).

Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.⁸⁷

Disparity index. An important component of statistical evidence is the "disparity index."⁸⁸ 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."⁸⁹

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.⁹⁰

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.⁹¹

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.⁹² The court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.⁹³ 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

⁸⁷ 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.

⁸⁸ *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).

⁸⁹ 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.

⁹⁰ 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.

⁹¹ *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).

⁹² *Id.* at 973.

⁹³ *Id.*

private discrimination specifically identified in its area.”⁹⁴ 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.”⁹⁵

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.⁹⁶ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.⁹⁷

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.⁹⁸ 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.⁹⁹

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 metropolitan statistical area (MSA) construction industry, not discrimination by the municipality itself.¹⁰⁰ 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.¹⁰¹

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.¹⁰² “[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.*”¹⁰³ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹⁰⁴ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in

⁹⁴ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

⁹⁵ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

⁹⁶ *Id.* at 973.

⁹⁷ *Id.*

⁹⁸ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 974.

¹⁰¹ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁰² *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹⁰⁵

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.”¹⁰⁶ 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.¹⁰⁷

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.”¹⁰⁸

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.¹⁰⁹

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.”¹¹⁰

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

¹⁰⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹⁰⁶ *Id.*

¹⁰⁷ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹⁰⁸ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹⁰⁹ *Id.* at 977.

¹¹⁰ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹¹¹

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.¹¹² But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹¹³ 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."¹¹⁴

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.¹¹⁵

Courts have accepted and recognized 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.¹¹⁶

¹¹¹ *Id.* at 979-80.

¹¹² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹¹³ 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).

¹¹⁴ *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).

¹¹⁵ 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).

¹¹⁶ 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).

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.¹¹⁷

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.¹¹⁸

The Eleventh Circuit described “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”¹¹⁹ Courts have found that “[w]hile

¹¹⁷ 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.

¹¹⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁹ *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).

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.”¹²⁰

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.’”¹²¹

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District* also found that race- and ethnicity-based measures should be employed as a last resort.¹²² 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.”¹²³ 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 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.¹²⁴ 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.

In *Northern Contracting* (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 [the 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.”¹²⁵ The Seventh Circuit

¹²⁰ 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.

¹²¹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730, 738 (6th Cir. 2000).

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

¹²³ 551 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).

¹²⁴ *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.

¹²⁵ 473 F.3d at 722.

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 held that the IDOT's 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.¹²⁶ The Seventh Circuit 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.¹²⁷ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹²⁸ Accordingly, the Seventh Circuit affirmed the district court's decision upholding the validity of IDOT's DBE program.¹²⁹

The 2015 and 2016 Seventh Circuit decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.* and *Midwest Fence Corp. v. USDOT, FHWA, IDOT* 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.¹³⁰ The court held the IDOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show IDOT exceeded its authority under the federal regulations.¹³¹

The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹³² In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program and upheld the IDOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹³³

It is noteworthy that there appears to be 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 Program, and the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. USDOT, FHWA, IDOT, Illinois State Toll Highway Authority, et al.*,¹³⁴ and in *Dunnet Bay Construction Co. v. Borggren, IDOT, et al.*, which upheld the implementation of the Federal DBE Program by IDOT.^{135, 136}

¹²⁶ *Id.* at 722.

¹²⁷ *Id.* at 723-24.

¹²⁸ *Id.*

¹²⁹ *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).

¹³⁰ *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).

¹³¹ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹³² *Id.*

¹³³ 840 F.3d 932 (7th Cir. 2016).

¹³⁴ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

¹³⁵ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

¹³⁶ 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

The court in *Dunnet Bay* held the Plaintiff 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.¹³⁷ 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰

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.”¹⁴¹

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;

¹³⁷ *Id.*

¹³⁸ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

¹³⁹ 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.

¹⁴⁰ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁴¹ *Croson*, 488 U.S. at 509-510.

- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state to acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁴²

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.”¹⁴³

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.¹⁴⁴ For example, to be considered narrowly tailored, courts have held that an MBE/WBE- or DBE-type program should include: (1) built-in flexibility; (2) good faith efforts provisions; (3) waiver provisions; (4) a rational basis for goals; (5) graduation provisions; (6) remedies only for groups for which there were findings of discrimination; (7) sunset provisions; and (8) limitation in its geographical scope to the boundaries of the enacting

¹⁴² 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).

¹⁴³ *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.

¹⁴⁴ 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).

jurisdiction.^{145, 146, 147, 148, 149, 150, 151, 152}

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.¹⁵³

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.

3. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Eighth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁵⁴ The courts, including in Arkansas and the Eighth Circuit, have applied “intermediate scrutiny” to classifications based on

¹⁴⁵ *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; *CAEPI*, 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).

¹⁴⁶ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEPI*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁴⁷ *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).

¹⁴⁸ *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).

¹⁴⁹ *Id.*

¹⁵⁰ 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 (CAEPI)*, 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.

¹⁵¹ 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).

¹⁵² *Coral Constr.*, 941 F.2d at 925.

¹⁵³ 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).

¹⁵⁴ *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.

gender.¹⁵⁵ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁵⁶

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

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

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁵⁸

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the

¹⁵⁵ *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, e.g., *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); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286-1287 (E.D. Ark. 2014); *Conser v. Bidy*, 274 Ark. 367, 625 S.W.2d 457 (Ark. S. Ct. 1981); *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (Ark. S. Ct. 1979); 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); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)).

¹⁵⁶ See, e.g., *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *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)); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286-1287 (E.D. Ark. 2014); *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 *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁵⁷ *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *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); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286-1287 (E.D. Ark. 2014); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *Conser v. Bidy*, 274 Ark. 367, 625 S.W.2d 457 (Ark. S. Ct. 1981); *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (Ark. S. Ct. 1979); 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); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁵⁸ *Id.*

objective.¹⁵⁹ The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁶⁰

The courts in the Eighth Circuit have held: “Restrictions based on gender are subject to intermediate scrutiny. “The burden of justification is demanding and it rests entirely on the State.”¹⁶¹ “The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹⁶² “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”¹⁶³

The Fourth Circuit in *H. B. Rowe*, found that the disparity analysis demonstrated women-owned businesses won far more than their expected share of subcontracting dollars during the study period.¹⁶⁴ Therefore, the court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects.¹⁶⁵ The court held the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires.¹⁶⁶

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.”¹⁶⁷

The Seventh Circuit Court of Appeals, however, in *Builders Association 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 in connection with a challenge to the MBE program involved in that case.¹⁶⁸ The Court

¹⁵⁹ See, e.g., *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *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.”); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286-1287 (E.D. Ark. 2014); *Conser v. Biddy*, 274 Ark. 367, 625 S.W.2d 457 (Ark. S. Ct. 1981); *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (Ark. S. Ct. 1979).

¹⁶⁰ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁶¹ *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996))

¹⁶² *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)) (internal quotation marks omitted)

¹⁶³ *Id.*

¹⁶⁴ 615 F.3d 233 at 254.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 255.

¹⁶⁷ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁶⁸ *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642, 644-45 (7th Cir. 2001).

in *Builders Association* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.¹⁶⁹

The Tenth Circuit in *Concrete Works* stated as follows in connection with the type of evidence involving the participation of WBEs:

“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 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.”¹⁷⁰ 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.¹⁷¹ The Court in *Contractors Association of Eastern Pennsylvania (CAEP I)* held the city had not produced enough evidence of discrimination, noting that in its brief, the city relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in city contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁷²

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.¹⁷³ 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.¹⁷⁴ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁷⁵ 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.¹⁷⁶ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

¹⁶⁹ 256 F.3d 642, 644-45 (7th Cir. 2001).

¹⁷⁰ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁷¹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁷² *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁷³ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Therefore, the Court in *CAEP I* affirmed the grant of summary judgment invalidating the gender preference for construction contracts.¹⁷⁷ 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.¹⁷⁸

4. 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.¹⁷⁹ 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.¹⁸⁰

Courts, including in Arkansas and the Eighth Circuit Court of Appeals in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”¹⁸¹ So

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 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); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; (4th Cir. 2010); *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.”); *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) ; see, e.g. *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

¹⁸⁰ 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); *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33(1996); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *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.”); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *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); see, *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

¹⁸¹ See, e.g., *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (quoting *United States v. Virginia*, 518 U.S. 515, 531-33(1996); *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.”); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023); see, *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); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *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).

long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.¹⁸²

“[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.”¹⁸³ 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.”¹⁸⁴

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.”¹⁸⁵ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁸⁶

¹⁸² *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)); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); 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); see, *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.”); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

¹⁸³ *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); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); 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); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

¹⁸⁴ *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); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); 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); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

¹⁸⁵ *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); *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.”); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); 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).

¹⁸⁶ *Id.*; see, *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.”); *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. 2023); *Brown v. State*, 2015 Ark. 16, 454 S.W.3d 226 (Ark. S. Ct. 2015); *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (Ark. S. Ct. 2002); *Physicians’ Specialty Hospital, LLC v. Arkansas Department*, 2023 Ark. App. 197, 666 S.W.3d 107 (Ark. App. 2023).

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.”¹⁸⁷

Arkansas courts hold that the party challenging a statute's constitutionality has the burden of proving that the act lacks a rational relationship to a legitimate objective of the legislature under any reasonably conceivable set of facts. It is not their role to discover the actual basis for the legislation. They merely consider whether there is any rational basis which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation *is not the product of arbitrary and capricious government purposes*. If they determine that any rational basis exists, the statute will withstand constitutional challenge.¹⁸⁸

An informative example of the application of the rational basis standard is the Third Circuit in *CAEP I* ruling regarding the City's 2 percent preference for businesses owned by “handicapped” persons.¹⁸⁹ 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.¹⁹⁰ 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.”¹⁹¹

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.”¹⁹² 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.”¹⁹³

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

¹⁸⁷ *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); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); 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.”).

¹⁸⁸ *Arkansas Hosp. Ass'n v. Arkansas St. Bd. Of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). See also *Smith v. Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990).

¹⁸⁹ 6 F.3d *Id.* at 1011 (3d Cir. 1993).

¹⁹⁰ *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993), citing 735 F.Supp. at 1308.

¹⁹¹ *Id.*, citing *Cleburne*, 473 U.S. at 440.

¹⁹² 6 F.3d at 1011, citing 509 U.S. 312-43 (1993)

¹⁹³ *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)).

the district court that these were legitimate goals, but unlike the district court, the Third Circuit held the 2 percent preference was rationally related to this goal.¹⁹⁴

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 (Firstline)* 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).¹⁹⁵

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.”¹⁹⁶

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.¹⁹⁷ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”¹⁹⁸

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.¹⁹⁹ 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... .”²⁰⁰

5. 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 socially and economically disadvantaged business programs that may potentially impact and are informative and instructive to the study, including the following:

a. *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). This was a

¹⁹⁴ 6 F.3d at 1011.

¹⁹⁵ 2012 WL 5939228 (Fed. Cl. 2012).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

challenge to the Federal DBE Program. Federal Defendants' Motion to Dismiss was Granted and Plaintiffs' Motion for Preliminary Injunction Denied on March 31, 2023. Judgment entered on April 3, 2023. Case did not reach merits.

b. *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration (SBA)*, 993 F.3d 353, 2021 WL 2172181 (6th Cir. May 27, 2021). The President signed the American Rescue Plan Act of 2021 (ARPA). H.R. 1319, 117th Cong. (2021). As part of ARPA, Congress appropriated \$28.600 billion to a Restaurant Revitalization Fund (RRF) and tasked the Administrator of the SBA with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. Under ARPA, the Administrator prioritized awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

The Court stated 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. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the discriminatory disbursement of RRF funds was not narrowly tailored to further that interest.

c. *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. Similar to *Vitolo*, above, *Greer* sought monetary relief under the \$28.6 billion RRF created by ARPA and administered by the SBA. The court held that Plaintiffs were 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 violated the Equal Protection Clause of the Constitution. The court granted Plaintiffs' motion for temporary restraining order (TRO), and enjoined Defendants to process Plaintiffs' application for an RRF grant.

d. *Faust v. Vilsack*, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021). The court granted Plaintiffs' motion for a TRO holding the federal government's use of racial classifications in awarding funds under the United States Department of Agriculture (USDA) loan forgiveness program was unconstitutional. The court held, "Defendants have not established that the loan forgiveness program ... is narrowly tailored and furthers compelling government interests."

e. *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. This 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 the federal Defendants (the USDA Secretary) enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of ARPA. The court held the government did not satisfy the strict scrutiny standard as it did not establish a compelling government interest or that the program was narrowly tailored.

f. *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. The court declared that Defendants' use of the rebuttable presumption of social disadvantage to certain minority groups to qualify them for inclusion in the federal Section 8(a) Program violated Ultima's Fifth Amendment right to equal protection of the law. The court ordered that Defendants were enjoined from using the rebuttable presumption of social disadvantage in administering the SBA's 8(a) Program holding the federal defendants did not satisfy the strict scrutiny standard as they did not establish a compelling government interest for their use of the rebuttable presumption and that presumption was not narrowly tailored to serve the asserted interest.

g. *Nuziard, et al. v. MBDA, et al.*, 721 F. Supp. 3d 431 (N.D. Tex. 2004), appeal dismissed, 2024 WL 5279784 (5th Cir. 2024); 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. 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 alleged this agency is dedicated to helping only certain businesses based on race or ethnicity. The court granted the Plaintiffs' Motion for Preliminary Injunction in June 2023, and Motion for summary Judgment in March 2024, holding the MBDA statute is unconstitutional, finding the federal defendants did not produce sufficient evidence of a compelling government interest, that the MBDA's racial presumption is not narrowly tailored, and thus the MBDA did not satisfy the strict scrutiny standard.

h. *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et. al.*, 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024); 2024 WL 4267183 (Sept. 23, 2024), U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFV. Plaintiffs filed this suit challenging the Federal DBE Program. Plaintiffs sought 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. Plaintiffs' Motion for Preliminary Injunction was granted that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups regarding its contracts impacted by DBE goals. The parties filed a joint motion to stay the case for 90 days as USDOJ is considering its position whether or not to defend the Federal DBE Program in light of the Executive Orders issued by the President on January 21, 2025 prohibiting diversity, equity, and inclusion; affirmative action; and preference programs based on race or gender.

i. *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. Challenge to the Houston MBE Program. Pending.

j. *Mechanical Contractors Assoc. of Memphis, Inc. v. Shelby County, Tennessee, et al.*, U.S. District Court for the Western District of Tennessee, Case No. 2:24 -cv- 02420 -JTF, Complaint filed November 6, 2024. Challenge to the County MBE Program. Pending.

k. *Aerospace Solutions, LLC v. Abott in his official capacity as Governor of the state of Texas, et al.*, US District Court for the Western District of Texas, Civ. Action No. 1:24-cv-1383, Complaint filed November 13, 2024. Challenge to the Texas HUB Program. Pending.

I. Landscape Consultants of Texas Inc. v. Harris County Texas, et-al., U.S. District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:25cv479. Complaint filed February 5, 2025. Challenge to the County MBE Program. Pending.

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 USD) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of ARP) 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 have been dismissed by the Courts.

m. January 2025 Executive Orders (Eos). At the time of this report, the President has issued multiple EOs involving prohibiting and elimination DEI programs and preferences and affirmative action programs concerning federal contractors and subcontractors in connection with federally funded projects. These EOs include a January 21, 2025 EO No. 14173, eliminating EO No. 11246. Executive Order 11246, required federal contractors to take affirmative action to ensure applicants and employees are treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

On January 21, 2025, the president issued EO 14173 entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." The Order instructs federal agencies to take administrative and legal action against DEI programs, which it defines as systems of race- and sex-based preferences. The Order is directed at both public- and private-sector conduct. The EO "instructs the Office of Federal Contract Compliance Programs to immediately cease: (A) Promoting 'diversity'; (B) Holding Federal contractors and subcontractors responsible for taking 'affirmative action'; and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin." It also instructs the Attorney General to submit a report containing recommendations for "enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including [diversity equity and inclusion]." That report is due on May 21, 2025.

On January 20, 2025, the President issued the EO "Ending Radical and Wasteful Government DEI Programs and Preferencing" that terminates "all discriminatory programs, including illegal DEI" and "diversity, equity, inclusion, and accessibility (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government ... " and terminates all "equity action plans," "equity" actions, initiatives, or programs, equity-related grants or contracts, and all DEI or DEIA performance requirements for employees, contractors, or grantees.

Certain of these EOs and their application are being challenged in court in cases pending at the time of this report. It is not clear if these EOs specifically may impact local and state government programs that implement contracting goals and do not involve federal funds or financial assistance.

Thus, this Appendix report does not address these EOs. There have been challenges in court to these EO, which cases are pending. For example, a federal district court in the District of Maryland has entered a nationwide preliminary injunction against the EO that target DEI type programs. *See, Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, 2025 WL 573764 (D. Md. Feb. 21, 2025). This order was based on finding EO 14173 void for vagueness and violates the First Amendment.

n. February 5, 2025 Attorney General Memorandum. On February 5, 2025, the United States Attorney General issued a Memorandum titled "Ending Illegal DEI And DEIA Discrimination and Preferences." The Memorandum provides: "To fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

This Attorney General Memorandum "is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex."

The Attorney General Memorandum provides that by March 1, 2025, "consistent with Executive Order 14173, the Civil Rights Division and the Office of Legal Policy shall jointly submit a report to the Associate Attorney General containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA"

It is not clear at the time of this report whether this Memorandum and any report issued by the Attorney General will impact or potentially apply to certain local and state government programs that use contracting goals for contractors and do not involve federal funds or financial assistance.

Thus, this Appendix report does not address the Attorney General Memorandum. As stated above, there have been challenges in court to the EOs, which cases are pending. *See, Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, 2025 WL 573764 (D. Md. Feb. 21, 2025).

In addition, there is a February 13, 2025 letter from 16 states Attorneys General regarding: "Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives." The letter provides guidance supporting "the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as "DEI" or "DEIA" initiatives) in creating and maintaining legally compliant and thriving workplaces." The letter appears to be in response to the

recent EOs. The Attorney General of the State of Arkansas is not one of the signatories to the February 13, 2025 letter.

o. Title VI Complaint against the State of NY MWBE program and Wisconsin Department of Administration (DOA) for Supplier Diversity Program. Title VI Complaints have been filed with USDOJ by Contractors for Equal Opportunity, a nationwide association of companies alleged to have negatively been impacted by race discrimination in government contracting programs. A separate civil-rights complain under Title VI of the Civil Rights Act of 1964 was filed against both the New York Department of Economic Development (DED) and the Wisconsin Department of Administration (DOA) for their alleged respective discriminatory Minority and Women-Owned Business Enterprise Program (MWBE Program) and Supplier Diversity Program. DED and DOA are recipients of federal funds, and therefore the Complaints allege are subject to the nondiscrimination provisions of Title VI. The complaints state they are being filed with the USDOJ because DED and DOA receive federal grants from multiple federal agencies.

The complaints ask USDOJ to open an investigation into a state-based supplier and procurement program they allege discriminates against small businesses based on race. The complaints allege that many states operate similar programs, which are similar to the Federal DBE Program. If that federal program is unconstitutional, then the complaints allege, these state-based counterparts are similarly unconstitutional. The complaints request that USDOJ investigate these programs and determine they are operating in violation of Title VI. Each state agency operating such a program, the complaints allege, receives federal funds and is therefore bound by Title VI and subject to the DOJ's jurisdiction.

The complaints allege that DED and DOA cannot offer any justification to defend their MWBE and Supplier Diversity type programs, which illegally discriminate by enforcing a percentage goal utilization rate for minority- and women-owned businesses in state procurement and contracting. The complaints allege that under *Students for Fair Admission v. Harvard* (which was a Title VI case), programs like these must pass several independent tests, which DED and DOA cannot satisfy.

First, the complaints allege that DED's and DOA's programs are illegal because they do not remedy "specific, identified instances of past discrimination that violated the Constitution or a statute." Second, the complaints allege, DED or DOA cannot "articulate a meaningful connection between the means they employ and the goals they pursue." For example, DED and DOA, the complaints allege, employ the same type of "overbroad" and "imprecise" racial categories employed by Harvard and North Carolina.

Third, the complaints allege, DED's and DOA's programs use race as a "negative." White business owners cannot bid on equal footing with minority-owned firms, which the complaints allege, have a preference and exclusive access to resources based on race.

Fourth, the complaints allege DED's and DOA's programs further "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." Fifth, DED's and DOA's programs allegedly have no "logical end point. Under *SFFA*, the complaints allege, a race-based government program must meet all five of these requirements to comply with Title VI, and DED and DOA cannot meet any of these requirements.

Based on this evidence, the complaints ask that the DOJ open a formal investigation and find that DED's and DOA's MWBE and Supplier Diversity Programs violate Title VI. The complaints assert that corrective action should include, at a minimum, a requirement that the program be open to all businesses regardless of race, or that the programs should be terminated immediately so that all procurement and contracting decisions at DED and DOA are race neutral.

p. Arkansas Act to Prohibit Discrimination or Preferential Treatment by the State of Arkansas and Other Public Entities. The State of Arkansas Legislature recently passed a state law, 2025 Senate Bill 3, that prohibits any programs which discriminate or provide preferential treatment because of race, sex, color, ethnicity or national origin. The law provides in pertinent part as follows:

Section 21. Arkansas Code Title 25, Chapter 1, Subchapter 1, was amended to add an additional section to read as follows:

25-1-130. Prohibition of discrimination or preferential treatment by state entities.

- (a) As used in this section, "state" means the State of Arkansas, a city, a county, an institution of higher education, a public school district, a public special school district, or a political subdivision or governmental instrumentality of the state.
- (b) The state shall not discriminate against, or grant preferential treatment to, an individual or group on the basis of race, sex, color, ethnicity, or national origin in matters of state employment, public education, or state procurement.
- (c) This section applies only to an action taken after the effective date of this act.
- (d) This section does not:
 - (1) Prohibit the consideration by the state of bona fide qualifications based on sex that are reasonably necessary to the normal functions of state employment, public education, or state procurement;
 - (2) Invalidate a court order or consent decree that is in force as of the effective date of this act;
 - (3) Prohibit an action necessary to establish or maintain eligibility for a federal program if ineligibility would demonstrably result in a loss of federal funds to the state;
 - (4) Affect any preference given to veterans in matters of state employment, public education, or state procurement; or
 - (5) Preempt state discrimination law or federal discrimination law.
- (e) A person who knowingly violates this section is guilty of a Class A misdemeanor.
- (f) (1) A person who believes his or her rights have been impacted under this section may bring a civil action in circuit court to:
 - (A) Enjoin a violation of this section; and
 - (B) Recover reasonable court costs and attorney's fees.
- (2) In an action brought under this section, if the court finds that a violation occurred, the court shall award:
 - (A) Injunctive relief; and
 - (B) Court costs and attorney's fees.

The Act repealed Arkansas Code Section 25-36-103, which provided:

25-36-103. Agency contracting — Diversity.

- (a) A state agency shall include in all requests for proposals and requests for qualifications, language that encourages minority participation in each request for proposals and request for qualifications issued by the state agency.
- (b) (1) State agency requests for proposals and requests for qualifications shall take into consideration minority inclusion in the proposed project.
- (2) Requests for proposals and requests for qualifications shall provide that an applicant unable to include minority-owned businesses may explain the circumstances preventing minority inclusion.

q. Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE programs, or race-, ethnicity-, or gender-neutral programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds, including public agencies, commissions, and authorities. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Eighth Circuit Court of Appeals

1. *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*, 2022 WL 3350525 (8th Cir. 2022). In 2020, The court 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.

a. 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 USDOT Federal 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).

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.

b. Strict scrutiny standard. 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 woman-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.

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)).

c. Personal net worth limitation. 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 asked 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 offered no authority for the premise that an individual narrow tailoring measure which differentiates between individuals or businesses based on a nonsuspect 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.

d. Narrow tailoring. 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 woman-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.

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.

2. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004). This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case is also instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

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

Sherbrooke and *Gross Seed* both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment’s Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads (Nebraska DOR) under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT’s and Nebraska DOR’s implementation of the Program also was constitutional and valid.

b. Strict scrutiny: compelling governmental interest. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, *Sherbrooke* and *Gross Seed* argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The

government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

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

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

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

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

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

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

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

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

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

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

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent woman-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent.

Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

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

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors.

The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke* (See district court opinions discussed *infra.*).

3. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014). In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, FHWA, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and MnDOT's implementation of the DBE Program on its face and as applied.

Geyer Signal sought an injunction against MnDOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the program improperly; a declaratory judgment declaring that the DBE Program violates the Equal Protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that MnDOT's implementation of the program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

a. Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, USDOT and FHWA filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Interveners requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Interveners and the plaintiffs filed a Stipulation that the Federal Defendant-Interveners have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervener's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Interveners may intervene in this lawsuit, be approved and that the Federal Defendant-Interveners are permitted to intervene in this case.

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

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

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

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

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

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

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

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

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

e. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court

considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

f. Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and woman-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and woman-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and woman-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.*

Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

g. The court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the Federal DBE Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

h. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the Federal DBE Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

i. Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing, and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing, and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

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

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

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

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

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

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

k. As-applied challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

l. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

m. Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability when DBEs will also compete for prime contracts and any success will be

reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

n. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

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

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

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

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the

government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

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

p. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

q. Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

4. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009). In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (VOP) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors that had their bids accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

a. The VOP. Under the VOP, the City sets annual benchmarks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various “good faith” requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

b. Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

c. Plaintiff’s claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiffs' claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

5. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001)(unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003). *Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued MnDOT claiming the Federal DBE provisions of TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," USDOT implementing regulations, and MnDOT's participation in the DBE Program. USDOT and FHWA intervened as federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals—simply on the basis of their birth—will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

a. *Sherbrooke*, 2001 WL 1502841 at *10 (D. Minn.). The court rejected plaintiff's claim that MnDOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at *11 (emphasis added).

The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

6. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003). The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska DOR DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program.

The court pointed out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

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

7. *CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.*; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099. Plaintiffs alleged this case arises from Defendant’s MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claimed that African Americans, Hispanic Americans, and Asian Americans are only required to “have origins” in any groups or peoples from certain parts of the world. This action alleged violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the United

States Constitution based on these definitions constituting per se discrimination. Plaintiffs sought injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs alleged they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs alleged the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs alleged the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs alleged the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans, and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also alleged that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs requested judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provides the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the

case to mediation “immediately,” with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs \$15,000 in attorney’s fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs’ certification applications and will provide a decision on each application by August 2, 2021. If the Plaintiffs are not certified as an MBE under the revised October 2020 rules, Plaintiffs reserved their right to pursue all claims relating to the decision.

APPENDIX C.

Availability Methodology

BBC Research & Consulting (BBC) used a custom census approach to estimate the availability of businesses located in the Little Rock metropolitan area for the construction, professional services, and goods and support services prime contracts and subcontracts the City of Little Rock (the City) awards. Appendix C expands on the information presented in Chapter 6 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 hundreds of businesses throughout the *relevant geographic market area (RGMA)*, which we identified as the six-county area consisting of Pulaski, Saline, Faulkner, Grant, Lonoke, and Perry Counties in central Arkansas. Davis Research surveyed businesses with locations in the RGMA that perform work in fields closely related to the types of contracts and procurements the City awarded between January 1, 2019 and December 31, 2023 (i.e., the *study period*). We began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract the City awarded during the study period and by 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 2,981 local businesses that perform work relevant to City contracting and procurement. We were able to successfully contact 944 of those businesses, 485 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, and veteran-owned businesses for City work in an accurate, statistically valid manner. In addition, we did not design the survey effort to contact every local business performing construction, professional services, or goods and support services work. Instead, we reviewed the relevant prime contract and subcontract dollars the City 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 C-1 lists 8-digit work specialization codes within construction, professional services, and goods and support services most related to the contract and procurement dollars the City 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 C-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 C. We modified the construction survey instrument slightly for use with businesses working in professional services and goods and support services to reflect terms more commonly used in those industries and to collect information specifically relevant to them. (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 16 sections, and Davis Research attempted to cover all sections with each business the firm successfully contacted.

a. Identification of purpose. The surveyor began by identifying the City as the survey sponsor and describing the purpose of the study. (e.g., “The City is conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, the City wants to understand the availability of different types of businesses for the contracts and procurements it awards. 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 Little Rock.”)

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 non-profit 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.

e. Confirmation of primary line of work. Next, the surveyor confirmed the business’ primary line of work according to D&B (Question A3a). If D&B’s information was incorrect, the respondent was asked to describe the business’ primary line of work (Question A3b). The surveyor then asked about other types of work the business performs (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.

Figure C-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Excavation, drilling, wrecking, and demolition	
15420100	Commercial and office building contractors	16290400	Land preparation construction
15420101	Commercial and office building, new construction	16290401	Land leveling
15420103	Commercial and office buildings, renovation and re	16299902	Earthmoving contractor
15210101	General remodeling, single-family houses	17940000	Excavation work
15420403	Hospital construction	17949901	Excavation and grading, building construction
15410000	Industrial buildings and warehouses	17959900	Wrecking and demolition work, nec
17990606	Kitchen and bathroom remodeling	17959902	Demolition, buildings and other structures
15220107	Multi-family dwellings, new construction		
15220000	Residential construction, nec		
Concrete, asphalt, sand, and gravel products		Fencing, guardrails, barriers, and signs	
32730000	Ready-mixed concrete	17999912	Fence construction
		52119907	Fencing
Electrical work		Landscaping services	
17310304	Telephone and telephone equipment installation	7810200	Landscape services
17310305	Voice, data, and video wiring contractor	7820203	Lawn care services
17310403	Fire detection and burglar alarm systems specializ	7839902	Removal services, bush and tree
17319903	General electrical contractor	17110300	Sprinkler contractors
17319904	Lighting contractor		
76290000	Electrical repair shops	Painting, striping, and marking	
		17210200	Commercial painting
		17210303	Pavement marking contractor

Figure C-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description
Construction (continued)	
Plumbing and HVAC	
17110000	Plumbing, heating, air-conditioning
17110200	Plumbing contractors
17110301	Fire sprinkler system installation
17110400	Heating and air conditioning contractors
17110401	Mechanical contractor
76239901	Air conditioning repair
Trucking, hauling, and storage	
42130000	Trucking, except local
42139901	Automobiles, transport and delivery
Water, drainage, and utility lines	
16230000	Water, sewer, and utility lines
16230203	Telephone and communication line construction
16239906	Underground utilities contractor
16290105	Drainage system construction
17310302	Fiber optic cable installation
17999907	Dewatering
Road construction and concrete work	
16110200	Surfacing and paving
16110202	Concrete construction: roads, highways, sidewalks,
16110205	Resurfacing contractor
16229901	Bridge construction
17710000	Concrete work
17710301	Blacktop (asphalt) work
17710303	Parking lot construction
17910000	Structural steel erection
17959901	Concrete Breaking For Streets and Highways
Other construction materials	
34419901	Building components, structural steel
35320300	Crushing, pulverizing, and screening equipment
36259904	Control equipment, electric
50310304	Doors, nec
50310307	Windows
50820304	Excavating machinery and equipment
52310100	Glass
52519901	Builders' hardware
Other construction services	
16290505	Waste water and sewage treatment plant constructio
17110201	Septic system construction
17210101	Exterior residential painting contractor
17410000	Masonry and other stonework
17420101	Drywall
17519900	Carpentry work, nec
17610000	Roofing, siding, and sheetmetal work
17610103	Roofing contractor
17930000	Glass and glazing work
17990105	Swimming pool construction
17990209	Waterproofing
17990611	Appliance installation
17999902	Artificial turf installation
72999905	Handyman service

Figure C-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and support services			
Cleaning and janitorial services		Vehicle maintenance and repair	
73490000	Building maintenance services, nec	75320401	Body shop, automotive
73490101	Building cleaning service	75320405	Tops (canvas or plastic), installation or repair:
73490102	Building maintenance, except repairs	75360000	Automotive glass replacement shops
73490104	Janitorial service, contract basis	75370000	Automotive transmission repair shops
73499902	Cleaning service, industrial or commercial	75380000	General automotive repair shops
76991700	Cleaning services	75380101	Diesel engine repair: automotive
		75389902	General truck repair
		75390400	Brake services
Office equipment and supplies		75490100	Automotive maintenance services
26530000	Corrugated and solid fiber boxes	76990000	Repair services, nec
50440000	Office equipment	76992400	Miscellaneous automotive repair services
59991401	Business machines and equipment		
59991402	Photocopy machines	Vehicle parts and supplies	
73590500	Business machine and electronic equipment rental s	50130100	Automotive supplies and parts
		50140000	Tires and tubes
Safety equipment		50149901	Automobile tires and tubes
36990502	Security control equipment and systems	50840602	Engines and parts, diesel
38420100	Personal safety equipment	55310100	Auto and truck equipment and parts
50990300	Safety equipment and supplies	55310103	Automotive parts
59990100	Alarm and safety equipment stores	55310107	Truck equipment and parts
		55319901	Automotive tires
Security guard services		Waste and recycling services	
73810100	Guard services	42129906	Garbage collection and transport, no disposal
73810104	Protective services, guard	49530000	Refuse systems
73810105	Security guard service	49530200	Refuse collection and disposal services
		49530201	Garbage: collecting, destroying, and processing
Uniforms and apparel		49530301	Dumps, operation of
56990102	Uniforms	49539905	Recycling, waste materials

Figure C-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and support services (continued)			
Other goods		Other services	
50851000	Gaskets and seals	17310400	Safety and security specialization
50999912	Signs, except electric	17310402	Closed circuit television installation
57120200	Customized furniture and cabinets	27590300	Promotional printing
57129904	Office furniture	72510104	Shoe repair shop
		75490301	Towing service, automotive
Professional Services			
Advertising, marketing, and public relations		Construction management	
73110000	Advertising agencies	87419902	Construction management
73119901	Advertising consultant		
87420300	Marketing consulting services		
Architectural and design services		Engineering	
73890602	Interior designer	87110000	Engineering services
87120000	Architectural services	87110202	Mechanical engineering
		87110400	Construction and civil engineering
		87110402	Civil engineering
		87110404	Structural engineering
		87119903	Consulting engineer
Bookkeeping and accounting		87119909	Professional engineer
72910000	Tax return preparation services	87120101	Architectural engineering
87210000	Accounting, auditing, and bookkeeping		
87210101	Certified public accountant		
87210200	Accounting services, except auditing		
Business services and consulting		Environmental services	
73899999	Business Activities at Non-Commercial Site	87119906	Energy conservation engineering
87420504	New business start-up consultant	87489904	Energy conservation consultant
87429900	Management consulting services, nec	87489905	Environmental consultant
87429902	Business management consultant	89990701	Geological consultant

Figure C-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services (continued)			
Human resources and job training services		Landscape architecture	
73610000	Employment agencies	7810201	Landscape architects
73610101	Executive placement	7810203	Landscape planning services
73630103	Temporary help service		
82439903	Software training, computer	Surveying and mapmaking	
87420200	Human resource consulting services	87130000	Surveying services
87420206	Training and development consultant		
IT and data services		Transportation planning services	
17319902	Computer installation	87420410	Transportation consultant
73730200	Systems integration services		
73790100	Computer related maintenance services	Other professional services	
73790200	Computer related consulting services	87420404	Hospital and health services consultant

f. Headquarters location and parent company. The surveyor asked if the business had multiple locations, and if so, where the business was headquartered (Questions A4, A5, and A5a). The surveyor also asked if the business was a subsidiary of a larger business, and if so, what the name of the parent company was (Questions A6 and A7).

g. Business roles. For construction- and professional services-related work, the surveyor asked whether the business is willing and able to work as a prime contractor, subcontractor, or supplier. Businesses could work in multiple roles (Questions B1 through B3). This question was not included in the goods and support services survey instrument.

h. Location of work. The surveyor confirmed that the business was able to serve customers in Little Rock (Question C1).

i. Interest in work with government. The surveyor asked whether the business was interested in future work with the City or other local government agencies (Question B4).

j. Capacity. The surveyor asked about the value of the largest prime contract or subcontract the business could perform (Question D1).

k. Race, gender, and veteran status. The surveyor asked whether the business was at least 51 percent owned and controlled by POCs or women (Questions E1 and E2). If the respondent indicated that the business was POC-owned, the respondent was also asked about the race of the business' owner(s) (Question E3). The surveyor also asked whether the business was veteran-owned (Question E4). BBC attempted to confirm that information through several other data sources, including:

- City vendor data;
- The Arkansas Economic Development Commission business directory;
- The Arkansas Department of Transportation list of disadvantaged business enterprises;
- Small Business Administration business directories;
- 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. Number of employees and revenue. The surveyor asked questions about the business' size in terms of its revenue and number of employees across all its locations (Questions F1 through F4).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question about the respondents' experiences working with the City and other local government agencies (Question G1). In addition, the surveyor asked whether the respondent would be willing to participate in a follow-up interview about conditions in the local marketplace. BBC used responses to this question to recruit participants for in-depth interviews (Question G2).

n. Contact information. The survey concluded with questions about the respondent's name, position, and contact information (Questions H1 through H3).

D. Survey Execution

Davis Research conducted all availability surveys between October 2024 and April 2025. The firm attempted to survey the owner, manager, or other officer of each business who could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure C-2 presents the disposition of the 2,981 businesses the study team attempted to contact for availability surveys and how that number resulted in the 944 businesses the study team was able to successfully contact.

Figure C-2.
Disposition of attempts to contact
businesses for availability surveys

	Number of businesses
Beginning list	2,981
Less non-working phone numbers	322
Less wrong number/business	152
Unique business listings with working phone numbers	2,507
Less no answer	1,260
Less could not reach responsible staff member	301
Less language barrier	2
Businesses successfully contacted	944

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B were:

- Non-working phone numbers (322 listings); or
- Wrong numbers for the desired businesses (152 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 C-2, there were 2,507 businesses with working phone numbers Davis Research attempted to contact. The firm was unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 1,260 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 301 businesses.
- The firm could not conduct the availability survey due to language barriers for two businesses.

Thus, Davis Research was able to successfully contact 944 businesses.

2. Businesses included in the availability database. Figure C-3 presents the disposition of the 944 businesses Davis Research successfully contacted and how that number resulted in the 485 businesses that completed surveys and the 409 businesses BBC considered potentially available for City work.

**Figure C-3.
Disposition of successfully
contacted businesses**

	Number of businesses
Businesses successfully contacted	944
Less businesses not interested in discussing availability for work	332
Less companies no longer in business	95
Less does not work in Little Rock area	11
Less not a for-profit business	21
Businesses that completed surveys	485
Less line of work outside of study scope	5
Less not interested in work with government	63
Less multiple locations of same business	8
Businesses potentially available for City of Little Rock work	409

a. Businesses not eligible or interested in discussing availability for City work. Of the 944 businesses the study team successfully contacted:

- The surveyors excluded 332 businesses because they refused to continue the survey or discuss their availability for City work.
- We excluded 95 businesses from the analysis that indicated they were no longer in business.
- We excluded 21 responses from the analysis that indicated they were not-for-profit businesses.
- We excluded 11 businesses because they indicated they do not perform work in Little Rock.

b. Businesses available for City work. A total of 485 businesses completed availability surveys, but BBC deemed only a portion of those businesses as potentially available for the prime contracts and subcontracts the City awarded during the study period. We excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded five businesses that reported primary lines of work outside the study scope.¹
- We excluded 63 businesses that reported they were not interested in contracting opportunities with the City or other government organizations.
- Eight 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 different locations of the same business indicated different lines of work, BBC conducted additional secondary research to reconcile that information into one primary line of work.
 - BBC combined the different roles of work (i.e., prime contractor or subcontractor) that different respondents representing the same business reported into a single response. For example, if one respondent reported that the business works as a prime contractor and another respondent reported that the business works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts.

¹ Examples include grocery stores, health care, and financial investment consulting.

- BBC considered the largest project any respondents 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 409 businesses we considered potentially available for City work.

AVAILABILITY SURVEY INSTRUMENT.

Construction

Hello. My name is [INTERVIEWER NAME] from Davis Research, calling on behalf of the City of Little Rock, Arkansas. This is not a sales call. The City of Little Rock is conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, the city wants to understand the *availability* of different types of businesses for the contracts and procurements it awards. 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 Little Rock.

The survey is designed only to gather information and will have no impact on present or future work opportunities with the City of Little Rock. 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 in Little Rock?

[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.]

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 Y3]

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. 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 [SKIP to A6]

2=Have other locations

98=Don't know

99=Refused

A5. Is this location the principal location for your business, or is your business primarily conducted at another location?

[NOTE TO INTERVIEWER – "PRINCIPAL LOCATION" MEANS THE OFFICE AT WHICH SENIOR MANAGEMENT AND LEADERSHIP ARE LOCATED AND WHERE MANAGEMENT AND FINANCIAL RECORDS ARE MAINTAINED.]

1=Principal location is here [SKIP to A6]

2=Principal location at another location

98=(DON'T KNOW)

99=(REFUSED)

A5a. What is the city and state of your business' principal location?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. CITY

. STATE

1=VERBATIM

A6. 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]

A7. 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

C1. Is your business able to do work or serve customers in Little Rock?

1=Yes

2=No [TERMINATE]

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your business interested in performing work on projects for government or other public agencies, entities, or offices in Little Rock?

[NOTE TO INTERVIEWER: IF ASKED, EXAMPLES INCLUDE STATES, CITIES, COUNTIES, PUBLIC SCHOOLS AND UNIVERSITIES, TRANSPORTATION ORGANIZATIONS, AND OTHERS]

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

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=Greater than \$200 million

98=(DON'T KNOW)

99=(REFUSED)

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, Middle Eastern or North African, 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 (examples include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), 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 (examples include 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 (examples include American Indians, Alaska Natives, or Native Hawaiians)

5=Subcontinent Asian American (examples include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka)

6=Middle Eastern or North African (examples include persons whose origins are from Afghanistan, Algeria, Bahrain, Comoros, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen)

7=Other, specify _____

98=Don't know

99=Refused

E4. A business is defined as a 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?

[NOTE TO INTERVIEWER – U.S. MILITARY SERVICES INCLUDE THE U.S. ARMY, AIR FORCE, NAVY, MARINES, AND COAST GUARD.]

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 F1]

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)

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=Sole proprietorship/no employees	10=251-500 employees
2=1-4 employees	11=501-750 employees
3=5-9 employees	12=751-1,000 employees
4=10-25 employees	13=1,001-1,250 employees
5=26-50 employees	14=1,251-1,500 employees
6=51-100 employees	15=1,501 or more employee
7=101-150 employees	98=(DON'T KNOW)
8=151-200 employees	99=(REFUSED)
9=201-250 employees	

F3. Dun & Bradstreet lists the average annual gross revenue of your business, including all your locations, as [DOLLAR AMOUNT]. Is that an accurate estimate of your business' average annual gross revenue?

1=Yes [SKIP TO G1a]
2=No
98=Don't know [SKIP TO G1a]
99=Refused [SKIP TO G1a]

F4. Roughly, what was the average annual gross revenue of your business, including all of your locations?

1=VERBATIM

[READ LIST IF NECESSARY]

1=\$1 Million or less	7=More than \$12 Million to \$19 Million
2=More than \$1 Million to \$3 Million	8= More than \$19 Million to \$25 Million
3=More than \$3 Million to \$6 Million	9= More than \$25 Million to \$30 Million
4=More than \$6 Million to \$9 Million	10=More than \$30 Million
5=More than \$9 Million to \$10 Million	98= (DON'T KNOW)
6=More than \$10 Million to \$12 Million	99= (REFUSED)

G1. We're interested in whether your business has experienced barriers or difficulties related to working with, or attempting to work with, the City of Little Rock or other government or public agencies, entities, or offices in Little Rock. Do you have any thoughts to share?

1=VERBATIM [PROBE FOR COMPLETE THOUGHTS]

97=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

10=Other, specify _____

99=Refused

H3. At what email address can you be reached?

1= VERBATIM

The survey also included contact information for the City and BBC in case the survey taker had any questions or concerns.

APPENDIX D.

Disparity Analysis Results

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of person of color (POC)-, woman-, and veteran-owned businesses in construction, professional services, and goods and support services prime contracts and subcontracts the City of Little Rock (the City) awarded between January 1, 2019 and December 31, 2023 (the *study period*) with the percentage of contract and procurement dollars one might expect it to award to those businesses based on their availability for that work.¹ Appendix D presents results from the disparity analysis for relevant business groups and various sets of contracts the City awarded during the study period.

A. Format and Information

Each table in Appendix D presents disparity analysis results for a different set of contracts. For example, Figure D-1 presents disparity analysis results for all relevant contracts the City awarded during the study period. A review of Figure D-1 introduces the calculations and format of all disparity analysis tables in Appendix D. Figure D-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-owned businesses considered together.
- Rows (3) through (8) present results for businesses of each relevant race/ethnic group.
- Row (9) presents results for all White woman-owned businesses.
- Row (10) presents results for all veteran-owned businesses.

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 D-1, we analyzed 832 contract elements the City 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 (4) of column (a), Black-owned businesses participated in 93 contract elements the City 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 D-1, BBC examined approximately \$160 million that was associated with the 832 relevant contract elements the City awarded during the study period. The value presented in column (b) for each individual business group represents the dollars the City awarded to that particular group on the set of contract elements. For example, as shown in row (4)

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 column (b), the City awarded approximately \$9.8 million to Black-owned businesses during the study period.

- Column (c) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (c) by dividing the dollars going to a particular group in column (b) by the total dollars associated with the set of contract elements shown in row (1) of column (b), and then expressing the result as a percentage. For example, for Black-owned businesses, the study team divided \$9.8 million by \$160 million and multiplied by 100 for a result of 6.1 percent, as shown in row (4) of column (c).

2. Availability results. Column (d) of Figure D-1 presents the availability of each relevant group for all the contract elements BBC analyzed as part of the contract set. Availability represents the percentage of dollars one might expect the City 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 contracts. Availability estimates, which are represented as percentages of the total dollars associated with the contract set, serve as benchmarks against which to compare the participation of specific groups in those contracts. For example, as shown in row (4) of column (d), the availability of Black-owned businesses for City work is 9.8 percent. That is, one might expect it to award 9.8 percent of relevant contract dollars to Black-owned businesses based on their availability for that work.

3. Disparity indices. BBC calculated a disparity index, or ratio, for each relevant business group, which compares the participation of POC-, woman-, and veteran-owned businesses in City work to their estimated availability for that work. Column (e) of Figure D-1 presents the disparity index for each group. For example, as reported in row (4) of column (e), the disparity index for Black-owned businesses was \$0.63, indicating that the City awarded approximately \$0.63 to Black-owned businesses for every dollar one might expect it to award to them based on their availability for that work. For disparity indices exceeding \$2.00, BBC reported an index of “\$2.00+.” A disparity index of \$1.00 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability.

B. Index and Tables

The table of contents provides an index of the sets of contracts for which BBC presents disparity analysis results. In addition, the heading of each table in Appendix D provides a description of the subset of contracts BBC presents in that table.

Appendix D Figure Table of Contents

Table	Contract area	Contract role	Contract size
D-1	All industries	Prime contracts and subcontracts	All sizes
D-2	Construction	Prime contracts and subcontracts	All sizes
D-3	Professional services	Prime contracts and subcontracts	All sizes
D-4	Goods and support services	Prime contracts and subcontracts	All sizes
D-5	All industries	Prime contracts	All sizes
D-6	All industries	Subcontracts	All sizes
D-7	All industries	Prime contracts and subcontracts	Small contracts
D-8	All industries	Prime contracts and subcontracts	Large contracts

Figure D-1.
Time period: 01/01/2019 - 12/31/2023
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	832	\$160,222			
Race and Gender					
(2) POC	125	\$15,421	9.6 %	18.3 %	\$0.52
(3) Asian Pacific	5	\$175	0.1 %	1.3 %	\$0.08
(4) Black	93	\$9,837	6.1 %	9.8 %	\$0.63
(5) Hispanic	25	\$4,770	3.0 %	5.9 %	\$0.50
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.8 %	\$0.00
(8) Subcontinent Asian	2	\$638	0.4 %	0.4 %	\$1.11
(9) White woman	35	\$3,160	2.0 %	13.3 %	\$0.15
Veteran					
(10) Veteran	7	\$3,140	2.0 %	6.0 %	\$0.33

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-2.
Time period: 01/01/2019 - 12/31/2023
Contract area: Construction
Contract role: Prime contracts and subcontracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	416	\$119,040			
Race and Gender					
(2) POC	101	\$12,496	10.5 %	19.2 %	\$0.55
(3) Asian Pacific	5	\$175	0.1 %	1.3 %	\$0.11
(4) Black	70	\$7,256	6.1 %	9.3 %	\$0.66
(5) Hispanic	25	\$4,770	4.0 %	7.4 %	\$0.54
(6) MENA	0	\$0	0.0 %	0.2 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.9 %	\$0.00
(8) Subcontinent Asian	1	\$295	0.2 %	0.1 %	\$2.00 +
(9) White woman	9	\$1,006	0.8 %	10.4 %	\$0.08
Veteran					
(10) Veteran	2	\$12	0.0 %	5.3 %	\$0.00

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-3.
Time period: 01/01/2019 - 12/31/2023
Contract area: Professional services
Contract role: Prime contracts and subcontracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	209	\$22,381			
Race and Gender					
(2) POC	5	\$594	2.7 %	12.9 %	\$0.21
(3) Asian Pacific	0	\$0	0.0 %	1.1 %	\$0.00
(4) Black	4	\$251	1.1 %	8.3 %	\$0.13
(5) Hispanic	0	\$0	0.0 %	1.1 %	\$0.00
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.5 %	\$0.00
(8) Subcontinent Asian	1	\$343	1.5 %	1.8 %	\$0.87
(9) White woman	18	\$1,710	7.6 %	20.0 %	\$0.38
Veteran					
(10) Veteran	0	\$0	0.0 %	11.7 %	\$0.00

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-4.
Time period: 01/01/2019 - 12/31/2023
Contract area: Goods and support services
Contract role: Prime contracts and subcontracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	207	\$18,802			
Race and Gender					
(2) POC	19	\$2,331	12.4 %	19.5 %	\$0.63
(3) Asian Pacific	0	\$0	0.0 %	1.6 %	\$0.00
(4) Black	19	\$2,331	12.4 %	14.6 %	\$0.85
(5) Hispanic	0	\$0	0.0 %	2.3 %	\$0.00
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.4 %	\$0.00
(8) Subcontinent Asian	0	\$0	0.0 %	0.4 %	\$0.00
(9) White woman	8	\$444	2.4 %	23.9 %	\$0.10
Veteran					
(10) Veteran	5	\$3,129	16.6 %	4.2 %	\$2.00 +

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-5.
Time period: 01/01/2019 - 12/31/2023
Contract area: All industries
Contract role: Prime contracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	610	\$106,607			
Race and Gender					
(2) POC	108	\$11,496	10.8 %	16.7 %	\$0.65
(3) Asian Pacific	2	\$74	0.1 %	1.4 %	\$0.05
(4) Black	83	\$7,557	7.1 %	9.1 %	\$0.78
(5) Hispanic	22	\$3,521	3.3 %	4.9 %	\$0.67
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.6 %	\$0.00
(8) Subcontinent Asian	1	\$343	0.3 %	0.4 %	\$0.72
(9) White woman	25	\$2,143	2.0 %	14.5 %	\$0.14
Veteran					
(10) Veteran	4	\$3,102	2.9 %	6.5 %	\$0.45

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-6.
Time period: 01/01/2019 - 12/31/2023
Contract area: All industries
Contract role: Subcontracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	222	\$53,616			
Race and Gender					
(2) POC	17	\$3,925	7.3 %	21.7 %	\$0.34
(3) Asian Pacific	3	\$101	0.2 %	1.2 %	\$0.16
(4) Black	10	\$2,280	4.3 %	11.1 %	\$0.38
(5) Hispanic	3	\$1,249	2.3 %	7.8 %	\$0.30
(6) MENA	0	\$0	0.0 %	0.2 %	\$0.00
(7) Native American	0	\$0	0.0 %	1.2 %	\$0.00
(8) Subcontinent Asian	1	\$295	0.6 %	0.2 %	\$2.00 +
(9) White woman	10	\$1,018	1.9 %	10.8 %	\$0.18
Veteran					
(10) Veteran	3	\$38	0.1 %	5.2 %	\$0.01

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-7.
Time period: 01/01/2019 - 12/31/2023
Contract area: All industries
Contract role: Prime contracts

Small contracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	594	\$72,373			
Race and Gender					
(2) POC	107	\$10,176	14.1 %	18.1 %	\$0.78
(3) Asian Pacific	2	\$74	0.1 %	1.3 %	\$0.08
(4) Black	82	\$6,238	8.6 %	10.2 %	\$0.85
(5) Hispanic	22	\$3,521	4.9 %	5.1 %	\$0.95
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.8 %	\$0.00
(8) Subcontinent Asian	1	\$343	0.5 %	0.6 %	\$0.83
(9) White woman	25	\$2,143	3.0 %	14.0 %	\$0.21
Veteran					
(10) Veteran	3	\$708	1.0 %	7.0 %	\$0.14

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-8.
Time period: 01/01/2019 - 12/31/2023
Contract area: All industries
Contract role: Prime contracts

Large contracts

Business ownership by group	(a) Contract elements	(b) Dollars (thousands)	(c) Participation	(d) Availability	(e) Disparity index
(1) All businesses	16	\$34,234			
Race and Gender					
(2) POC	1	\$1,319	3.9 %	13.6 %	\$0.28
(3) Asian Pacific	0	\$0	0.0 %	1.6 %	\$0.00
(4) Black	1	\$1,319	3.9 %	6.8 %	\$0.56
(5) Hispanic	0	\$0	0.0 %	4.5 %	\$0.00
(6) MENA	0	\$0	0.0 %	0.1 %	\$0.00
(7) Native American	0	\$0	0.0 %	0.4 %	\$0.00
(8) Subcontinent Asian	0	\$0	0.0 %	0.2 %	\$0.00
(9) White woman	0	\$0	0.0 %	15.7 %	\$0.00
Veteran					
(10) Veteran	1	\$2,394	7.0 %	5.3 %	\$1.33

Note: Results do not include participation from any businesses that were located outside of the relevant geographic market area.

Source: BBC Research & Consulting Disparity Analysis.