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Draft Report

2012 Georgia Department of Transportation Disparity Study

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APPENDIX J.
Information from Local Agency Disparity Studies

The BBC study team identified four disparity studies completed by local governments in Georgia after January 1, 2009:

- City of Atlanta study (only the Executive Summary has been made public);
- Clayton County study;
- Augusta-Richmond County (ARC) study; and
- City of Savannah study (along with the County and School District).

At the time of this draft report, BBC was awaiting release of the disparity study conducted in Savannah.

Analysis of the Atlanta Metropolitan Area Marketplace for the City of Atlanta

Dr. Ian Ayres directed the disparity study for the City of Atlanta.[1] The study was completed in October 2009. The Atlanta disparity study examined construction, professional services and a wide range of other goods and services procurements made by the City from 2005 through 2008.

Analyses of the Atlanta metropolitan area marketplace. The report included a number of analyses concerning conditions within the Atlanta metropolitan area marketplace.

Quantitative analyses using secondary data. Dr. Ayres used many of the same sources of secondary data to examine firm ownership rates and owners' earnings that BBC utilized in the GDOT Disparity Study (e.g., Current Population Survey, decennial Census of Population). He reports for the Atlanta metropolitan area in 2000 that:

- Business ownership rates for African Americans, Hispanic Americans and women were lower than non-minorities and men, after controlling for neutral factors; and
- Business owner earnings for African Americans, Asian Americans, Hispanic Americans and women were lower than non-minorities and men, after controlling for neutral factors.

Dr. Ayres considered all industries as a whole in the above results.

[1] Dr. Ian Ayres. 2009. *City of Atlanta Disparity Study, Executive Summary.* Prepared for the City of Atlanta, Georgia.

Dr. Ayres examined access to financial capital using data from the 1998 and 2003 Surveys of Small Business Finances (SBBF). From his analyses for the South Atlantic region, he reported the following statistically significant disparities after controlling for neutral factors:

- Higher rates of "non-application for fear of loan denial" for African Americans and women;
- Higher rates of loan denial for African Americans; and
- Higher interest rates for those obtaining loans for African Americans and Hispanic Americans.

Analysis of total revenue of minority- and women-owned firms in the Atlanta area using Dun & Bradstreet data. For nine industries in the Atlanta metropolitan area, Dr. Ayres compared annual revenue of African American-, Asian-Pacific American-, Hispanic American- and women-owned firms to revenue of other firms. He compiled revenue information from Dun & Bradstreet. Focusing on results for construction and professional services, there were statistically significant disparities, after controlling for neutral factors, for:

- African American-, Hispanic American- and women-owned firms in the construction industry; and
- African American, Asian-Pacific American-, Hispanic American and women-owned firms in the professional, scientific and technical services industry (which includes engineering).

The analysis performed for the Atlanta report provides information on the utilization of firms in a race- and gender-neutral market.

Interviews with minority- and women-owned firms. The disparity study team led by Dr. Ayres conducted interviews with minority- and women-owned businesses that had worked as subcontractors on City projects. Many of the minority- and women-owned firms indicated that prime contractors using them on City contractors did not contact them for work on private sector projects or those public projects not requiring efforts to obtain minority or female firm participation.

Disparity analysis for City of Atlanta contracts. Dr. Ayres compared the City of Atlanta's utilization of minority- and women-owned firms as prime contractors and vendors (by racial/ethnic/gender group) with what might be expected from his availability analysis for City prime contracts. He examined City contracts from 2005 to 2008. With a few exceptions, Dr. Ayres did not identify substantial disparities between the utilization and availability of minority- and women-owned firms in City prime contracts.

Performing the disparity analysis for only small businesses (as defined by the U.S. Small Business Administration), Dr. Ayres identified substantial disparities in the utilization of Asian-Pacific American-owned firms and women-owned firms for City construction and professional services contracts (excluding joint-venture contracts), among other industries.

Analysis of the Atlanta Metropolitan Area Marketplace for Clayton County

Mason Tillman Associates, Ltd. conducted a disparity study for Clayton County.[2] The study compared the utilization and availability of minority- and women-owned firms in County contracting and collected anecdotal information about the local marketplace. Mason Tillman Associates completed the study in 2011.

Interviews with business owners. As part of the disparity study, Mason Tillman Associates held a business community meeting and conducted 40 one-on-one interviews with business owners within the study area (Clayton, Cobb, DeKalb, Fayette, Fulton, Gwinnett and Henry counties). Interviews included businesses owned by African Americans, Asian Americans, women and white men.

The interviews identified qualitative evidence of:

- Discrimination by prime contractors against subcontractors on the basis of race;
- Unequal pay for contractors' work based on the race and gender of the business owner;
- Unequal access to public sector professional services contracts for minority-owned firms;
- Negative stereotypes and stigmas associated with minority ownership of a professional services firm;
- Double-standards for work performed by minority- and women-owned construction and professional services firms compared with majority-owned firms;
- Racist and sexist comments made to minority and female business owners or representatives by non-minorities and men;
- Existence of a "good old boys' system" in Clayton County and across Georgia that negatively affects opportunities for firms outside that network; and
- Fraudulent use of MBE/WBE certification status by prime contractors and existence of MBE/WBE front companies.

Other insights from interviewees included:

- Preference of prime contractors to self-perform rather than subcontract work;
- Inability to break into Clayton County work for firms that had not received work in the past;
- Difficulty meeting County bidding requirements, including inability to secure bonding; and
- Difficulty obtaining financing.

[2] Mason Tillman Associates, Ltd. 2011. *Clayton County Disparity Study*. Prepared for Clayton County, Georgia

One minority-owned professional services firm specifically discussed perceived lack of opportunities on GDOT consultant contracts. He reported that his firm has not had opportunities as a subconsultant on GDOT consultant contracts because prime consultants prefer to use white women-owned subconsultants to meet DBE program requirements.

Disparity analysis for Clayton County contracts. Mason Tillman Associates compared utilization of minority- and women-owned firms on Clayton County contracts with what might be expected from their availability analysis for those contracts. They examined County contracts for FY 2004–FY2009.

Mason Tillman Associates identified disparities for African American, Hispanic American, Native American- and women-owned firms for County construction prime contracts less than $500,000. In addition to the above groups, the disparity study identified disparities in the utilization of Asian American-owned firms as subcontractors on County construction contracts.

For County professional services prime contracts less than $500,000, Mason Tillman Associates reported disparities in the utilization of African American-, Asian American-, Hispanic American-, Native American- and women-owned firms. The disparity study identified disparities for each of the above groups except for women-owned firms when examining professional services subcontracts.

Analysis of the Augusta Metropolitan Area Marketplace

NERA Economic Consulting completed a disparity study in 2009 for Augusta-Richmond County (ARC).[3] The Augusta disparity study examined construction, construction-related professional services, other services and commodities.

The Augusta disparity study includes many of the same quantitative analyses of the local marketplace, using the many of the same data sources, as BBC's disparity study for GDOT. NERA also performed a survey of business establishments in the Augusta metropolitan area and six group interviews of local businesses.

Survey of business establishments. In the NERA business survey, more than 40 percent of minority- and women-owned firms reported that they had experienced as least one instance of disparate treatment in one or more areas of business dealings listed in the survey. For example, 47 percent of African American-owned firms indicated that they had been treated less favorably due to their race when applying for commercial loans. Further NERA analyses indicated that size, qualifications and experience of firms could not explain the differences in survey responses for minorities and women compared with majority-owned companies.

The NERA survey also asked firms, "How often do prime contractors who use your firm as a subcontractor on public-sector projects with requirements for minority, women and/or disadvantaged businesses also hire your firm on projects (public or private) *without* such goals or requirements?" Most minority- and women-owned firms responded that this seldom or never occurs. A similar question asked whether firms were even solicited for bids on non-goals projects. Again, most minority- and women-owned firms responded that this seldom or never occurs.

[3] NERA Economic Consulting. 2009. *Race, Sex, and Business Enterprise: Evidence from Augusta, Georgia*. Prepared for Augusta-Richmond County, Georgia.

Group interviews of businesses. The group interviews conducted by the NERA study team included 114 business owners in the Augusta area. The interviews identified qualitative evidence of:

- Stereotypical attitudes and double standards for performance which negatively affect minorities and women in business.
- Exclusion of minorities and women from industry networks (sometimes referred to as the "good ol' boy network").
- The possibility that suppliers quote MBE/WBEs higher prices than other firms.
- Discrimination against minorities and women when applying for commercial loans.
- Difficulties obtaining surety bonds, which were reported to have a negative effect on prime contract and subcontract opportunities in the construction industry.
- Barriers for small businesses in obtaining public sector prime contracts as well as difficulties obtaining subcontracts, experiencing fair treatment and receiving timely payment. Some firms reported that they had been listed as subcontractors on contracts but then were not utilized on those contracts.
- Difficulty obtaining work on private sector and non-goals projects.

Utilization, availability and disparity analyses for Augusta-Richmond County contracts. NERA examined utilization of minority- and women-owned firms on ARC construction contracts during the 2003 through 2007 study period:

- About 3 percent of contract dollars went to African American-owned firms;
- Other minority-owned firms received about 1 percent of contract dollars; and
- White women-owned firms received about 2 percent of construction contract dollars.

These levels of utilization were substantially below what might be expected from NERA's availability analysis for construction contracts: 15 percent availability for African American-owned firms, 4 percent availability for other minority-owned firms, and 13 percent availability for white women-owned firms. NERA identified substantial disparities for each minority group and for white women when examining ARC construction contracts, even with ARC efforts in place to encourage utilization of minority- and women-owned firms.

It is instructive that disparities in the utilization of minority- and women-owned construction firms occurred even with ARC's operation of a DBE program. ARC discontinued that program after a 2007 federal district court ruling [4] (before completing the 2009 disparity study).

[4] *Thompson Building Wrecking Co., Inc. v. City of Augusta, Georgia*, No. 1:07 CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007).

NERA performed a similar analysis for ARC construction-related professional services contracts. Utilization of minority-owned firms was much higher for these contracts (28% of contract dollars) and, except for Asian American-owned businesses, there were no disparities for minority-owned firms on these contracts. There were substantial disparities for white women-owned firms, however.

Summary

The quantitative and qualitative information from local government disparity studies provides further insights into marketplace conditions for minority- and women-owned firms in Georgia. Results of the local government studies are consistent with much of the information from BBC's analysis of the Georgia construction and engineering industries.

APPENDIX I.
Analysis of Complaints from DBEs and Other Firms

GDOT has a process for receiving and investigating complaints from DBEs and other firms concerning implementation of the Federal DBE Program. GDOT can issue sanctions based upon these investigations. The BBC study team reviewed written complaints GDOT received between January 2009 and June 2011 related to operation of the DBE Program. The study team examined documentation in GDOT files and interviewed GDOT staff about the 19 written complaints identified for this time period.

Types of Complaints

Complaints made by DBEs and other firms related to:

- Improper delay or withholding of payment by the prime contractor;
- Non-use of a listed DBE subcontractor and fraudulent reporting of DBE use; and
- Other fraudulent actions.

Each is discussed in turn.

Allegations of improper delay or withholding of payment by the prime contractor. Two-thirds of the written complaints GDOT received within the study period included assertions by the DBE subcontractor that the prime contractor had improperly delayed or withheld payment to the subcontract.

- After researching these complaints, GDOT found in four of the complaints that the prime contractor's withholding of payments was permissible. In some of these instances, GDOT agreed with the prime contractor that the subcontract's work was unsatisfactory and that withholding payment was justified.
- In most of the complaints concerning withholding or delay of payment to DBE subcontractors, GDOT determined that the prime contractor was in violation of the GDOT prompt payment provision (and sometimes other aspects of the DBE Program or other GDOT policies). When investigating complaints made by a DBE subcontractor, there are instances where GDOT found evidence that the prime contractor had taken improper actions concerning other DBE subcontractors as well.

GDOT pursued suspension of the prime contractor from bidding on future federally-funded contracts for a specific length of time (six months up to three years).

Allegations of non-use of DBE subcontractor and/or fraudulent reporting of DBE use. Eight of the 19 written complaints included allegations by a DBE that it had been listed by the prime contractor as a DBE subcontractor to meet DBE goals on a contract, but that the prime contractor had not used the DBE. Some of these complaints alleged false reporting of DBE use to GDOT.

- In one of the cases, GDOT determined that the prime contractor had improperly substituted another DBE in violation of the Federal DBE Program. The prime contractor had listed one DBE but substituted another DBE after award of the contract allegedly because it was able to obtain a lower price from the second DBE. GDOT pursued sanctions against the prime contractor that included a six-month suspension from receiving or working on federally-funded contracts.

- In another case, GDOT determined that the prime contractor had submitted falsified records concerning the subcontractor's work and found evidence of possible retaliation by the prime contractor against the subcontractor for making the complaint. GDOT pursued sanctions against the prime contractor that included a three-year suspension from federally-funded contracts.

Allegations included instances where the prime contractor had listed the DBE without the DBE's prior knowledge or approval. One example involved a prime contractor and a city government that used the DBE status of a certified company on a contract without the DBE's knowledge. GDOT pursued sanctions against both the city government and the prime contractor.

Other allegations of fraudulent actions. One DBE alleged that a prime contractor sent a letter to the DBE offering a $500 fee for the firm to be listed as a DBE subcontractor for a contract but receive no work. GDOT's investigation found that the prime contractor attempted to circumvent the DBE Program in a fraudulent manner and that it had appeared to violate federal regulations. GDOT placed a stop work order on the project and withheld all of the project's federal funds. The DBE subcontractor received payment from the prime contractor's bonding company.

Summary

The types of complaints DBEs made to GDOT pertaining to payment issues and non-use of listed DBEs are consistent with qualitative information compiled in local government disparity studies discussed in Chapter 4. The complaints made to GDOT indicate a reluctance of some prime contractors on GDOT projects to comply with the Federal DBE Program. The complaints suggest that DBE subcontractors are unfairly treated by some prime contractors on GDOT contracts.

GDOT recently revised its process to act on complaints, including a stronger system for implementing sanctions when firms have violated provisions of the Federal DBE Program.

APPENDIX H.
Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices D through G, BBC used data from a range of sources, including:

- U.S. Census Bureau Public Use Microdata Samples (PUMS) from the 1980 and 2000 Census;
- U.S. Census Bureau PUMS data from the 2007-2009 3-year American Community Survey (ACS);
- The Federal Reserve Board's 1998 and 2003 Survey of Small Business Finances (SSBF);
- The 2007 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how it was used in marketplace analyses.

PUMS Data

Focusing on the construction and engineering industries, BBC used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources;
- Educational attainment; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and state-level samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., ethnic and occupational groups).

BBC obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized,

accurate data extracts.[1] For the analyses contained in this report, BBC used the 1980 and 2000 Census five percent samples and the 2007-2009 ACS one percent sample.

2000 Census data. The 2000 U.S. Census five percent sample contains 14,081,466 observations. When applying the Census person-level population weights, this sample represents 281,421,906 people in the United States. The 2000 Georgia sub-sample contains 406,368 individual observations, weighted to represent 8,186,187 people.

Categorizing individual race/ethnicity. To define race/ethnicity for the 2000 Census dataset, BBC used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered "non-Hispanic white" if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification.

For the five other racial groups, an individual's race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. BBC used a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified multiple races was placed in the reported race category with the highest ranking in BBC's ordering. African American is first, followed by Native American, Asian-Pacific American and then Subcontinent Asian American. For example, if an individual was identified as "Korean," this person was placed in the Asian-Pacific American category; if the individual was identified as "Korean" in combination with "Black," the individual was considered African American.

[1] Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder, and Matthew Sobek. *Integrated Public Use Microdata Series: Version 5.0* [Machine-readable database]. Minneapolis: University of Minnesota, 2011.

- The Asian-Pacific American category included the following race/ethnicity groups: Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Native Hawaiian, Samoan, Taiwanese, Thai, Tongan, and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races as well as individuals identified as Pacific Islanders.

- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani, and Sri Lankan. Individuals who identified themselves as "Asian," but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.

- American Indian, Alaska Native and Latin American Indian groups were considered Native American.

- If an individual was identified with any of the above groups and an "other race" group, the individual was categorized into the known category. Individuals identified as "other race" or "white and other race" were categorized as "other minority."

For some analyses — those in which sample sizes were small — BBC combined minority groups.

Business ownership. BBC used the Census detailed "class of worker" variable (CLASSWKD) to determine self-employment. Individuals were classified into eight categories.

- Self-employed for a non-incorporated business;

- Self-employed for an incorporated business;

- Wage or salary employee for a private firm;

- Wage or salary employee for a non-profit organization;

- Employee of the federal government;

- Employee of a state government;

- Employee of a local government; or

- Unpaid family worker.

BBC counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

Study industries. The marketplace analyses focus on two study industries: construction and engineering-related services. BBC used the IND variable to identify individuals as working in one or the other industry. This variable includes several hundred industry and sub-industry categories. Figure H-1 identifies the IND codes used to define each study area for the 2000 Census analyses.

Figure H-1.
2000 Census industry codes used for construction and engineering-related services

Study industry	2000 Census IND codes	Description
Construction	77	Construction industry
Engineering-related services	729	Architectural, engineering and related services

Source: BBC Research & Consulting from the IPUMS program: http://usa.ipums.org/usa/.

Industry occupations. BBC also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure H-2 summarizes the 2000 Census OCC codes used in the study team's analysis.

Figure H-2.
2000 Census and 2007-2009 ACS occupation codes used to examine workers in construction industry

Census 2000 and 2007-2009 ACS occupational title and code	Job description
Construction managers 22	Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers, and constructors who manage, coordinate, and supervise the construction process.
First-line supervisors/managers of construction trades and extraction workers 620	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, Blockmasons and Stonemasons 622	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block, and terra-cotta block, Construct or repair walls, partitions, arches, sewers, and other structures. Build stone structures, such as piers, walls, and abutments and lay walks, curbstones, or special types of masonry for vats, tanks, and floors.
Carpenters 623	Construct, erect, install, or repair structures and fixtures made of wood, such as concrete forms, building frameworks, including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 624	Apply shock-absorbing, sound-deadening, or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings, and roof decks.
Cement masons, concrete finishers and terrazzo workers 625	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks, or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways, and cabinet fixtures.

Census 2000 and 2007-2009 ACS occupational title and code	Job description
Construction laborers 626	Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades."
Paving, surfacing and tamping equipment operators 630	Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators.
Miscellaneous construction equipment operators, including pile-driver operators 632	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures, such as buildings, bridges, and piers.
Drywall installers, ceiling tile installers and tapers 633	Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.
Electricians 635	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems. Exclude "Security and Fire Alarm Systems Installers." The 2000 category includes electrician apprentices.
Glaziers 636	Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings, and tabletops.
Painters, construction and maintenance 642	Paint walls, equipment, buildings, bridges, and other structural surfaces, using brushes, rollers, and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.
Pipelayers, plumbers, pipefitters and steamfitters 644	Lay pipe for storm or sanitation sewers, drains, and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe, or seal joints. Excludes "Welders, Cutters, Solderers, and Brazers." Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.
Plasterers and stucco masons 646	Apply interior or exterior plaster, cement, stucco, or similar materials and set ornamental plaster.
Roofers 651	Cover roofs of structures with shingles, slate, asphalt, aluminum, and wood. Spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures

Census 2000 and 2007-2009 ACS occupational title and code	Job description
Iron and steel workers, including reinforcing iron and rebar workers 653	*Iron and steel workers* raise, place, and unite iron or steel girders, columns, and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. *Reinforcing iron and rebar workers* position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches, and hand tools. Include rod busters.
Helpers, construction trades 660	All construction trades helpers not listed separately.
Driver/sales workers and truck drivers 913	*Driver/sales workers* drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. *Truck drivers (heavy)* drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock, or materials in liquid, loose, or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. *Truck drivers (light)* drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude "Couriers and Messengers."
Crane and tower operators 951	Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines, or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."
Dredge, excavating and loading machine operators 952	*Dredge operators* operate dredge to remove sand, gravel, or other materials from lakes, rivers, or streams; and to excavate and maintain navigable channels in waterways. *Excavating and loading machine and dragline operators* Operate or tend machinery equipped with scoops, shovels, or buckets, to excavate and load loose materials. *Loading machine operators, underground mining*, Operate underground loading machine to load coal, ore, or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.

Source: 2000 Census occupational titles and codes at http://usa.ipums.org/usa/volii/00occup.shtml, job descriptions from the Bureau of Labor Statistics www.bls.gov.

Education variables. BBC used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into four categories:[2]

- Less than high school;
- High school diploma;
- Some college or associate's degree; and
- At least a bachelor's degree.

[2] In the 1940-1980 samples, respondents were classified according the highest year of school completed (HIGRADE). In the years after 1980, this method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn.

Definition of workers. The universe for the class of worker, industry and occupation variables includes workers 16 years of age or older who are gainfully employed and those who are unemployed but seeking work. "Gainfully employed" means that the worker reported an occupation as defined by the Census code, OCC.

1980 Census data. BBC compared 2000 Census data with data for the 1980 Census to analyze changes in worker demographics, educational attainment and business ownership over time. The 1980 Census five percent sample includes 11,343,120 observations weighted to represent 226,862,400 people. The sample includes 273,230 observations in Georgia, weighted to represent 5,464,600 individuals. A number of changes in variables and coding took place between the 1980 and 2000 Censuses.

Changes in race/ethnicity categories between censuses. Figure H-4 lists the seven BBC-defined racial/ethnic categories with the corresponding 1980 and 2000 Census race groups. Combinations of race types are available in the 2000 Census but not in the 1980 Census. The Bureau of the Census introduced categories in 2000 representing a combination of race types to allow individuals to select multiple races when responding to the questionnaire.

For example, an individual who is primarily white with Native American ancestry could choose the "white and American Indian/Alaska Native" race group in 2000. However, if the same individual received the 1980 Census questionnaire, she would need to choose a single race group — either "white" or "American Indian/Alaska Native." Such a choice would ultimately depend on unknowable factors including how strongly the individual identifies with her Native American heritage.

In addition, data analysts do not have information about the proportions of individual ancestry in 2000 and can only know that a particular individual has mixed ancestry. The variability introduced by allowing multiple race selection complicates direct comparisons between years with respect to race and ethnicity. Even so, 98 percent of survey respondents in 2000 indicated a single race.[3]

[3] Grieco, Elizabeth M. & Rachel C. Cassidy. "Overview of Race and Hispanic Origin," *Census 2000 Brief*, March 2001, page 3.

Figure H-3.
BBC race/ethnic categories compared with Census race and Hispanic Origin survey questions, 1980 and 2000

BBC-defined race/ethnic categories	2000 Census	1980 Census
African American	**Hispanic origin:** no **Race:** Black/Negro alone or in combination with any other non-Hispanic group	**Hispanic origin:** no **Race:** Black/Negro
Asian-Pacific American	**Hispanic origin:** no **Race:** Chinese, Taiwanese, Japanese, Filipino, Korean, Vietnamese, Cambodian, Hmong, Laotian, Thai, Indonesian, Malaysian, Samoan, Tongan, Polynesian, Guamanian/Chamorro, Native Hawaiian, Pacific Islander, Micronesian, Melanesian, or other Asian, either alone or in combination with any non-Hispanic, non-Black, or non-Native American groups	**Hispanic origin:** no **Race:** Chinese, Japanese, Filipino, Korean, Vietnamese, Native Hawaiian, Pacific Islander or other Asian
Subcontinent Asian American	**Hispanic origin:** no **Race:** Asian Indian, Bangladeshi, Pakistani or Sri Lankan, alone or in combination with white or other groups only	**Hispanic origin:** no **Race:** Asian Indian
Hispanic American	**Hispanic origin:** yes **Race:** any race groups, alone or in combination with other groups	**Hispanic origin:** yes **Race:** any or **Hispanic origin:** no **Race:** Spanish
Native American	**Hispanic origin:** no **Race:** American Indian or Alaskan Native tribe identified alone or in combination with any non-Hispanic, non-Black group	**Hispanic origin:** no **Race:** American Indian/Alaska Native
Other minority group	**Hispanic origin:** no **Race:** other race alone or in combination with white only	**Hispanic origin:** no **Race:** other race
Non-Hispanic white	**Hispanic origin:** no **Race:** white alone	**Hispanic origin:** no **Race:** white

Source: BBC Research & Consulting from the IPUMS program: http://usa.ipums.org/usa/.

Business ownership. BBC uses the Census "class of worker" variable (CLASSWKD) to determine self-employment. This variable is the same for 1980 and 2000 with one exception: the 1980 variable does not include a separate category for individuals who work for a wage or salary at a non-profit organization.

Changes in industry codes between Censuses. The Census definitions of some industries and sub-industries changed between 1980 and 2000. As a result, 1980 codes for the industry variable (IND) are not the same as 2000 IND codes in all cases. However, for the construction and engineering-related industries, the 1980 code corresponds directly to an equivalent 2000 code.

Geographic variables. For the analyses presented in the marketplace appendices, there were no substantial changes in geographic variables. BBC used the same variable (STATEFIP) available for 2000 Census data to identify Georgia in the 1980 data.

Changes in educational variables between Censuses. The 1980 Census PUMS data includes the same educational variable found in the 2000 Census data, although the questions used for each Census to capture educational attainment differed between the two surveys.[4]

2007-2009 American Community Survey (ACS) data. BBC also examined 2007-2009 ACS data from IPUMS. Conducted by the U.S. Census Bureau, the ACS uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form.[5] Since 2005, the ACS has expanded to a roughly one percent sample of the population, based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). The 2007-2009 ACS three-year estimates represent the average characteristics over the three-year period of time.

Applying the person-level population weights to the 3,006,322 observations included in the data, the 2007-2009 ACS dataset represents 304,192,356 people in the U.S. For Georgia, the 2007-2009 ACS dataset includes 283,271 observations representing 9,687,004 individuals.

With the exception of a few minor differences, the variables available for the 2007-2009 ACS dataset are the same as those available for the 2000 Census five percent sample.

Changes in race/ethnicity categories between 2000 Census and 2007-2009 ACS data. The 2000 Census five percent sample and the 2007-2009 ACS PUMS data use essentially the same numerical categories for the detailed race variable (RACED). However, in both samples, any category representing fewer than 10,000 people was combined with another category. As a result, some PUMS race/ethnicity categories that occur in one sample may not exist in the other, which could lead to inconsistencies between the two samples once the detailed race/ethnicity categories are grouped according to the seven broader categories. This issue is likely to affect only a very small number of observations. PUMS categories that were available in 2000 but not 2007-2009 (or vice versa) represented a very small percentage of the 2000 (or 2007-2009) population. Categories for the Hispanic variable (HISPAN) remained consistent between the two datasets.

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[4] For a more detailed explanation, see footnote 2.

[5] U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing 2009. Available at http://www.census.gov/acs/www/SBasics/desgn_meth.htm.

Other variables. Other variables used by BBC did not change between 2000 and 2007-2009. The variables CLASSWKD, LABFORCE, IND, OCC, PUMA, and EDUCD were consistent between datasets, with variable codes in each case representing the same categories.

Survey of Small Business Finances (SSBF)

The study team used the SSBF to analyze the availability and characteristics of small business loans.

The SSBF, conducted every five years by the Federal Reserve Board, collects financial data from non-governmental for-profit firms with fewer than 500 employees. This survey is a nationally representative sample, structured to allow for analysis of specific geographic regions, industry sectors, and racial and gender groups. The SSBF is unique as it provides detailed data on both firm and owner financial characteristics. For the purposes of this report, BBC used the surveys from 1998 and 2003, which are available at the Federal Reserve Board website.[6]

Data for 1998. The 1998 SSBF includes information from 3,561 small businesses. The survey oversampled minority-owned businesses, allowing for a more precise analysis of how race and ethnicity may affect loan and financial outcomes.

Categorizing owner race/ethnicity and gender. Definition of race and ethnic groups in the 1998 SSBF are slightly different than the classifications used in the 2000 Census and 2007-2009 ACS. In the SSBF, businesses are classified into the following five groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian American;
- Native American; and
- Other (unspecified).

A business is considered Hispanic American-owned if more than 50 percent of the business is owned by Hispanic Americans, regardless of race. All businesses reporting 50 percent or less Hispanic American ownership are included in the racial group that owns more than half of the company. No firms reported ownership by "other."

Similarly, firms are classified as female-owned if more than 50 percent of the firm is owned by women. Firms owned half by women and half by men were counted as male-owned.

[6] The Federal Reserve Board. *Survey of Small Business Finances, 1998* and *Survey of Small Business Finances, 2003*. Available online at http://www.federalreserve.gov/pubs/.

Defining selected industry sectors. In the 1998 SSBF, each business was classified according to SIC code and placed into one of eight industry categories:

- Construction;
- Mining;
- Transportation, communications and utilities;
- Finance, insurance and real estate;
- Trade;
- Engineering;
- Services (excluding engineering); or
- Agriculture, forestry and fishing.

Region variables. The SSBF divides the United States into nine Census Divisions. Along with Delaware, District of Columbia, Florida, Maryland, North Carolina, South Carolina, Virginia and West Virginia, Georgia resides in the South Atlantic Census Division (referred to in marketplace appendices as the South Atlantic region).

Loan denial variables. In the 1998 survey, firm owners were asked if they have applied for a loan in the last three years and whether loan applications were always approved, always denied, or sometimes approved and sometimes denied. For the purposes of this study, only firms that were always denied were considered when analyzing loan denial.

Data for 2003. The 2003 SSBF differs from previous surveys in terms of the population surveyed, the variables available and in data reporting methodology.

Population differences. Similar to the 1998 survey, the 2003 survey records data from businesses with 500 or fewer employees. The sample contains data from 4,240 firms, but in 2003, minority-owned firms were not oversampled. In the 1998 data, 7.3 percent of the survey firms were owned by Hispanic Americans, but that number dropped to 4 percent in the 2003 data. Representation in the sample also dropped for African American-owned (7.7% to 2.8%) and Asian American-owned firms (5.7% to 4.2%). The smaller sample sizes for minority groups in the 2003 SSBF affects the ability to conduct analyses related to differences in loan application outcomes for race and ethnic groups.

Variable differences. In the 2003 SSBF, businesses were able to give responses on owner characteristics for up to three different owners. The data also include a fourth variable that is a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables consistently from the 1998 to 2003 surveys, BBC used the final weighted average for variables on owner characteristics. Firms were then divided into race, ethnicity and gender groups according to the same guidelines used for the 1998 data.

Industry, region and loan denial variables for the 2003 survey were defined by the study team along the same guidelines as the 1998 survey, with one exception: the 2003 survey did not include any firms in the agriculture, forestry and fishing industry.

Data reporting. Due to missing responses to survey questions in both the 1998 and 2003 datasets, data were imputed to fill in missing values. For the 1998 SSBF data, missing values were imputed using a randomized regression model to estimate values based on responses to other questions in the survey. A single variable includes both reported and imputed values, and a separate "shadow variable" can be used to identify where missing values have been imputed. However, the missing values in the 2003 data set were imputed using a different method than in previous studies. In the 1998 survey data, the number of observations in the data set matches the number of firms surveyed. However, the 2003 data includes five implicates, each with imputed values that have been filled in using a randomized regression model.[7] Thus there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. Across the five implicates, all non-missing values are identical, whereas imputed values may differ. In both data sets, therefore, when a firm answered a survey question, the response was not altered. However the method for filling in missing values differed between surveys.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates and inaccurate variances and confidence intervals.[8] These problems can be corrected through use of multiple implicates. In order to provide the most accurate analysis, BBC utilized all five implicates provided with the 2003 data in analysis of the survey.

Multiple implicates were not provided with the 1998 data, making the method of analysis used for the 2003 data inapplicable. To address this, the study team performed analysis two different ways, first only with observations whose data was not imputed and second with all observations. Differences in results were insignificant. For summary statistics using SSBF data, BBC included observations with missing values in the analyses. For the probit regression model presented in Appendix G, the study team did not include observations with imputed values for the depended variable, loan denial.

[7] For a more detailed explanation of imputation methods, see the "Technical Codebook" for the *2003 Survey of Small Business Finances.*

[8] Lieu N. Hazelwood, Traci L. Mach and John D. Wolken. *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses*. Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board. Washington, D.C., 2007. http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf.

Survey of Business Owners (SBO)

BBC used data from the 2007 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2007. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed: firms with and without paid employees. In 2007, almost 8 million firms were surveyed.

BBC examined SBO data relating to the number of firms, number of firms with paid employees and total receipts. This information is available by geographic location, industry, gender and race/ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. BBC analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction and engineering-related services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is African American, Asian American, Hispanic American, Native American or another minority group. Respondents had the option of selecting one or more racial groups when reporting on business ownership.

BBC reported business receipts for the following race/ethnicity and gender groups:

- African American;
- Asian American;
- Hispanic American;
- Native American; and
- Women.

BBC also reported business receipts for all firms.

Home Mortgage Disclosure Act (HMDA) Data

BBC used HMDA data provided by the Federal Financial Institutions Examination Council (FFIEC) to analyze mortgage lending in Georgia and the nation. HMDA data provide information on mortgage loan applications received by financial institutions, savings banks, credit unions and some mortgage companies. These data include information about the location, dollar amount, and types of loans made, as well as race and ethnicity, income, and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Financial institutions were required to report 2009 HMDA data if they had assets of more than $39 million ($35 million for 2006), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, were located in an Metropolitan Statistical Area (or originated five or more home purchase loans in an MSA) and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

BBC used these data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2006 and 2009. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined; these data are not a sample. However, BBC did not report loan denial rates or subprime lending rates in cases where there were fewer than 25 loans in a particular category. Appendix G provides detailed explanation of the methodology used for measuring loan denial and subprime lending rates.

APPENDIX G.
Access to Capital for Business Formation and Success

Access to capital is one of the factors researchers have examined when studying business formation and success. If discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.[1] This appendix explores access to business capital, which relates closely to matters discussed in Appendix E and Appendix F.

BBC first examines homeownership and mortgage lending, as home equity can be an important source of capital to start and expand businesses. The appendix then turns to business loans, assessing whether minorities and females experience difficulty acquiring capital.

Homeownership and Mortgage Lending

BBC analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. Wealth created through homeownership can be an important source of capital to start or expand a business.[2] Any barriers to homeownership and home equity growth for minorities or women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. In sum:

- A home is a tangible asset that provides borrowing power;[3]
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;[4]
- Next to business lines of credit, mortgage loans have traditionally been the second largest loan type for small businesses;[5] and
- Homeownership is associated with an estimated 30 percent reduction in probability of loan denial for small businesses.[6]

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[1] For example, see: Coleman, Susan. 2002. Small Firm Sources of Debt Capital: A Comparison by Gender, Race and Ethnicity. University of Hartford.

[2] The recent (beginning in late 2006) housing and mortgage crisis has substantially impacted the ability of small businesses to secure loans through home equity. A discussion of the consequences to small businesses and MBE/WBEs is provided at the end of this section.

[3] Nevin, Allen. 2006. "Homeownership in California: A CBIA Economic Treatise." *California Building Industry Association.* 2.

[4] Jackman, Mary R. and Robert W. Jackman 1980. "Racial Inequalities in Home Ownership." *Social Forces.* 58. 1221-1234.

[5] Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking and Finance.* 22.

The study team first analyzed homeownership rates and home values in Georgia before considering loan denial and subprime lending.

Homeownership rates. Many studies document past discrimination in the U.S. housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.[7] In the past, for example, a woman's participation in homeownership was secondary to that of her husband and parents.[8]

BBC used 2000 U.S. Census of Population (Census) and 2007-2009 American Community Survey (ACS) data to examine homeownership rates in Georgia and the United States. Figure G-1 presents rates of homeownership for minority groups and non-Hispanic whites.

Approximately three quarters of non-Hispanic white households owned homes in Georgia in 2000. Homeownership rates were lower for each minority group than for non-Hispanic white households in Georgia.

- Approximately 51 percent of African American households were homeowners in 2000 (a difference from the rate for non-Hispanic white households that is statistically significant at the 99% level);
- About 38 percent of Hispanic American households in Georgia were homeowners in 2000 (statistically significant at the 99% level);
- The homeownership rates in 2000 for Subcontinent Asian Americans and Asian-Pacific Americans were 48 percent and 58 percent, respectively; and
- Native Americans in Georgia owned homes at a rate of 65 percent.

Disparities in homeownership rates are also apparent in the 2007-2009 data.

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[6] Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth and Discrimination." *Journal of Business.* 78:2153-2178.

[7] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72:166-170.

[8] Card, Emily. 1980. "Women, Housing Access, and Mortgage Credit." *Signs.* 5:215-219.

Figure G-1. Homeownership rates, 2000, 2007-2009

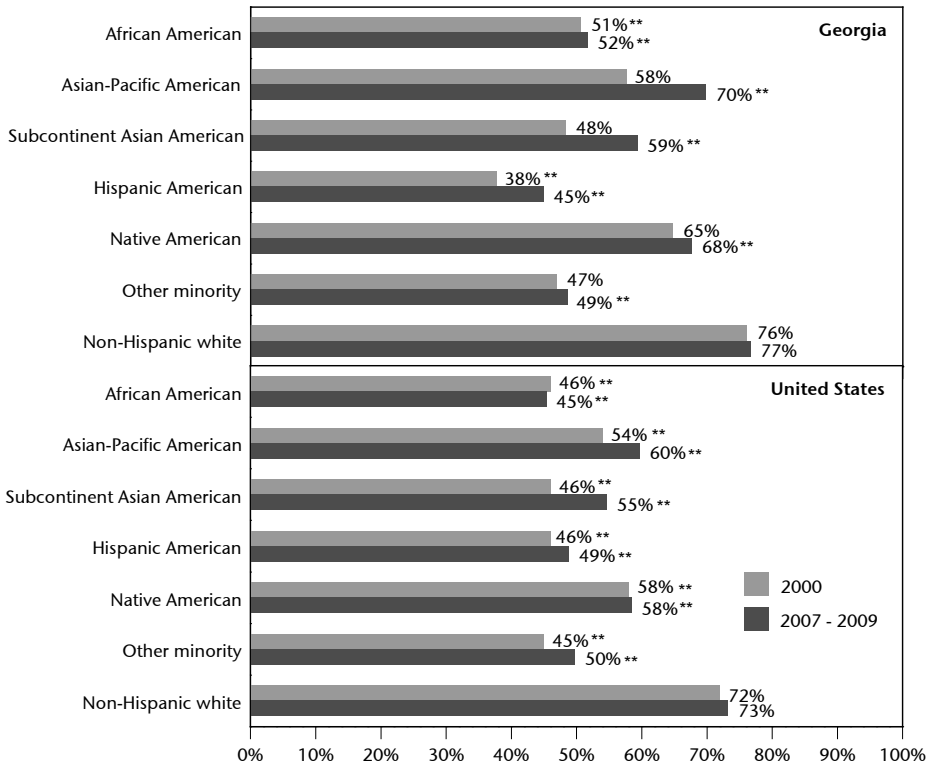
Note:

The sample universe is all households.

** Denotes that the difference in proportions from non-Hispanic white for the given year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2000 U.S. Census and 2007-2009 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



Although not presented here, the study team also examined homeownership rates for heads of household working in the construction and engineering industries. In Georgia, each minority group in the engineering industry and each minority group except Asian Americans in the construction industry had lower rates of home ownership than non-Hispanic whites. In the U.S. as a whole, each minority group in both industries had a lower rate of home ownership than non-Hispanic whites.

Lower rates of homeownership may, to an extent, reflect lower incomes for minorities. This relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been an effective path to building wealth. An older study found statistically significant results indicating that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the U.S.[9]

Home values. Research has found homeownership and home values to be direct determinants of capital available to form or expand businesses.[10] Using 2000 Census and 2007-2009 ACS data, BBC compared median home values by racial and ethnic groups. Figure G-2 presents results for 2000 in Georgia and the United States.

[9] Jackman. 1980. "Racial Inequalities in Home Ownership."

[10] Fairlie, Robert W. and Harry A. Krashinky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." IZA Discussion Paper. No. 2201.

For 2000, the median home value of non-Hispanic white homeowners in Georgia was $110,300, substantially greater than the median value of homes owned by African Americans ($79,500), Hispanic Americans ($97,000) and Native Americans ($89,600). Asian Pacific Americans and Subcontinent Asian Americans, on average, owned homes of greater value than non-Hispanic whites.

The pattern of differences in median home value for minorities compared to non-Hispanic whites in Georgia was similar to the differences seen in the United States as a whole.

Figure G-2. Median home value, 2000

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2000 U.S. Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

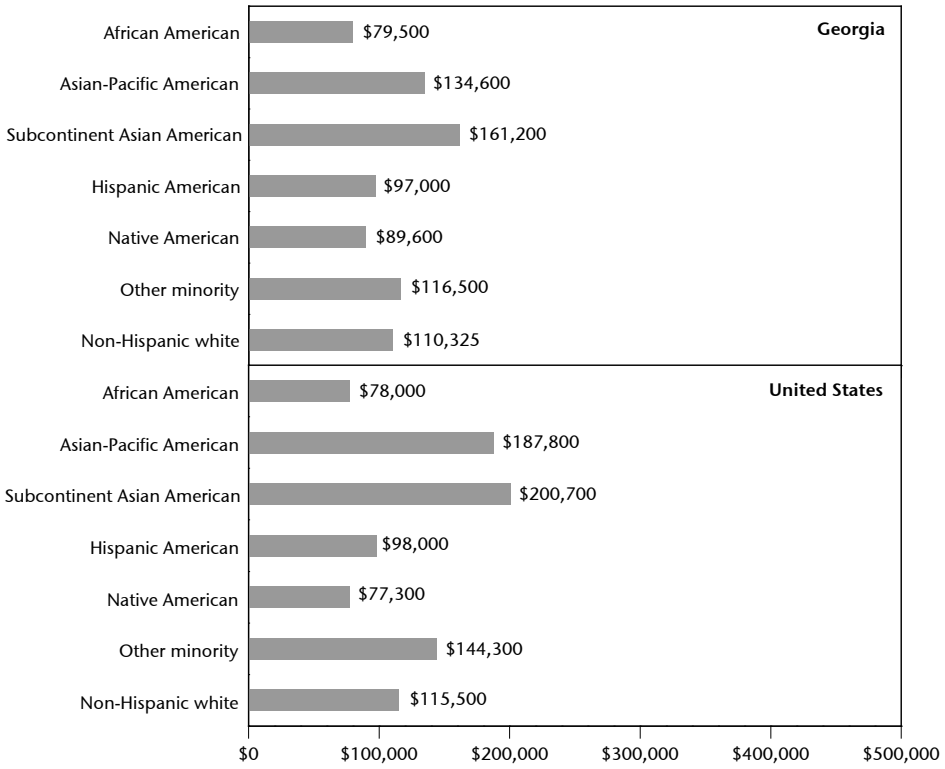


Figure G-3 presents median home values by race/ethnicity groups in Georgia and the U.S. based on 2007-2009 ACS data. Similar to the figures for 2000, African Americans, Hispanic Americans and Native Americans had substantially lower median home values than non-Hispanic whites in Georgia.

In the United States, median home values for African Americans and Native Americans remained well below values for non-Hispanic whites in 2007-2009. The national median value for Hispanic Americans began to close the gap, but was still slightly below the value for non-Hispanic whites.

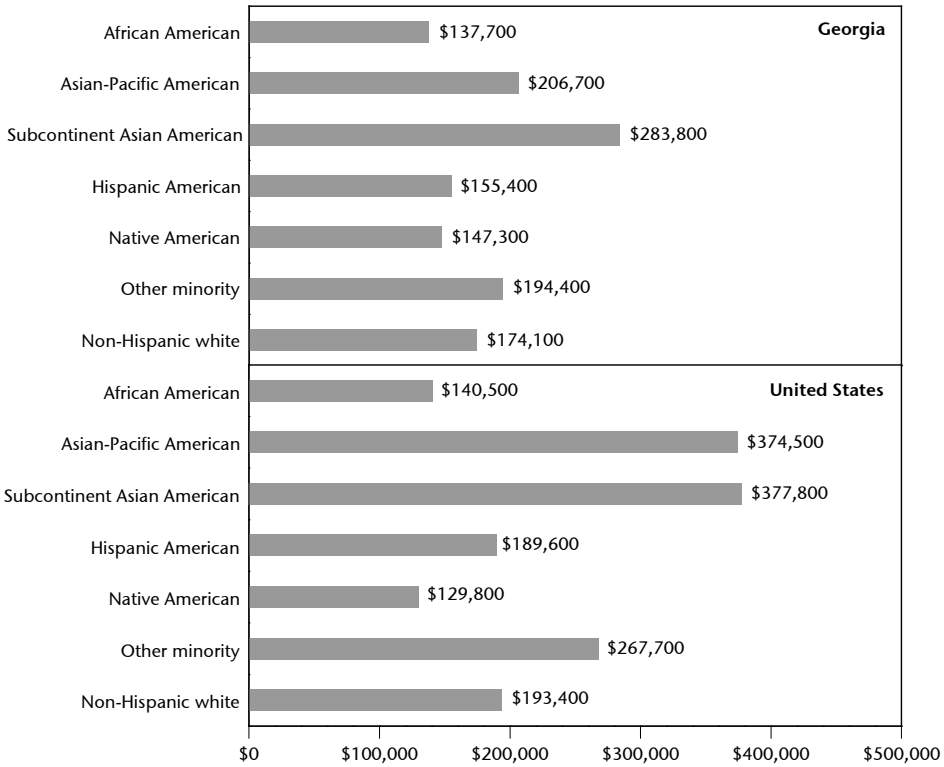
Figure G-3. Median home value, 2007-2009

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2007-2009 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, in a recent lawsuit, Bank of America paid $335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of "statistically significant disparities by race and ethnicity" among Countrywide Financial customers.[11]

[11] Savage, Charlie. December 22, 2011. "$335 Million Settlement on Countywide Lending Bias." NYTimes.com. Available online at http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html.

BBC explored market conditions for mortgage lending in Georgia and the nation as a whole. The best available source of information concerning mortgage lending comes from Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications received by financial institutions, savings banks, credit unions and some mortgage companies.[12] These data include information about the location, dollar amount and types of loans made, as well as race and ethnicity, income and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

BBC examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) on conventional loan denial rates for high-income borrowers. Conventional loans are loans not insured by a government program; high-income borrowers are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.[13] Loan denial rates are calculated as a share of mortgage loan applications, excluding applications terminated by the potential borrowers.

Figure G-4 reports denial rates for 2006 and 2009. Although the 2009 HMDA data reflect a more recent lending climate, the 2006 data represent a more complete data set from before the recent mortgage crisis. For example, many of the institutions that originated loans in 2006 were no longer in business by the 2009 reporting date for HMDA data.[14] Additionally, the percentage of government-insured loans (which are not included in HMDA data) increased dramatically between 2006 and 2009, thus decreasing the proportion of total loans analyzed here. [15]

Figure G-4 examines results for Georgia and the United States. These data show higher denial rates for minority high-income households than for non-Hispanic white high-income households. Among high-income households applying for mortgages in 2006, 28 percent of African American applicants in Georgia had their applications denied compared with 7 percent of non-Hispanic white households. Loan denial rates in 2006 were also higher for Asian Americans, Hispanic Americans and Native Americans compared to non-Hispanic whites.

The data from 2009 still show denial rates that are higher for minority groups compared with non-Hispanic whites. The patterns of loan denial rates by race and ethnicity in Georgia were similar to those of the United States in both 2006 and 2009.

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[12] Financial institutions were required to report 2009 HMDA data if they had assets of more than $39 million ($35 million for 2006), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies are required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, are located in an Metropolitan Statistical Area (or originated five or more home purchase loans in an MSA) and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

[13] 2009 median family income was about $61,000 for the United States and $56,000 for Georgia (in 2009 dollars). Median family income for 2006 was about $62,000 for the United States and $60,000 for Georgia (in 2009 dollars). Source: U.S. Census Bureau, 2009 and 2006 American Community Surveys.

[14] According to an article by the Federal Reserve, the volume of reported loan applications and originations fell sharply from 2007 to 2008 after previously falling between 2006 and 2007. See Avery, Brevoort, and Canner, "The 2008 HMDA Data: The Mortgage Market during a Turbulent Year." Available online: http://www.federalreserve.gov/pubs/bulletin/.

[15] Loans insured by government programs have surged since 2006. In 2006, about 10 percent of first lien home loans were insured by a government program. More than half of home loans were insured by the government in 2009. Source: "The 2009 HMDA Data: The Mortgage Market in a Time of Low Interest Rates and Economic Distress," Federal Reserve Bulletin. December 2010, pp A39-A77.

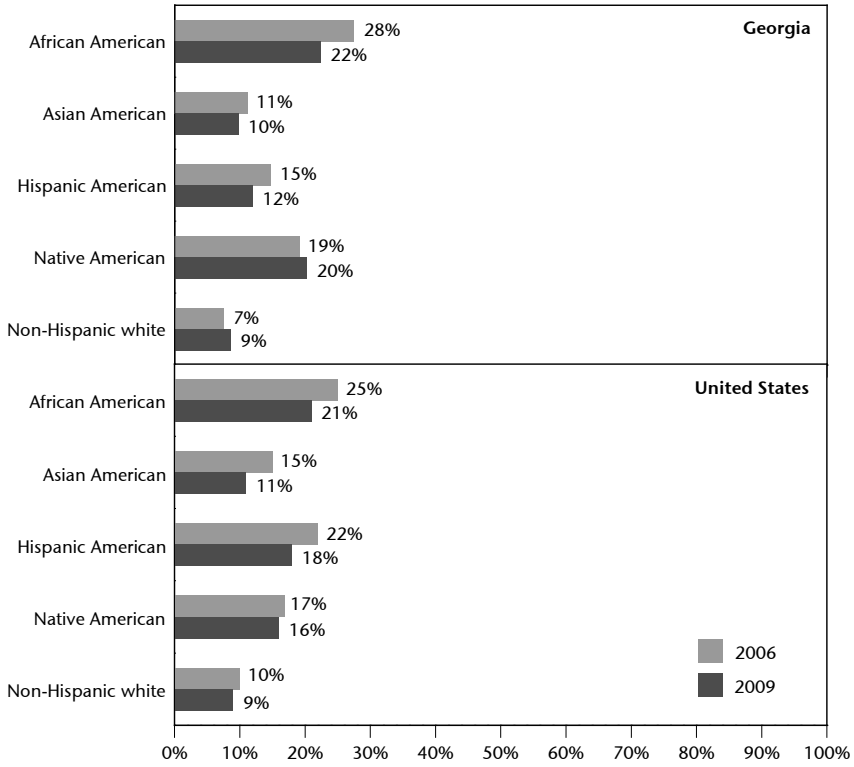
Figure G-4. Denial rates of conventional purchase loans to high-income households, 2006 and 2009

Note:

High-income borrowers are those households with 120% or more than the HUD area median family income (MFI).

Source:

FFIEC HMDA data 2006 and 2009.



A number of national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. Examples include the following:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination.[16] It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.[17] The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.[18]

- Using the Federal Reserve Board's 1983 Survey of Consumer Finances and the 1980 Census of Population and Housing data, logit statistical analysis revealed that minority households were one-third as likely to receive conventional loans as non-Hispanic white households after taking into account financial and demographic controls.[19]

- Findings from a Midwest study indicate a significant relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics

[16] Munnell, Alicia H., Geoffrey Tootell, Lynn Browne and James McEneaney. 1996. "Mortgage Lending in Boston: Interpreting HMDA Data." The American Economic Review. 86: 25-53.

[17] Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." The Journal of Economic Perspectives. 12:41-62.

[18] Yinger, John. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. New York: Russell Sage Foundation, 71.

[19] Canner, Glenn B., Stuart A. Gabriel and J. Michael Woolley. 1991. "Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets." Southern Economic Journal. 58:249-262.

revealed that African American borrowers across 13 census tracts received significantly fewer and smaller loans compared to their white counterparts.[20]

However, other studies have found that differences in preferences for Federal Housing Administration (FHA) loans — mortgage loans that are insured by the government — versus conventional loans among racial and ethnic groups may partly explain disparities found in conventional loan approvals between minorities and non-minorities.[21] Several studies have found that, historically, minority borrowers are far more likely to obtain FHA loans than comparable non-Hispanic white borrowers at all income and wealth levels. The insurance on FHA loans protects the lender, but the borrower can be disadvantaged by higher borrowing costs.[22]

Subprime lending. Loan denial is one of several ways minorities might be discriminated against in the home mortgage market; mortgage-lending discrimination can also occur through higher fees and interest rates. The housing market provides a unique environment for this type of discrimination through fees associated with various loan types.

Until recently, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.[23]

With higher interest rates than prime loans, subprime loans have been typically marketed and sold to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, these loans also became available to homeowners who did not want to make a down payment or provide proof of income and assets or wanted to purchase a larger home with a cost above that for which they would qualify from a prime lender.[24] Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity while simultaneously increasing their risk of foreclosure.

Although there is no standard definition of a subprime loan, there are several commonly-used approaches to examining rates of subprime lending. BBC used a "rate-spread method"— in which subprime loans are identified as those with substantially above-average interest rates — to measure rates of subprime lending in 2006 and 2009.[25] These results are presented in Figure G-5 and Figure G-6.

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[20] Leahy, Peter J. 1985. "Are Racial Factors Important for the Allocation of Mortgage Money?: A Quasi-Experimental Approach to an Aspect of Discrimination." American Journal of Economics and Sociology. 44:185-196.

[21] Canner. 1991. "Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets."

[22] Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 80.

[23] Avery, Brevoort, and Canner, ''The 2006 HMDA Data.'' Federal Reserve Bulletin, December 2007, pp. A73-A109.

[24] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*.

[25] Prior to October 2009, first lien loans were identified as subprime if they had an APR 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. BBC identified subprime loans according to these measures in the corresponding time periods.

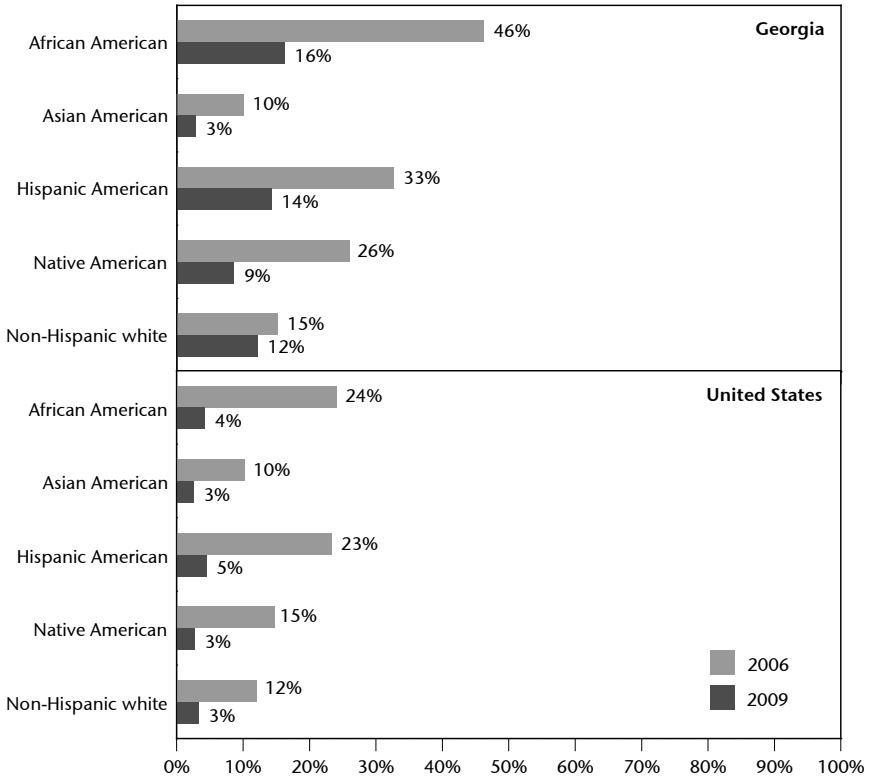
Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans. Results from the two methods for identifying patterns in subprime lending did not differ substantially.

Based on 2006 and 2009 HMDA data, Figure G-5 shows the percent of conventional home purchase loans that were subprime in Georgia and the United States. The rates of subprime lending in 2009 were dramatically lower overall than in 2006 due to the collapse of the mortgage lending market in the late 2000s.

In Georgia during the two years examined, African American, Hispanic American and Native American borrowers were more likely to receive subprime purchase loans than non-Hispanic whites. For example, in 2006, about 46 percent of conventional home purchase loans issued to African Americans were subprime. In contrast, subprime loans represented only about 15 percent of loans issued to non-Hispanic whites in Georgia in 2006. Asian Americans, however, were less likely than non-Hispanic whites to receive subprime loans in that year. By 2009, use of subprime loans diminished for all groups. Disparities remained for African Americans and Hispanic Americans, however.

Figure G-5. Percent of conventional home purchase loans that were subprime, 2006 and 2009

Source:
FFIEC HMDA data 2006 and 2009.



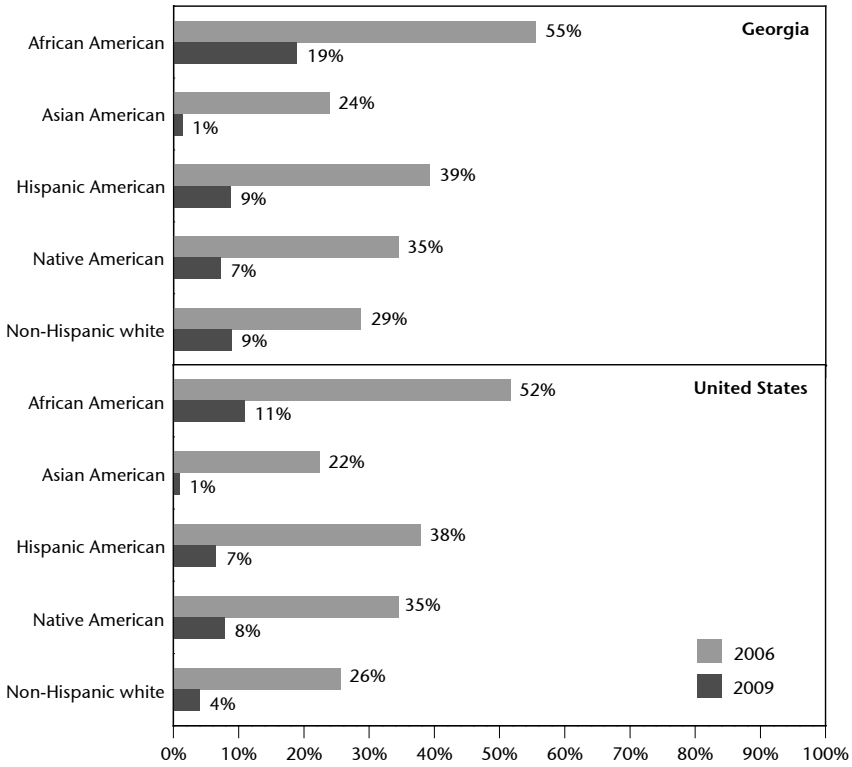
Similar to Figure G-5, Figure G-6 illustrates the percent of home refinance loans that were subprime in Georgia and the United States.

African American, Hispanic American and Native American borrowers were more likely to receive subprime refinance loans than non-Hispanic whites in 2006. In 2006, about 55 percent of refinance loans issued to African Americans, 39 percent of loans to Hispanic Americans and 35 percent of loans to Native Americans in Georgia were subprime. In contrast, subprime loans represented only about 29 percent of refinance loans issued to non-Hispanic whites in Georgia in 2006.

In 2009, subprime loans made up a much smaller proportion of total conventional home refinance loans in Georgia across race/ethnic groups. Even so, African American households receiving refinance loans in 2009 were more likely than non-Hispanic whites to receive a subprime loan. Hispanic American, Asian American and Native American households receiving refinance loans in 2009 were less likely to have a subprime loan than non-Hispanic whites.

Figure G-6. Percent of conventional refinancing loans that were subprime, 2006 and 2009

Source:
FFIEC HMDA data 2006 and 2009.



Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan,[26] a form of "predatory lending." Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.[27]

[26] Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001. HUD-Treasury National Predatory Lending Task Force Report. *HUD*; Carr, J. and L. Kolluri. 2001. Predatory Lending: An Overview. *Fannie Mae Foundation*; and California Reinvestment Coalition, Community Reinvestment Association of North Carolina, Empire Justice Center, Massachusetts Affordable Housing Alliance, Neighborhood Economic Development Advocacy Project, Ohio Fair Lending Coalition and Woodstock Institute, 2008. "Paying More for the American Dream."

Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities. A 2001 HUD study using 1998 HMDA data found that subprime loans were disproportionately concentrated in black neighborhoods compared to white neighborhoods even after controlling for income.[28] For example, borrowers in upper-income black neighborhoods were six times more likely to refinance with a subprime loan than borrowers in upper-income white neighborhoods.

Historically, differences in types of loans awarded to minorities have also been attributed to steering by real estate agents, who serve as an information filter.[29] Some studies claim that real estate brokers provide different levels of assistance and different information on loans to minorities and non-minorities.[30] This "steering" can shape the perception by minority borrowers of the availability of loans.

Lessons from the recent mortgage lending crisis. The turmoil in the housing market since late 2006 has been far-reaching, resulting in the loss of home equity, decreased demand for housing and increased rates of foreclosure.[31] Much of the blame has been placed on risky practices in the mortgage industry including substantial increases in subprime lending.

As discussed above, subprime mortgages increased at an extraordinary rate between the mid-1990s and mid-2000s. These high-cost loans increased from 8 percent of originations in 2003 to 20 percent in both 2005 and 2006.[32] In 2005, subprime loans represented about 20 percent of all loans originated in the Atlanta Metropolitan Statistical Area (MSA).[33] The preponderance of subprime lending is important as households repaying subprime loans have a higher likelihood of delinquency or foreclosure. As a 2008 study released from the Federal Reserve Bank of Boston found, "homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than 6 times as often as experiences that begin with prime purchase mortgages."[34]

While Georgia has not suffered to the same extent as states such as Nevada in terms of foreclosures and falling home values, the state has nevertheless been affected by the change in housing market conditions. In Georgia there were approximately 10,100 properties with foreclosure filings in October of 2011. This represents one in every 406 housing units and gives Georgia the sixth highest foreclosure rate in the nation.[35] In October 2011, the proportion of residential properties in Georgia

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[27] Freddie Mac. 1996, September. "Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families." *Freddie Mac.* (accessed February 5, 2007); and Lanzerotti. 2006. "Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California." *Federal Reserve Bank of San Francisco*.

[28] Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

[29] Kantor, Amy C. and John D. Nystuen. 1982. "De Facto Redlining a Geographic View." *Economic Geography.* 4:309-328.

[30] Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78–79.

[31] Joint Center for Housing Studies of Harvard University. 2008. "The State of the Nation's Housing."

[32] Ibid.

[33] Mayer, Chris and Karen Perce. "Subprime Mortgage: Who, Where and to Whom?" *Division of Research and Statistics and Monetary Affairs.* Available online at http://www.federalreserve.gov/Pubs/FEDS/2008/200829/200829abs.html.

[34] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*.

[35] RealtyTrac. 2011 U.S. Foreclosure Market Report.™ Available online at http://www.realtytrac.com.

with negative equity (a mortgage worth more than the value of the home) was 30 percent, one of the highest rates in the country. In the third quarter of 2011, Georgia passed California with the fifth highest negative equity percentage (behind Nevada, Arizona, Florida and Michigan).[36] Due to higher rates of subprime mortgages, it is likely that minority homeowners have been disproportionately affected in terms of foreclosures and loss of home equity.

These problems facing the housing industry substantially impact the ability to secure capital through home mortgages to start or expand a small business. This issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that "one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press." [37]

- On November 20, 2008, Randall Kroszner told the U.S. House of Representatives Committee on Small Business that "small business and household finances are, in practice, very closely intertwined. [T]he most recent Survey of Small Business Finances (SSBF) indicated that about 15 percent of the total value of small business loans in 2003 was collateralized by 'personal' real estate. Because the condition of household balance sheets can be relevant to the ability of some small businesses to obtain credit, the fact that declining house prices have weakened household balance-sheet positions suggests that the housing market crisis has likely had an adverse impact on the volume and price of credit that small businesses are able to raise over and above the effects of the broader credit market turmoil." [38]

Federal Reserve Chairman Ben Bernanke recognized the reality of these concerns in a speech titled "Restoring the Flow of Credit to Small Businesses" on July 12, 2010.[39] Bernanke indicated that small businesses have had difficulty accessing credit and pointed to the declining value of real estate as one of the primary obstacles.

Furthermore, the National Federation of Independent Business (NFIB) conducted a national survey of 751 small businesses[40] in late 2009 to investigate how the recession impacted access to capital.[41]

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[36] CoreLogic. November 29, 2011. CoreLogic Negative Equity press release.

[37] Mishkin, Frederic. 2008. "Statement of Frederic S. Mishkin, Member, Board of Governors of the Federal Reserve System before the Committee on Small Business and Entrepreneurship, U.S. Senate on April 16."

[38] Kroszner, Randall. 2008. "Effects of the financial crisis on small business." *Testimony before the Committee on Small Business, U.S. House of Representative on November 20.*

[39] Bernanke, Ben. 2010. Restoring the Flow of Credit to Small Businesses. *Presented at the Federal Reserve Meeting Series: Addressing the Financing Needs of Small Businesses on July 12.*

[40] The study defined a small business as a business employing no less than one individual in addition to the owner(s) and no more than 250.

[41] National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

NFIB concluded that "falling real estate values (residential and commercial) severely limit small business owner capacity to borrow and strains currently outstanding credit relationships." Survey results indicated that 95 percent of small business employers owned real estate and 13 percent held upside-down property.[42]

Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through these loans. These consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Redlining. Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. These areas are often racially determined, such as African American or mixed race neighborhoods.[43] This practice can perpetuate problems in already poor neighborhoods.[44]

Studies of redlining have primarily focused on the geographic aspect of lender decisions; however, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising and other pre-application procedures.[45] These practices can deter minorities from starting businesses. Locations of financial institutions are important to small business start-up because local banking sectors often finance local business. [46] Redlining practices would deny this capital resource to minorities.

For example, the United States Department of Justice brought suit in 1992 against Decatur Federal Savings & Loan Association of Atlanta for racial discrimination in mortgage lending. The Justice Department alleged that Decatur Federal had for many years engaged in lending practices that discriminated on the basis of race, including redlining. The Justice Department also alleged that Decatur Federal had discriminated against black mortgage applicants. Decatur Federal entered a consent decree in which it agreed to change certain banking practices.[47]

Gender discrimination in mortgage lending. Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Risk associated with women of childbearing age and unmarried women resulted in "income discounting," limiting the availability of loans to women.[48]

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[42] Upside-down is defined as a mortgage that is worth more than the appraised value of the house.

[43] Holloway, Steven R. 1998. "Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio." *Annals of the Association of American Geographers.* 88:252-276.

[44] Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives.* 12:41-62.

[45] Yinger, John. 1995. "Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination." Russell Sage Foundation. New York. 78-79.

[46] Holloway. 1998. "Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio."

[47] *United States of America v. Decatur Federal Savings and Loan Association*, No. 92-CV-2198 (N.D. Georgia, Sept. 17, 2992), Consent Decree.

[48] Card. 1980. "Women, Housing Access, and Mortgage Credit."

The Equal Credit Opportunity Act (ECOA) in 1973 suspended these discriminatory lending practices. A study in California that used regression analysis to explore discrimination against married and single women in 16 metropolitan areas from 1977 to 1978 revealed little evidence of gender discrimination in the state. Certain barriers have continued after 1973, however. For example, there is some past evidence that lenders under-appraised property for female borrowers.[49]

Steering by real estate agents. A number of researchers have found that discrimination by real estate agents contributes to residential segregation of minorities. One such practice is "steering" of prospective homebuyers toward particular neighborhoods and away from others because of their race or ethnicity (a practice that has been prohibited by law for many decades). A 2005 study found such practices in cities throughout the country.[50]

Access to Business Capital

Barriers to capital markets can have significant impacts on small business formation and expansion. In addition, several studies have found evidence that start-up capital is important for business profits, longevity and other outcomes.[51]

- The amount of start-up capital is positively associated with small business sales and other outcomes;[52]
- Limited access to capital has limited the size of African American-owned businesses;[53] and
- Weak financial capital was identified as a significant reason that more African American-owned firms than non-Hispanic white-owned firms closed over a four-year period.[54]

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[49] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72:166-170.

[50] Galster, George and Erin Godfrey. 2005. "Racial Steering by Real Estate Agents in the U.S. in 2000." *Journal of the American Planning Association.* 71:251-268.

[51] For examples see Fairlie. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited;" and Grown, Caren and Timothy Bates. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies." Center for Economic Studies, U.S. Bureau of the Census.

[52] Ibid.

[53] Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

[54] Ibid.

Bank loans are one of the largest sources of debt capital for small businesses.[55] Discrimination in the application and approval processes of these loans and other credit resources could be detrimental to the success of minority- and women-owned businesses. Previous studies have addressed race/ethnicity and gender discrimination in capital markets by evaluating:

- Loan denial rates;
- Loan values;
- Interest rates;
- Individual assumptions that loan applications will be rejected;
- Sources of capital; and
- Relationships between start-up capital and business survival.

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board's 1998 and 2003 Survey of Small Business Finances (SSBF), the most comprehensive national source of credit characteristics of small firms (firms with fewer than 500 employees). The survey contains information on loan denial and interest rates, as well as anecdotal information from firms. Sample weights are applied to provide representative estimates. The samples from 1998 and 2003 contain records for 3,521 and 4,240 firms, respectively.

The SSBF records the geographic location of the firm by Census Division, not city, county or state. The South Atlantic Census Division (referred to below as the South Atlantic region) contains Georgia, along with Delaware, District of Columbia, Florida, Maryland, North Carolina, South Carolina, Virginia and West Virginia. This is the greatest level of geographic detail available for SSBF data, and 2003 remains the most recent information as the survey was discontinued after that year.

Loan denial rates. Figure G-7 shows loan denial rates from the 1998 and 2003 SSBFs for the South Atlantic region and the United States. National SSBF data for 1998 reveal the following:

- African American-owned businesses experienced higher rates of denial compared to all other racial and ethnic groups;
- African American-, Hispanic American- and Asian American-owned firms had a loan denial rate considerably above that of non-Hispanic white male-owned firms (in each case a statistically significant difference); and
- A larger proportion of women-owned firms than male-owned firms were denied business loans.

[55] Data from the 1998 SSBF indicates that 70 percent of loans to small business are from commercial banks. This result is present across all gender, race and ethnic groups with the exception of African Americans, whose rate of lending from commercial banks is even greater than other minorities. See Blanchard, Lloyd, Bo Zhao and John Yinger. 2005. "Do Credit Market Barriers Exist for Minority and Woman Entrepreneurs." *Center for Policy Research, Syracuse University.*

Measured against rates of loan denial for non-Hispanic white- and male-owned firms in 2003, loan denial rates were higher for minority- and women-owned firms in the United States. The loan denial rate for African American-owned firms in 2003 was substantially higher than rates for other groups (51%).

Loan denial statistics on individual minority groups in the South Atlantic region are not reported in Figure G-7 due to small sample sizes. However, about 31 percent of minority- and women-owned firms in the South Atlantic region reported being denied loans in 1998, a larger proportion than the 17 percent of non-Hispanic white male-owned firms that were denied. This difference was also evident in the 2003 SSBF data for the South Atlantic region, where 26 percent of minority- and women-owned firms reported being denied loans, compared to 7 percent of non-Hispanic white male-owned firms.

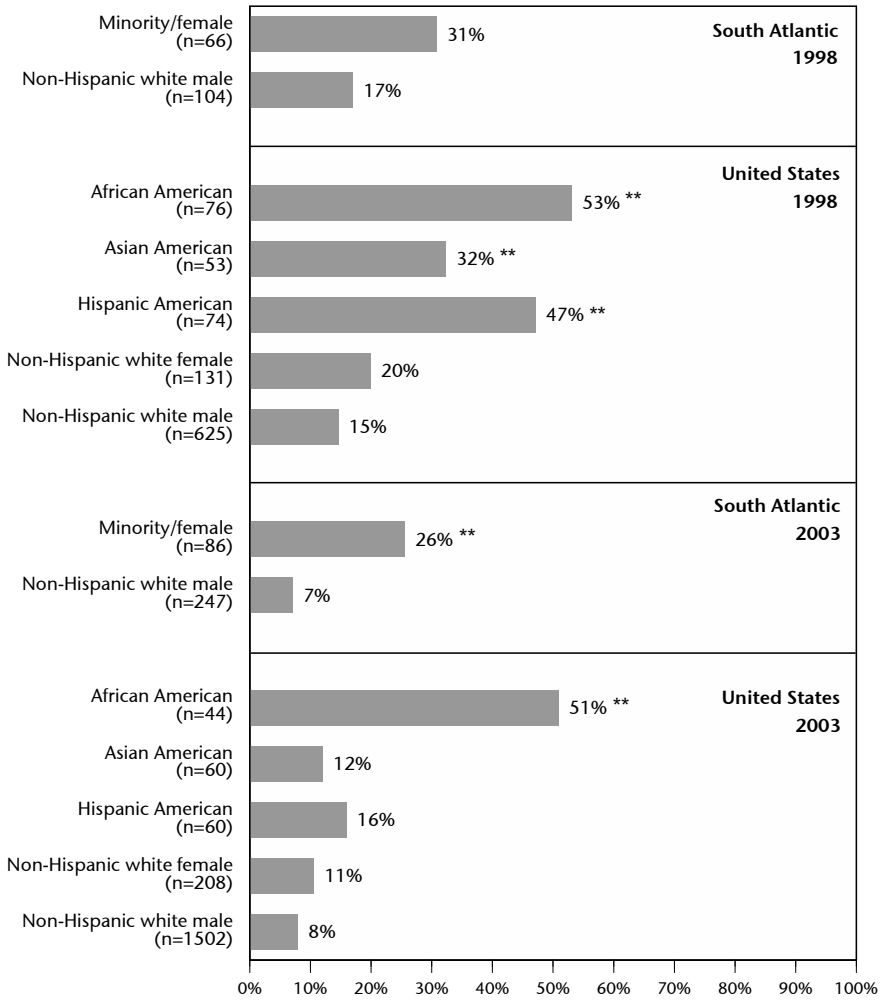
Figure G-7. Business loan denial rates, 1998 and 2003

Note:

** Denotes that the difference in proportion from non-Hispanic white male-owned firms is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



Regression analyses of loan denial rates. A number of studies have investigated whether disparities in loan denial rates for different race/ethnicity and gender groups exist after controlling for other factors that affect loan approvals. Findings from these studies include:

- Commercial banks are less likely to loan to African American-owned firms than to non-Hispanic white-owned firms after controlling for other factors.[56]

- African American, Hispanic American and Asian American men are more likely to be denied a loan than non-Hispanic white men. However, African American borrowers are more likely to apply for a loan.[57]

- Disparities in loan denial rates between African American-owned and non-Hispanic white-owned firms tend to decrease with increasing competitiveness of lender markets. A similar phenomenon is observed when considering differences in loan denial rates between male- and female-owned firms. [58]

- The probability of loan denial decreases with greater personal wealth. However, controlling for personal wealth does not resolve the large differences in denial rates across African American-, Hispanic American-, Asian American-, and non-Hispanic white-owned firms. Specifically, information on personal wealth explained some differences for Hispanic- and Asian American-owned firms compared to non-Hispanic whites, but almost none for African American-owned firms.[59]

- Loan denial rates are significantly higher for African American-owned firms than non-Hispanic white-owned firms in the presence of several other factors such as creditworthiness and other characteristics. This result is largely insensitive to specification of the model. Consistent evidence on loan denial rates and other indicators of discrimination in credit markets was not found for other minorities and women.[60]

- Women-owned businesses are no less likely to apply for or to be approved for loans in comparison to firms owned by men.[61]

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[56] Cavalluzzo, Ken, Linda Cavalluzzo and John Wolken. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey." *Journal of Business.* 75: 641-679.

[57] Coleman, Susan. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances." *The Journal of Business and Entrepreneurship.* 151-166.

[58] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[59] Cavalluzzo, Ken and John Wolken. 2002. "Small Business Turndowns, Personal Wealth and Discrimination." *FEDS Working Paper No. 2002-35.*

[60] Blanchflower, David G., Phillip B. Levine and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics.* 85:930-943.

[61] Coleman. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances."

BBC regression model for the 1998 SSBF. The study team conducted its own analysis of the 1998 SSBF by developing a model to explore the relationships between loan denial and race/ethnicity and gender of firm ownership while controlling for other factors.[62] As discussed above, there is extensive literature on business loan denials that provides the theoretical basis for the regression models. Many studies have used probit econometric models to investigate the effects of various owner, firm and loan characteristics, including the race and gender of the ownership, on the likelihood of being denied a loan. The standard model includes three general categories of variables including:

- The owner's demographic characteristics (including race and gender), credit and resources (12 variables);
- The firm's characteristics, credit and financial health (29 variables); and
- The environment in which the firm and lender operate and characteristics of the loan (19 variables). [63]

After excluding a small number of observations where the loan outcome was imputed, the national sample included 931 firms that had applied for a loan during the three years preceding the survey. The South Atlantic region included 161 such firms.

Given the relatively small sample size and the large number of variables, the study team developed a model based on firms located in the U.S. and estimated any South Atlantic region effects by including regional control variables — an approach commonly used in other studies that analyze these data.[64] The regional variables include an indicator variable for firms located in the South Atlantic region and interaction variables that represent firms owned by minorities or women and are located in the South Atlantic region.

Figure G-8 presents the coefficients and t-statistics from the probit model predicting loan denials. The results from the model indicate that a number of neutral factors affect the probability of loan denial with statistical significance:

- Having a four-year degree lowers the probability of loan denial;
- Business owners who filed for bankruptcy in the past seven years or have had a judgment against them are more likely to be denied a loan;
- Family-owned businesses are more likely to be denied;

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[62] BBC performed the regression analysis using the 1998 SSBF — as opposed to the 2003 SSBF — to capitalize on oversampling of minority-owned businesses in the national dataset in 1998 (not done in 2003).

[63] See, for example, Blanchard, Lloyd; Zao, Bo and John Yinger. 2005. "Do Credit Barriers Exist for Minority and Women Entrepreneurs?" *Center for Policy Research, Syracuse University*.

[64] Blanchflower, David G.; Levine, Phillip B. and David J. Zimmerman. 2003. "Discrimination in the Small-Business Credit Market." *The Review of Economics and Statistics*. 85(4): 930-943; NERA Economic Consulting. 2008. "Race, Sex, and Business Enterprise: Evidence from the City of Austin." *Prepared for the City of Austin, Texas*; and CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority.*

- Businesses with an existing line of credit, an existing mortgage, or existing vehicle or equipment loans are less likely to be denied a loan. However, firms with outstanding loans from stockholders are more likely to be denied;

- Firms that have been delinquent in business transactions have a higher probability of being denied a loan;

- Being in the construction industry increases the likelihood of loan denial;

- Firms in highly-concentrated industry segments (as measured by the Herfindahl index) are more likely to be denied; and

- Business mortgage applications and vehicle and equipment loan applications are less likely to be denied than other types of business loans.

Even after controlling for neutral influences, firms owned by African Americans, Hispanic Americans and Asian Americans were more likely to have their loans denied than other firms (all statistically significant differences). The indicator variable for the South Atlantic region and the interaction terms for South Atlantic region and African American- and women-ownership are not statistically significant. This result implies that the probabilities of loan denials for African American- and women-owned firms within the South Atlantic region are not statistically different from the U.S. as a whole. However, Hispanic Americans in the South Atlantic region were less likely to have their loans denied than Hispanic Americans in the U.S. as a whole (a statistically significant difference).

Figure G-8.
Likelihood of business loan denial (probit regression) in the U.S. in the 1998 SSBF,
Dependent variable: loan denial

Variable	Coefficient	t-statistic
Race/ethnicity and gender		
Constant	-5.619290	-4.29 **
African American	1.116122	3.91 **
Asian American	0.591101	2.04 **
Hispanic American	1.244493	5.26 **
Female	-0.079250	-0.44
South Atlantic (SA) region	0.139515	0.53
African American in SA region	-0.062685	-0.12
Hispanic American in SA region	-1.256719	-2.14 **
Female in SA region	0.220593	0.51
Owner's characteristics, credit and resources		
Age	0.010133	1.27
Owner experience	0.008516	0.81
Less than high school education	0.300144	0.88
Some college	-0.104356	-0.50
Four-year degree	-0.497340	-2.23 **
Advanced degree	-0.372587	-1.55
Bankruptcy in past 7 years	1.504404	2.83 **
Judgement against in past 3 years	1.097196	3.49 **
Log of net worth excluding home	-0.043445	-0.79
Owner has negative net worth	-0.694371	-1.03

Variable	Coefficient	t-statistic
Firm's characteristics, credit and financial health		
D&B credit score = moderate risk	0.662866	1.22
D&B credit score = average risk	0.739182	1.38
D&B credit score = significant risk	0.482355	0.87
D&B credit score = high risk	0.463841	0.80
Total employees	-0.001146	-0.39
Percent of business owned by principal	-0.003902	-0.83
Family-owned business	0.712623	2.40 **
Firm purchased	-0.345877	-1.70 *
Firm inherited	0.055522	0.16
Firm age	-0.012951	-1.21
Firm has checking account	0.408644	1.23
Firm has savings account	-0.196643	-1.11
Firm has line of credit	-0.943682	-5.10 **
Existing capital leases	-0.135828	-0.68
Existing mortgage for business	-0.396853	-1.90 *
Existing vehicle loans	-0.529937	-2.88 **
Existing equipment loans	-0.508333	-2.34 **
Existing loans from stockholders	0.565370	2.71 **
Other existing loans	-0.121736	-0.63
Firm used trade credit in past year	-0.236970	-1.48
Log of total sales in prior year	-0.004571	-0.07
Negative sales in prior year	0.289566	0.36
Log of cost of doing business in prior year	0.009130	0.18
Log of total assets	0.020691	0.29
Negative total assets	-0.597249	-0.67
Log of total equity	0.098601	1.32
Negative total equity	1.047813	1.37
Firm bankruptcy in past 7 years	0.581274	1.18
Firm delinquency in business transactions	1.169890	6.24 **

Variable	Coefficient	t-statistic
Firm and lender environment and loan characteristics		
Partnership	0.052549	0.16
S corporation	-0.263722	-1.12
C corporation	-0.315194	-1.15
Construction industry	0.459936	1.71 *
Manufacturing industry	0.142339	0.52
Transportation, communications and utilities industry	0.334972	0.74
Finance, insurance and real estate industries	-0.163856	-0.45
Engineering industry	0.606954	1.63
Other industry	0.237486	1.23
Herfindahl index = .10 to .18	2.363897	4.62 **
Herfindahl index = .18 or above	2.755233	5.34 **
Located in MSA	0.184649	1.00
Sales market local only	0.134497	0.84
Loan amount	0.000000	-0.38
Capital lease application	-0.119932	-0.34
Business mortgage application	-0.744808	-2.68 **
Vehicle loan application	-1.277041	-3.94 **
Equipment loan application	-0.813908	-2.83 **
Loan for other purposes	-0.343966	-1.68 *

Note: * Statistically significant at 90% confidence level.
** Statistically significant at 95% confidence level.

Source: BBC Research & Consulting analysis of 1998 SSBF data.

The study team simulated loan approval rates for those minority groups with statistically significant disparities (African Americans, Asian Americans and Hispanic Americans) by comparing observed approval rates with simulated rates. The study team simulated the rates by inputting observed variables for those minorities into a probit model developed for non-Hispanic white male-owned firms that includes the effects of a business being in the South Atlantic region.[65] Figure G-9 shows these simulated loan approval rates in comparison to the actual approval rates observed in the 1998 SSBF.

Figure G-9. Comparison of actual loan approval rates to simulated loan approval rates, 1998

Group	Loan Approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
African American	46.4%	74.6%	62
Asian American	69.4%	83.8%	83
Hispanic American	53.7%	81.8%	66

Note:

Actual approval rates presented here and denial rates in Figure G-7 do not sum to 100% because some observations were dropped in the probit regression.

Source:

BBC Research & Consulting analysis of 1998 NSSBF data.

Based on 1998 SSBF data, the observed loan approval rate was 46 percent for African American-owned firms that applied for loans. Model results show that African American-owned firms would have an approval rate of about 75 percent if they were approved at the same rate as similarly situated firms owned by non-Hispanic whites. For Asian Americans, the actual loan approval rate was 69 percent, compared to a rate of 84 percent if they were approved at the same rate as similarly situated firms owned by non-Hispanic whites. Hispanic American-owned firms experienced a 54 percent loan approval rate, compared to 82 percent for similarly situated non-Hispanic white-owned firms.

Other researchers' analyses of the 2003 SSBF. Summary statistics from the 2003 SSBF of loan denial rates by race and ethnicity are presented at the beginning of this section. While these data are the most recent information collected from small businesses, the study team selected the data from the 1998 SSBF to conduct the econometric analysis to capitalize on the over-sampling of minority-owned business in the 1998 SSBF (not done in the 2003 SSBF).[66]

However, other recent studies elected to incorporate the 2003 SSBF into the analysis, while at the same time acknowledging the drawbacks of these data. In a 2009 study prepared for the Augusta-Richmond County, Georgia, NERA Economic Consulting (NERA) presented results from models using the 1993, 1998 and 2003 SSBFs, while focusing the analysis on the 1993 data. NERA investigated factors influencing loan denial rates using a probit econometric model. At a national level, their results using the 1998 SSBF are consistent with BBC's findings. When using the 2003 SSBF data, however, they find that loan denial rates for Hispanic-owned firms are not significantly different

[65] The approval rate is equal to one minus the denial rate.

[66] In the 1998 data, 7.3 percent of the firms surveyed were owned by Hispanic Americans, however in 2003 that number dropped to 4 percent. Numbers dropped from 7.7 percent to 2.8 percent and 5.7 percent to 4.2 percent for African American-owned and Asian American-owned firms, respectively. This decrease in minority samples impacts the precision of econometric analysis used to investigate disparities in loan denial rates for minority groups.

from rates for non-Hispanic white-owned firms.[67] The results of NERA's probit regression models at the national level are summarized in Figure G-10.

Figure G-10.
Likelihood of loan denial:
Results from 2009 NERA
Augusta-Richmond County study

	Statistical significance	Likelihood of loan denial
1998 SSBF		
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	Yes	Higher
Female	No	N/A
2003 SSBF		
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	No	N/A
Native/Other	No	N/A
Female	No	N/A

Note:

N/A: not applicable.

The model specifications included controls for owner characteristics, business characteristics, geographic characteristics, personal financial history, business financial history and use of financial services.

Source:

NERA Economic Consulting, 2009. "Race, Sex and Business Enterprise: Evidence from Augusta, Georgia."

Charles River Associates (CRA) also incorporated the 2003 SSBF in a study prepared for the Santa Clara Valley Transportation Authority. Combining data from the 1998 and 2003 SSBFs, the CRA study reveals possible disparities in loan denial by race/ethnicity and gender using a probit econometric model and controlling for other factors. Figure G-11 shows a summary of their results.

Figure G-11.
Likelihood of loan denial:
Findings from 2007 CRA study
using 1998 and 2003 SSBF data

	Statistical significance	Likelihood of loan denial
African American	Yes	Higher
Asian American	Yes	Higher
Hispanic American	Yes	Higher
Female	No	N/A

Note:

N/A: not applicable.

The model specification included controls for owner characteristics, business characteristics, geographic characteristics, business performance, personal financial history, business financial history, use of financial services and loan application characteristics.

While the study does not find differences in the likelihood of loan denial for female-owned business at a national level, the results indicate that female-owned firms have a lower likelihood of denial in the Pacific region.

Source:

CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization." Prepared for Santa Clara Valley Transportation Authority.

Consistent with BBC's results, CRA's analysis indicates that African American- and Hispanic-owned firms have higher probabilities of loan denial. They also find that Asian-owned firms are more likely to be denied loans.[68]

[67] NERA Economic Consulting. 2009. "Race, Sex, and Business Enterprise: Evidence from Augusta, Georgia." *Prepared for Augusta-Richmond County, Georgia.*

[68] CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization." *Prepared for Santa Clara Valley Transportation Authority.*

Applying for loans. Fear of loan denial can be a barrier to capital markets as it prevents small businesses from applying for needed loans and thus can help explain differences in business outcomes. An examination of this fear provides insight into minority business owners' perceptions of the small business lending market. Using data from the 1998 and 2003 SSBF, Figure G-12 shows the proportion of firms that reported needing credit but did not apply for fear of denial.

In 1998 and 2003, minority- and women-owned firms were more likely than non-Hispanic white male-owned firms to forgo applying for loans due to fear of denial, both in the South Atlantic region and nationally. In 1998, for example, about 30 percent of minority- and women-owned firms in the South Atlantic region indicated that they had not applied for loans for this reason, compared to 21 percent of non-Hispanic white male-owned firms.

At the national level in 1998 and 2003, disparities were greatest for African American- and Hispanic American-owned business.

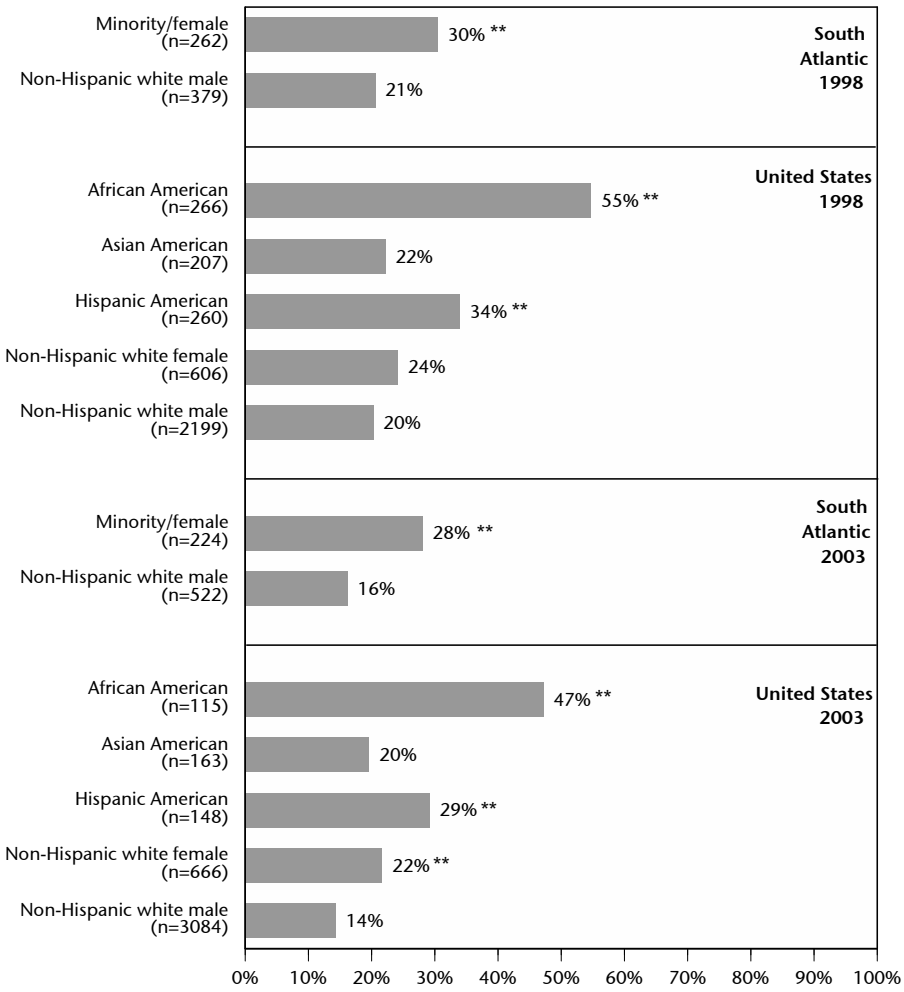
Figure G-12. Firms that needed loans but did not apply due to fear of denial, 1998 and 2003

Note:

** Denotes that the difference in proportions from non-Hispanic white male-owned firms is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



NERA's study in Augusta, Georgia also included an econometric model to investigate firms that have not applied for loans due to fear of denial. The model explored whether differences between race/ethnicity and gender groups exist after controlling for other factors. Figure G-13 presents a summary of their findings for the South Atlantic region, which includes Georgia.

Figure G-13.
Fear of loan denial:
Findings from 2009 NERA Augusta-Richmond County study, South Atlanta region only

	Statistical significance	Likelihood of not applying for a loan for fear of denial
1998 SSBF		
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	No	N/A
Female	No	N/A
2003 SSBF		
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	No	N/A
Native/Other	No	N/A
Female	Yes	Higher

Note:

N/A: not applicable.

The model specifications included controls for owner characteristics, business characteristics, geographic characteristics, personal financial history, business financial history and use of financial services.

Source:

NERA Economic Consulting, 2009. "Race, Sex and Business Enterprise: Evidence from Augusta, Georgia."

NERA's results indicate that African American-owned businesses in the South Atlantic region are more likely to not apply for a loan for fear of denial, a result also evident at the national level.[69]

In its study for the Santa Clara Valley Transportation Authority, CRA used an econometric model to investigate firms that did not apply for loans for fear of denial. The model explored whether differences between race/ethnicity and gender groups exist after controlling for other factors. As explained above, CRA based its analysis on combined data from the 1998 and 2003 SSBFs. Figure G-14 presents a summary of their findings.

Figure G-14.
Fear of loan denial:
Findings from 2007 CRA study using 1998 and 2003 SSBF data

	Statistical significance	Likelihood of not applying for a loan due to fear of denial
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	Yes	Higher
Female	No	N/A

Note:

N/A: not applicable.

The model specification included controls for owner characteristics, business characteristics, geographic characteristics, personal financial history, business financial history and use of financial services.

Source:

CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization." Prepared for Santa Clara Valley Transportation Authority.

Results from CRA's model indicate that African American- and Hispanic American-owned businesses are more likely to not apply out of fear of being denied.[70]

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[69] NERA Economic Consulting, 2009. "Race, Sex and Business Ownership: Evidence from Augusta, Georgia." *Prepared for Augusta-Richmond County, Georgia.*

[70] CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority.*

Other studies have identified factors that influence the decision to apply for a loan, such as firm size, firm age, owner age and educational attainment. Controlling for these factors can help in determining whether race and ethnicity explain fear of loan denial. Findings indicate:

- One study found that African American- and Hispanic American-owners were significantly less likely to apply for loans.[71]

- Another study concluded that, after controlling for educational attainment, there were no significant differences in loan application rates between non-Hispanic white, African American, Hispanic American and Asian American men.[72]

- A third study revealed that African American-owned firms were more likely than other firms to report being seriously concerned with credit markets and were less likely to apply for credit in fear of denial.[73]

[71] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[72] Coleman, Susan. 2004. "Access to Debt Capital for Small Women- and Minority-Owned Firms: Does Educational Attainment Have an Impact?" *Journal of Developmental Entrepreneurship*. 9:127-144.

[73] Blanchflower et al., 2003. Discrimination in the Small Business Credit Market.

Loan values. The study team also considered average loan values for firms that received loans. Results from the 1998 and 2003 SSBFs for mean loan values awarded by racial and ethnic group are presented in Figure G-15. In both 1998 and 2003, minority- and women-owned firms in the South Atlantic region received loans that amounted to less, on average, than loan amounts awarded to non-Hispanic white male-owned firms.

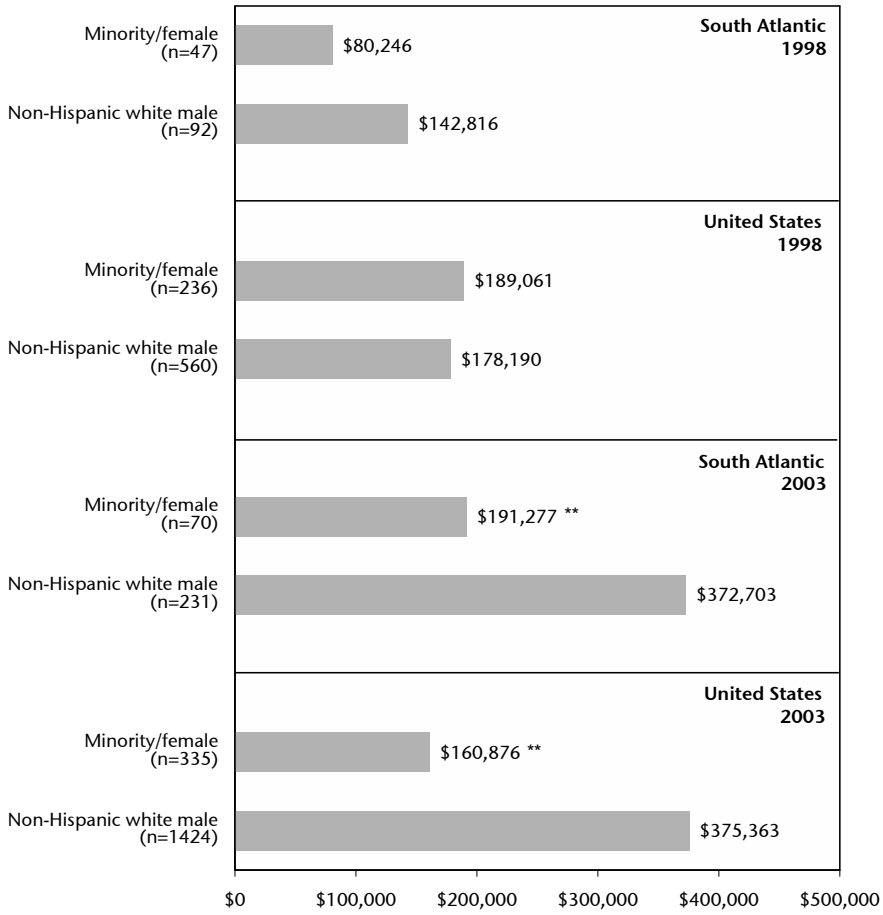
Figure G-15. Mean value of approved business loans, 1998 and 2003

Note:

** Denotes that the difference in means from non-Hispanic white male-owned firms is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



Previous national studies have found that African American-owned firms received substantially lower loan amounts than their non-Hispanic white counterparts with similar characteristics. Examination of construction companies in the United States revealed that African American-owned firms received smaller loans than firms with otherwise identical traits.[74]

[74] Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

Interest rates. Based on 1998 and 2003 SSBF data, Figure G-16 presents the average interest rates on commercial loans by the race and ethnicity of firm ownership. In 1998, on average, minority- and women-owned firms in the South Atlantic region received loans with similar interest rates compared to loans received by non-Hispanic white male-owned firms. However, in 2003, the average interest rate on loans obtained by minority- and women-owned firms was about 1.9 percentage points higher than the mean interest rate for non-Hispanic white-owned firms.

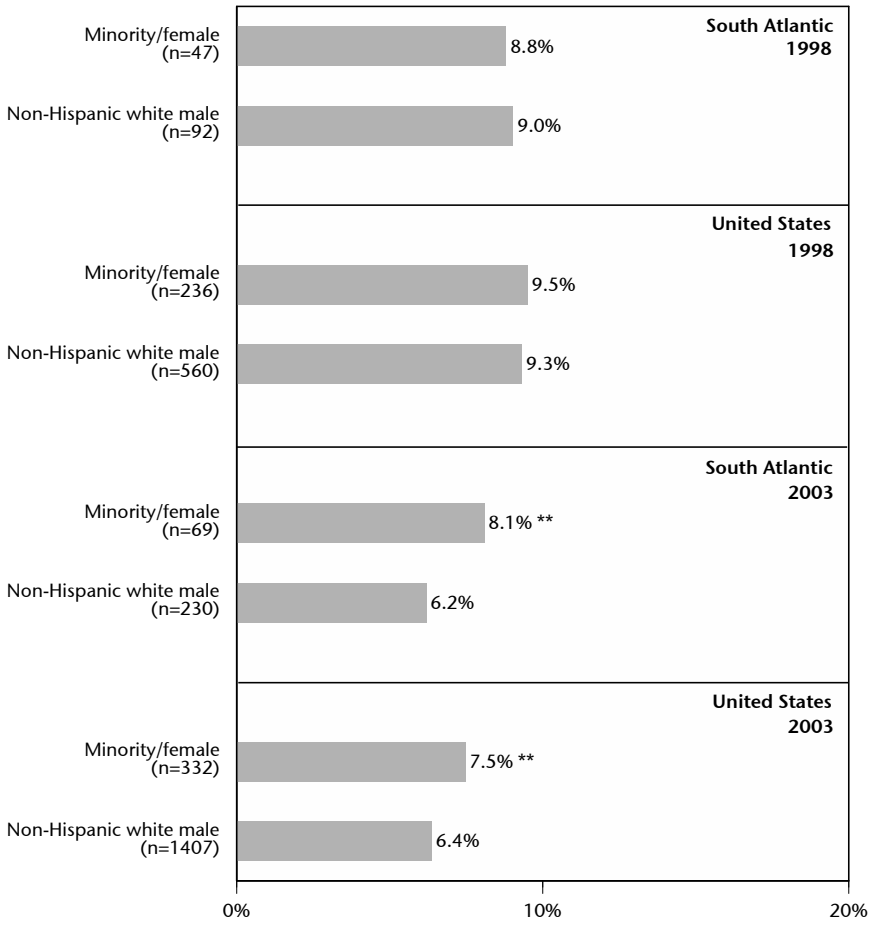
Figure G-16. Mean interest rate for business loans, 1998 and 2003

Note:

** Denotes that the difference in means from non-Hispanic white male-owned firms is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



Previous studies have investigated differences in interest rates across race/ethnicity and gender while controlling for factors such as individual credit history, firm credit history and Dun and Bradstreet credit scores. Findings from these studies include:

- Hispanic-owned firms had significantly higher interest rates for lines of credit in places with less credit market competition. However, no evidence was found that African American- or female-owned firms received different rates.[75]

- Among a sample of firms with no past credit problems, African American-owned firms paid significantly higher interest rates on approved loans.[76]

[75] Cavalluzzo. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[76] Blanchflower. 2003. "Discrimination in the Small Business Credit Market."

NERA's 2009 Augusta study also investigated differences in interest rates by race/ethnicity and gender using an econometric model that controlled for other factors that may impact interest rates. A summary of the results are shown in Figure G-17. NERA developed models for 1998 and 2003 that included the whole of the U.S. as well as interaction terms for the South Atlantic region.

Figure G-17.
Differences in interest rates: Findings from 2009 NERA Augusta-Richmond County study

	Statistical significance	Comparison of interest rates
1998 SSBF		
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	No	N/A
Female	No	N/A
2003 SSBF		
African American	No	N/A
Asian American	No	N/A
Hispanic American	No	N/A
Native/Other	No	N/A
Female	Yes	Higher

Note:

N/A: not applicable.

The model specifications included controls for owner characteristics, business characteristics, geographic characteristics, business performance, personal financial history, business financial history and use of financial services.

Source:

NERA Economic Consulting, 2009. "Race, Sex and Business Enterprise: Evidence from Augusta, Georgia."

NERA's 1998 model found that African American-owned firms in the U.S. pay significantly higher interest rates on business loans, even after controlling for other factors, and that there was no statistically significant difference for African American-owned business in the South Atlantic region. NERA's 2003 model found that Hispanic American-owned businesses were charged significantly higher interest rates on loans compared to non-Hispanic whites at the national level.

The CRA study also investigated differences in interest rates by race/ethnicity and gender using a linear econometric model and controlling for other factors that may impact interest rates.

On a national level, African American- and Hispanic American-owned firms paid a higher interest rate than non-minority-owned firms even after controlling for other factors.[77] Results are summarized in Figure G-18.

[77] CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization." *Prepared for Santa Clara Valley Transportation Authority.*

Figure G-18.
Differences in interest rates: Findings from 2007 CRA study using 1998 and 2003 SSBF data

	Statistical significance	Comparison of interest rates
African American	Yes	Higher
Asian American	No	N/A
Hispanic American	Yes	Higher
Female	No	N/A

Note:

N/A: not applicable.

The model specification included controls for owner characteristics, business characteristics, geographic characteristics, business performance, personal financial history, business financial history and use of financial services.

Source:

CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization." Prepared for Santa Clara Valley Transportation Authority.

Results from BBC availability interviews. At the close of the 2011 availability interviews conducted as part of the GDOT disparity study, BBC asked, "Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as we ask you these questions."

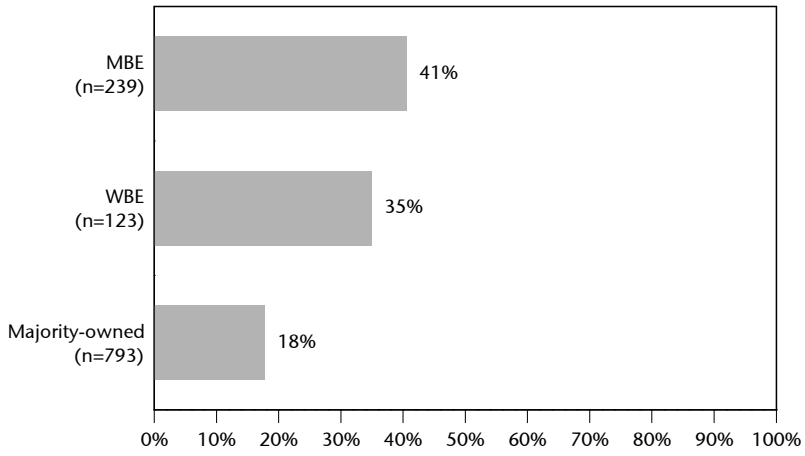
The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?"

Access to lines of credit and loans. As shown in Figure G-19, 41 percent of MBEs and 35 percent of WBEs reported difficulties obtaining lines of credit or loans. Fewer majority-owned firms (18%) reported that they had experienced difficulties obtaining lines of credit or loans.

Figure G-19.
Has your company experienced any difficulties in obtaining lines of credit or loans?

Source:

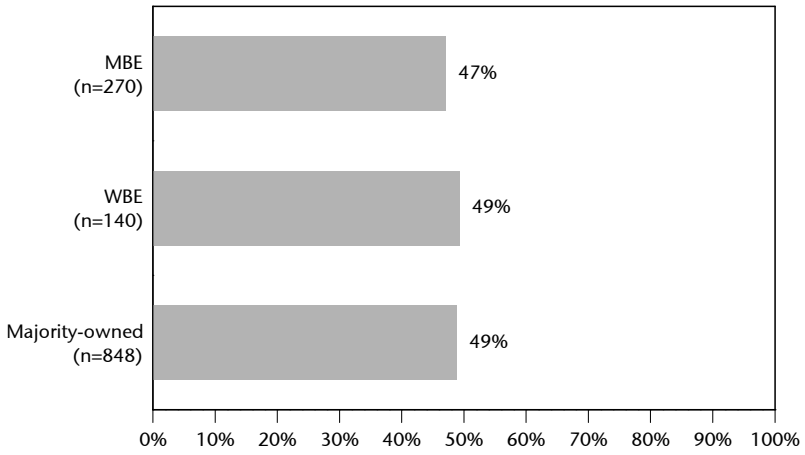
BBC Research & Consulting from 2011 Availability Interviews.



Receiving timely payment. Need for business credit is, in part, linked to whether firms are paid for their work in a timely manner. In the availability interviews, BBC asked, "Has your company had any difficulties receiving payment in a timely manner?" Figure G-20 shows that nearly half of all respondents indicated that they had experienced difficulties receiving payments in a timely manner. There was little difference in responses between MBEs, WBEs and majority-owned firms.

Figure G-20.
Has your company experienced any difficulties receiving payment in a timely manner?

Source:
BBC Research & Consulting from 2011 Availability Interviews.



Other factors affecting capital markets. Ethnic banking sectors may also affect the availability of loans to different minority groups. For example, one study found that strength in the ethnic banking sector influences credit accessibility in ethnic communities in Los Angeles. A strong Asian American bank sector helped Asian American communities transition to successful business environments, and a lack of strong banking sectors in African American communities could hinder development of African American businesses.[78]

Bonding and Insurance

Bonding is closely related to access to capital. Some national studies have identified barriers regarding MBE/WBEs and access to surety bonds for public construction projects.[79] High insurance requirements on public sector projects may also represent a barrier for certain construction and engineering-related firms attempting to do business with government agencies.

Bonding. To research whether bonding represented a barrier for Georgia businesses, BBC asked firms completing availability interviews:

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

Among firms reporting that they had obtained or tried to obtain a bond, one-third of MBEs indicated difficulties obtaining bonds needed for a project. A somewhat smaller share of WBEs (28%) reported difficulties. Only 14 percent of majority-owned firms that had obtained or tried to obtain a bond reported difficulties. Figure G-21 presents these results from the 2011 availability interviews.

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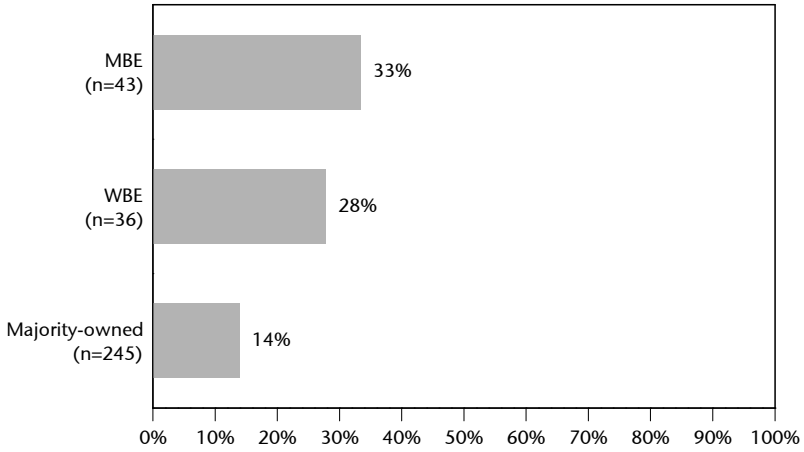
[78] Dymski, Gary and Lisa Mohanty. 1999. "Credit and Banking Structure: Asian and African-American Experience in Los Angeles." *The American Economic Review.* 89:362-366.

[79] For example, Enchautegui, Maria E. et al. 1997. "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?" *The Urban Institute:* 1-117, p. 56.

Figure G-21.
Has your company had any difficulties obtaining bonds needed for a project?

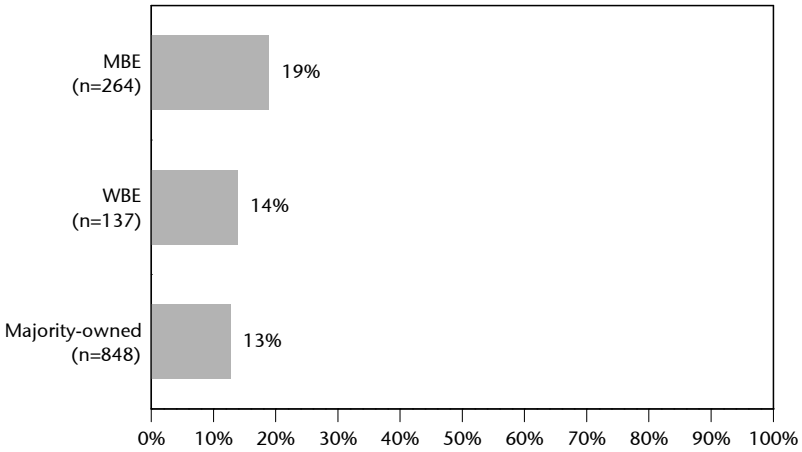
Source:
BBC Research & Consulting from 2011 Availability Interviews.



Insurance. BBC also examined whether minority- and women-owned firms were more likely than majority-owned firms within the study area to report that insurance requirements represented a barrier to bidding. About one-in-five MBEs interviewed reported such difficulties. Fewer WBEs (14%) and majority-owned firms (13%) indicated that insurance requirements presented a barrier to bidding on projects.

Figure G-22.
Have any insurance requirements on projects presented a barrier to bidding?

Source:
BBC Research & Consulting from 2011 Availability Interviews.



Summary of Analysis of Access to Capital for Business Formation and Success

There is evidence that minorities and women continue to face certain disadvantages in accessing capital necessary to start and expand businesses, based upon analysis of 2000 and 2007-2009 U.S. Census Bureau data; 2006 and 2009 HMDA data; and the 1998 and 2003 SSBF data.

- Home equity is an important source of funds for business start-up and growth. Relatively fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Georgia own homes than non-Hispanic whites. African Americans, Hispanic Americans and Native Americans in Georgia who do own homes have lower home values than non-Hispanic whites.

- African Americans, Asian Americans, Hispanic Americans and Native Americans applying for home mortgages in Georgia are more likely than non-minorities to have their applications denied.

- African American and Hispanic American home purchase mortgage borrowers in Georgia have been more likely to have subprime loans.

- Minority- and women-owned firms in the South Atlantic region have been more likely to forgo applying for loans due to fear of denial.

- Based on a regression analysis using 1998 SSBF data, African American, Asian American and Hispanic American business owners were more likely to be denied a loan (results relevant to the South Atlantic region).

- Data indicate that minority- and women-owned firms receiving business loans obtained smaller loans than majority-owned firms. There is some evidence for the South Atlantic region that minority- and women-owned firms receiving business loans pay higher interest rates on those loans.

- Among Georgia firms completing availability interviews as part of this study, minority- and women-owned firms were far more likely to report difficulties obtaining a line of credit or loans than were majority-owned firms.

- Among firms completing availability interviews and reporting that they had obtained or tried to obtain a bond, MBEs and WBEs were far more likely than majority-owned firms to indicate difficulties obtaining a bond. MBEs were also more likely to report difficulties obtaining insurance.

APPENDIX F.
Success of Businesses in the Georgia Construction and Engineering-related Industries

BBC examined the success of minority- and women-owned firms (MBE/WBEs), assessing whether business outcomes for those firms differ from those of majority-owned firms (i.e., firms not owned by minorities or women) in the construction and engineering-related industries.

In this and other marketplace appendices, engineering-related work refers to architectural, engineering and related services. Each reference to "engineering-related" work refers to these types of services.

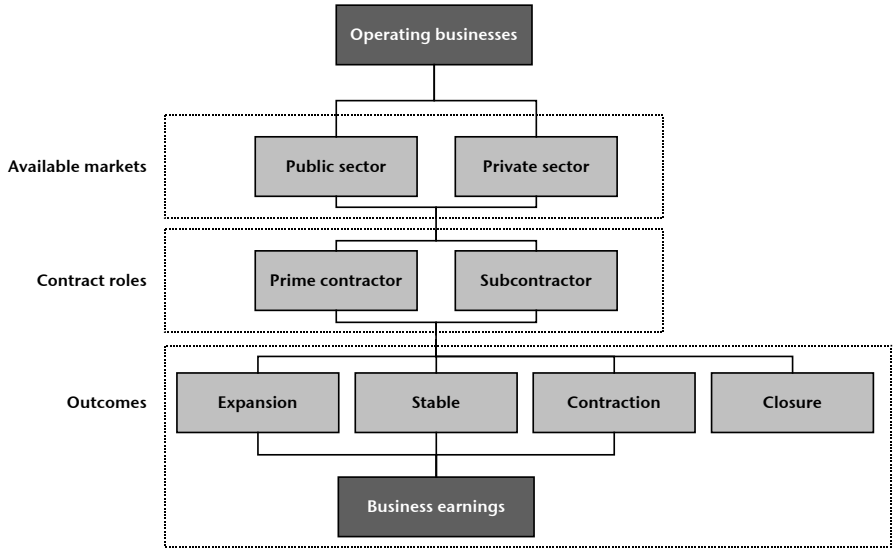
BBC researched outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Participation in public versus private sector markets;
- Participation as prime contractors and subcontractors;
- Sizes of contracts bid on and performed;
- Businesses discontinuing operations;
- Businesses expanding or contracting;
- Business receipts and earnings;
- Size distribution of gross revenue; and
- Difficulties and barriers to starting and expanding a business.

Figure F-1 provides a framework for the analysis.

Figure F-1.
Business success

Source:
BBC Research & Consulting.



The study team begins this section by examining data collected from interviews with Georgia businesses as part of BBC's availability interviews. Those data include information about firms' involvement on public and/or private sector work, such as:

- Whether firms had bid on and won contracts in study industries and the size of those projects; and
- Whether firms had worked as prime contractors, subcontractors or both.

BBC also examined firms' responses to questions concerning potential barriers to bidding and business success in the local marketplace.

After examining data from the availability interviews, the study team then turns to federal data for Georgia and the nation concerning business closures, expansion and contraction. Using those data and information collected from availability interviews, BBC concludes this appendix with an analysis of business earnings.

Markets, Contract Roles and Bid Capacity

As part of the disparity study, the study team performed availability interviews (mostly by telephone) with construction and engineering-related firms in Georgia. The study team conducted interviews in 2011. Results provide information related to bidding on public and private sector work as well as prime contracts and subcontracts. The study team also examined data on the largest contracts firms bid on or received. Firm owners and managers were also asked about potential difficulties in the marketplace. Appendix C describes the interview methodology in detail.

Results from the availability interviews pertain to businesses with Georgia locations that reported working within the Georgia transportation contracting industry (i.e., does work or provides materials related to construction, maintenance or design of roads and highways).

- Because of the relatively small number of firms representing specific minority groups, BBC reports results from the availability interviews in aggregate for minority-owned firms("MBEs" regardless of whether they are certified as an MBE or a DBE). Note that results for MBEs include minority women-owned firms.

- Responses for white women-owned firms are shown as "WBE," regardless of whether they are certified as a WBE or a DBE.

- "Majority-owned firms" are all firms not owned or controlled by minorities or women.

Public sector versus private sector work. BBC examined whether minority- and women-owned transportation contracting firms were less likely to work in the private sector than the public sector.

The study team separately examined responses for firms in construction and engineering-related subindustries. Results indicate whether a firm had pursued public or private sector work. [1,2]

Construction firms. The pie charts in Figure F-2 present the distribution of majority-, minority- and women-owned firms competing for government and private sector prime contracts and subcontracts, based on responses from availability interviews.

[1] A firm was deemed to have performed or bid on public sector work if it answered "yes" to either of the following questions: (a) "Next, I have a few questions about your company's role in construction, maintenance or design work related to roads and highways. During the past five years, has your company submitted a bid or a price quote for any part of a state or local government project in Georgia?"; or (b) "During the past five years, has your company received an award for work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier to any part of a state or local government project in Georgia?"

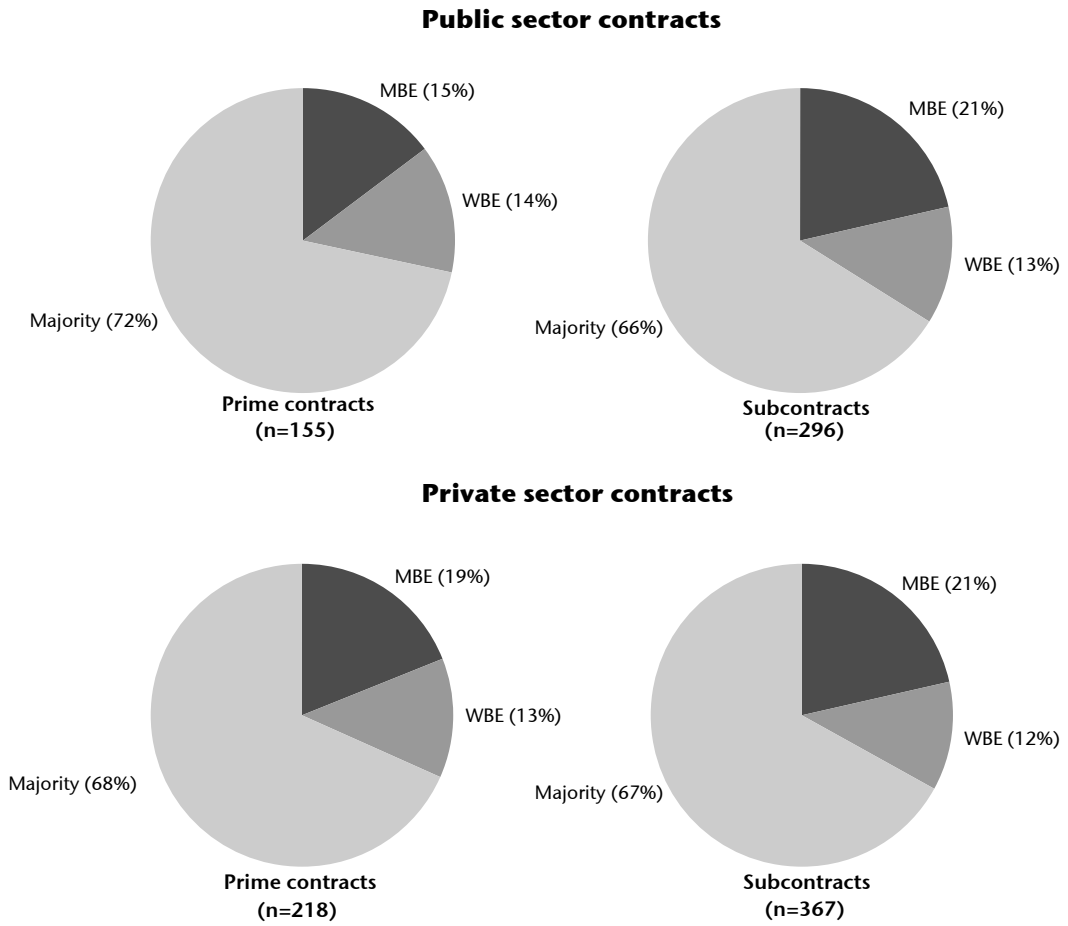
[2] A firm was deemed to have performed or bid on private sector work if it answered "yes" to either of the following questions: (a) "Again thinking about construction, maintenance or design work related to roads and highways during the past five years, has your company submitted a bid or a price quote for any part of a private sector contract in Georgia?"; or (b) "During the past five years, has your company received an award for work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier for any part of a private sector contract in Georgia?"

- Of the 155 construction industry firms that reported bidding on public sector prime contracts in the past five years, 72 percent were majority-owned, 15 percent were MBEs and 14 percent were WBEs.

- The share of firms bidding as primes that were MBEs was higher (19%) for private sector work.

- Among the 296 firms that reported competing for public sector subcontracts, two-thirds were majority-owned, 21 percent were MBEs and 13 percent were WBEs. The representation of MBE/WBEs among firms bidding on subcontract work was about the same between public sector and private sector contracts.

Figure F-2.
MBEs, WBEs and majority-owned construction firms bidding on public sector and private sector of work in Georgia in the past five years



Note: "WBE" represents white women-owned firms.
Total may not add to 100 percent due to rounding.

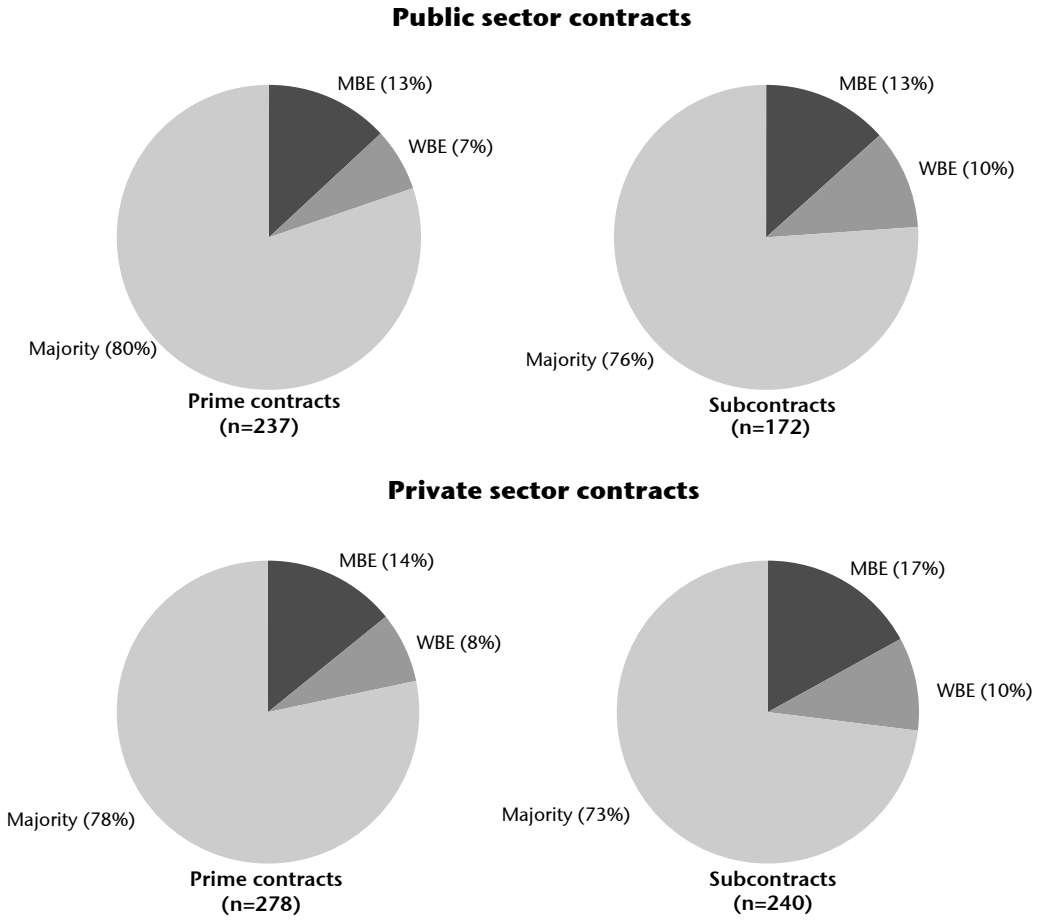
Source: BBC Research & Consulting from 2011 Availability Interviews.

Firms competing for public sector work in Georgia were also asked if they had been awarded any public sector contracts (including both prime contracts and subcontracts). When asked to consider the past five years, about 80 percent of MBEs and majority-owned construction firms reported that they had been successful in obtaining work. A larger share of WBE construction firms bidding on public sector work said that they had been successful in obtaining some work (87%).

Nearly 90 percent of WBEs and majority-owned firms bidding on private sector work indicated that they had received such work. However, only 78 percent of MBEs competing for private sector prime contracts or subcontracts indicated that they had been successful.

Engineering-related firms. The study team also analyzed the representation of minority- and women-owned engineering-related firms among businesses competing for government and private sector prime contracts and subcontracts. MBE/WBEs were about 20 percent of firms competing for public sector prime contracts and private sector prime contracts. MBE/WBEs comprised 27 percent of firms pursing subcontracts in the private sector, more than the MBE/WBE representation among firms seeking subcontracts in the public sector (23%).

Figure F-3.
Share of engineering-related firms bidding on public sector and private sector work in Georgia in the past five years



Note: "WBE" represents white women-owned firms.
Total may not add to 100 percent due to rounding.

Source: BBC Research & Consulting from 2011 Availability Interviews.

As with construction firms, engineering-related firms competing for public sector and private sector work were asked if they had received any such work in the past five years.

- Three-quarters of majority-owned firms proposing on public sector work said that they had received public work.
- A higher proportion of WBEs seeking public sector work (83%) indicated that they had received some work.
- Only 70 percent of MBEs indicated that they had received some public sector work.

Turning to engineering-related firms competing for private sector work:

- About 86 percent of majority-owned firms and 91 percent of WBEs pursuing private sector work reported receiving some contracts or subcontracts.
- Only 78 percent of MBEs pursuing private sector prime contracts or subcontracts reported receiving at least some private sector work.

Bidding as prime contractors and subcontractors/suppliers. The next four figures examine — for MBEs, WBEs and majority-owned firms — the percentage of firms bidding in different roles (as prime contractors, subcontractors, or both). These results are based on the same availability interview questions discussed above, and pertain to bidding within the Georgia transportation contracting industry within the past five years.

Construction firms. Figure F-4 examines the share of majority-, minority and women-owned Georgia construction firms that reported bidding on public sector work as a prime contractor (dark portion of bar), a subcontractor (light portion of bar) or as both (middle portion of bar).

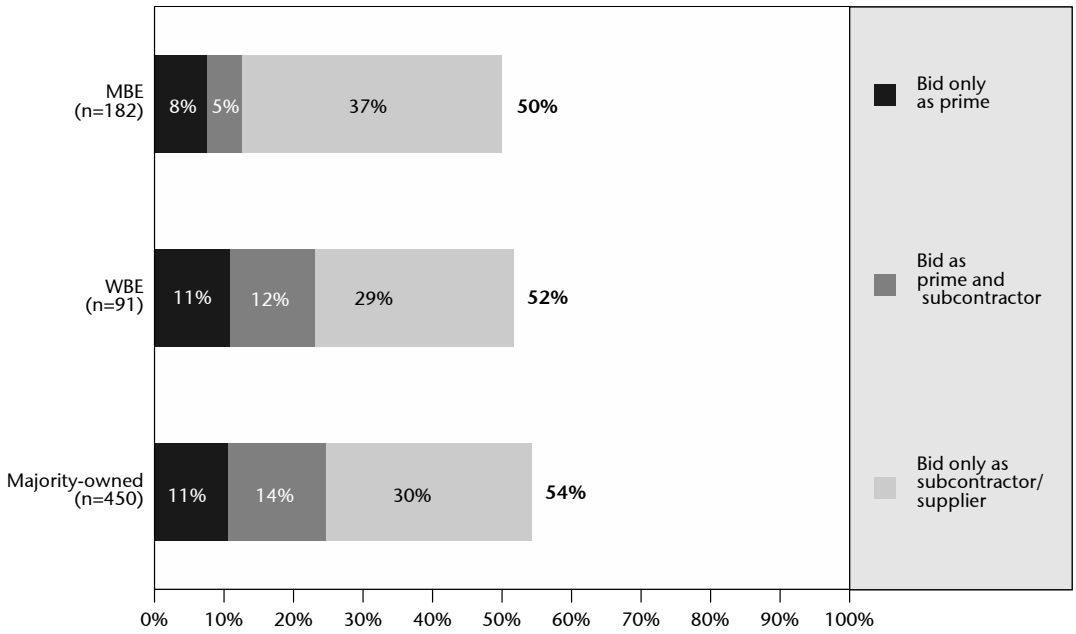
- Approximately 54 percent of majority-owned construction firms that reported being qualified and interested in future construction work bid on public sector work as a prime contractor or a subcontractor in the past five years (including submitting price quotes). About 11 percent bid only as a prime contractor and 30 percent bid only as a subcontractor.

- A similar percentage (52%) of WBEs reported bidding on public sector work in the past five years, as shown in Figure F-4. About 11 percent had bid only as a prime contractor, and 29 percent of WBEs bid only as a subcontractor on public sector construction work.

- Compared to majority-owned firms, a smaller share of MBEs reported bidding on public sector work as a prime contractor or a subcontractor in the past five years (50%). About 37 percent of MBEs bid only as a subcontractor, and 8 percent bid only as a prime contractor.

- A smaller share of MBEs reported bidding on public sector work as a prime contractor in the past five years (13%) than majority-owned (25%) and WBE (23%) construction firms.

Figure F-4.
Percent of construction firms that reported submitting a bid for any part of a public sector project in Georgia in the past five years

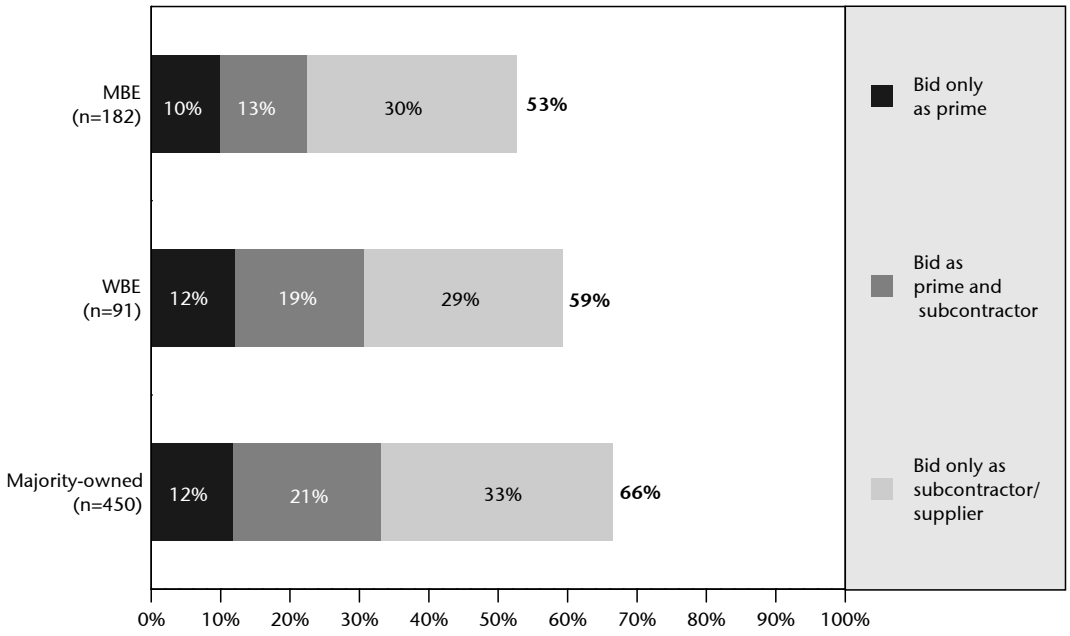


Note: "WBE" represents white women-owned firms.
Source: BBC Research & Consulting from 2011 Availability Interviews.

The study team also asked firm owners and managers if the firm had bid on a private sector construction project in the past five years. Figure F-5 presents the share of minority-, women- and majority-owned construction firms that reported bidding on private sector work as a prime contractor, a subcontractor or as both.

- A larger share of majority-owned firms (66%) reported bidding on private sector construction work in that past five years than MBEs (53%) and WBEs (59%).
- One-third of majority-owned firms, 30 percent of MBEs and 29 percent of WBEs reported submitting bid or price quotes in the past five years for private sector work only as a subcontractor.
- Compared to majority-owned firms (33%) and WBEs (31%), a smaller share of MBEs reported bidding on private sector work as a prime contractor in the past five years (23%).

Figure F-5.
Percent of construction firms that reported submitting a bid for any part of a private sector project in Georgia the past five years



Note: "WBE" represents white women-owned firms.

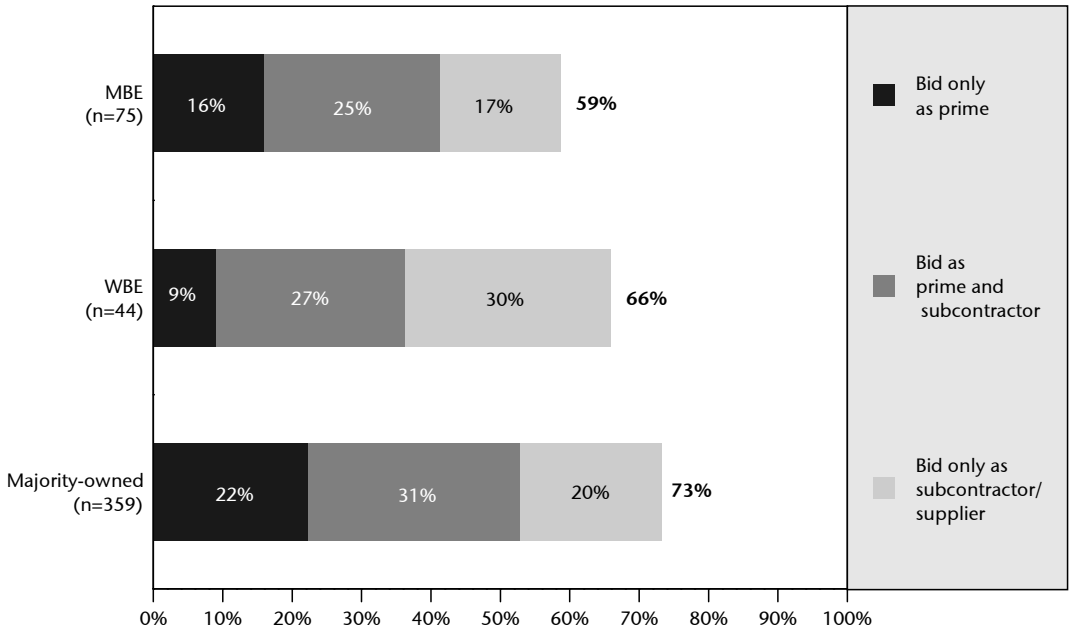
Source: BBC Research & Consulting from 2011 Availability Interviews.

Engineering-related firms. Figures F-6 and F-7 examine prime contract versus subcontract bidding for engineering-related firms, based on data from the availability interviews.

Figure F-6 shows that overall, majority-owned firms (73%) were more likely to bid on public sector contracts than MBEs (59%) and WBEs (66%).

- For WBEs, this difference was due to a smaller percentage of firms proposing as prime consultants (36% compared to 53%).
- Relatively fewer MBEs reported bidding as prime consultants and as subconsultants on private sector work (compared with majority-owned firms).

Figure F-6.
Percent of engineering-related industry firms that reported submitting a bid for any part of a public sector project in Georgia the past five years



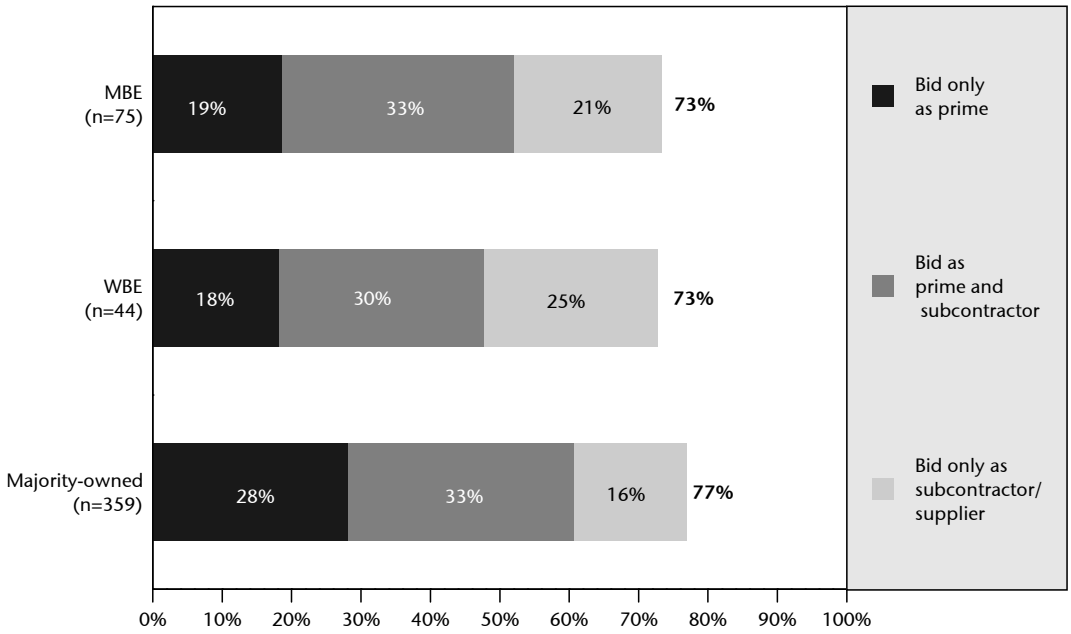
Note: "WBE" represents white women-owned firms.
Source: BBC Research & Consulting from 2011 Availability Interviews.

Figure F-7 presents results for engineering-related firms bidding on private sector work in the past five years.

- Overall, the same share of MBEs (73%) and WBEs (73%) said that they had bid on private sector engineering-related contracts within the past five years. A slightly higher share of majority-owned firms (77%) reported bidding on private sector contracts within the past five years.

- Majority-owned engineering-related firms were also more likely to bid on private sector prime contracts. About 61 percent of majority-owned firms had submitted a bid or price quote as prime contractors in the past five years. About 52 percent of MBEs and 48 percent of WBEs had bid on such prime work in the past five years. Over one-quarter (28%) of majority-owned firms reported bidding as only a prime contractor on private sector work.

Figure F-7.
Percent of engineering-related industry firms that reported submitting a bid for any part of a private sector project in the past five years



Note: "WBE" represents white women-owned firms.
Source: BBC Research & Consulting from 2011 Availability Interviews.

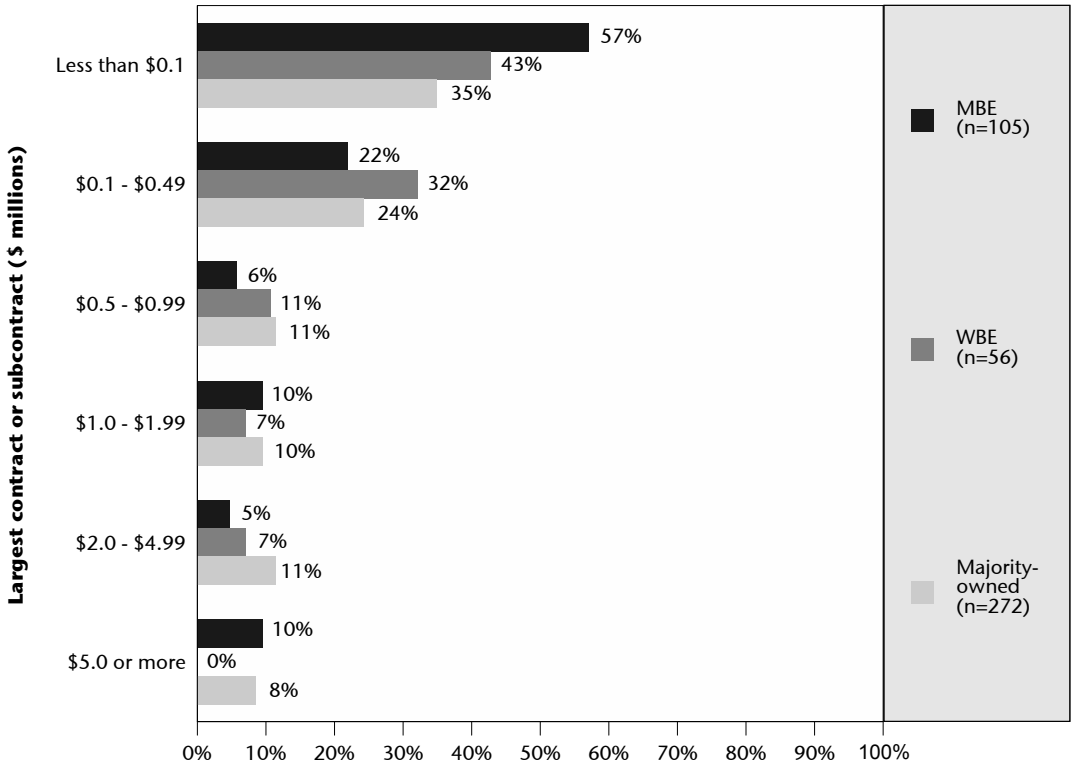
Largest contract in Georgia in the past five years. As part of the availability interviews, the study team asked firms to identify the largest contract each firm was awarded in Georgia in the past five years.

Construction firms. Among construction firms in the availability interviews, 29 percent of majority-owned firms reported that the largest contract they received was worth $1 million or more. A smaller share of MBEs (25%) reported that they had received a contract of this size, and only 14 percent of WBEs won work worth $1 million or more.

Compared to majority-owned firms (8%), a slightly larger share of MBEs (10%) reported winning construction work worth $5 million or more. No WBEs reported receiving work $5 million or more in that past five years.

More than one-half of MBE construction firms reported that the largest contract they received was less than $100,000 (compared with only one-third of majority-owned firms).

Figure F-8.
Largest contract or subcontract that the company received in Georgia in the past five years, construction firms



Note: "WBE" represents white women-owned firms.

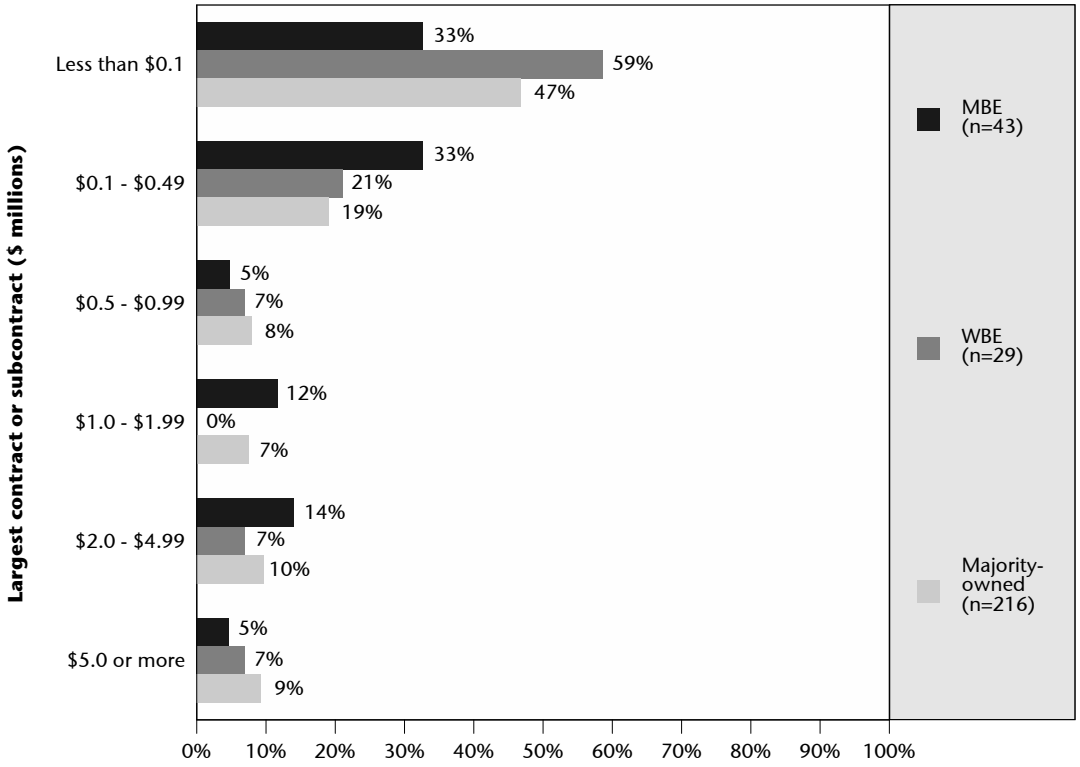
Source: BBC Research & Consulting from 2011 Availability Interviews.

Engineering-related firms. Among engineering industry firms, almost one-third of MBEs reported that the largest contract that they received in the past five years was worth $1 million or more. The percentage for MBEs was higher than majority-owned firms (26%) and WBEs (14%).

However, only 5 percent of MBE engineering-related firms reported receiving a contract of $5 million or more, much less than the 9 percent found for majority-owned firms. Seven percent of WBEs reported this size of contract.

Nearly 60 percent of WBEs reported that the largest contract they had received in the past five years was worth less than $100,000. Just one-third of MBEs and 47 percent of majority-owned firms said that the largest contract they had been awarded in the past five years was worth less than $100,000.

Figure F-9.
Largest contract or subcontract that the company received in Georgia in the past five years, engineering-related firms



Note: "WBE" represents white women-owned firms

Source: BBC Research & Consulting from 2011 Availability Interviews.

Bid capacity. Some recent legal cases regarding race- and gender-conscious contracting programs have considered the issue of the "relative capacity" of firms included in an availability analysis.[3] One approach to accounting for differing capacity between types of firms is to examine relatively small contracts, a technique noted in *Rothe*. In addition to examining small contracts, BBC directly measured bid capacity in its availability analysis.

Measurement of bid capacity. "Bid capacity" for a firm is measured as the largest contract or subcontract the firm bid on or performed in Georgia within the five years preceding when BBC interviewed the firm. BBC uses bid capacity as one factor in determining whether a firm would be available to bid on specific prime contracts and subcontracts.

Assessment of possible disparities in bid capacity of MBE/WBEs and majority-owned firms. The availability analysis produced a database of 929 firms potentially available for Georgia work. [4,5] The following analysis of bid capacity relies on the results of availability interviews.

One factor that affects bid capacity is the specializations of firms within the transportation contracting industry. Subindustries such as construction management involve larger projects. Other segments, such as surveying and mapping, typically involve smaller assignments. One way of controlling for variation in bid capacities in different subindustries is to assess whether a firm has a bid capacity above or below the median level of firms in a particular subindustry. BBC can then test whether minority- and women-owned firms bid on larger or smaller contracts or subcontracts compared with other firms in the same subindustry.

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[3] See, for example, the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008).*

[4] Two hundred and forty-six of these firms were not included in the availability marketplace analysis reported in this section, because they did not supply answers to survey question D2 or D4 on the Availability Survey.

[5] See Appendix C for further description of the survey sample and process.

Figure F-10 indicates the median bid capacity among Georgia-based firms in each of the 19 industry segments within the construction and engineering-related subindustries included in the availability study. Note that the survey questions regarding the largest project that firms had bid on or been awarded captured data in dollar ranges rather than in specific dollar amounts.

Figure F-10.
Median bid capacity by subindustry

Subindustry	Median Bid Capacity
Construction	
Highway and street construction	$1 million to $2 million
Bridge and elevated highway construction	$1 million to $2 million
Painting, striping and marking	$1 million
Water, sewer, and utility lines	$1 million
Asphalt, concrete and other paving materials	$500,000 to $1 million
Concrete work	$100,000 to $500,000
Construction materials	$100,000 to $500,000
Electrical work	$100,000 to $500,000
Grading, excavation, drainage and land prep	$100,000 to $500,000
Other construction	$100,000 to $500,000
Trucking, hauling and storage	Less than $100,000
Engineering-related	
Construction management	$1 million to $2 million
Engineering	$100,000 to $500,000
Environmental services	$100,000 to $500,000
Environmental and materials testing	$100,000 to $500,000
Transportation planning	$100,000 to $500,000
Traffic control systems	$100,000
Surveying and mapping	Less than $100,000

Source: BBC Research & Consulting from 2011 Availability Interviews.

Firms with bid capacities above the median for their industry segments are counted as available for larger projects than most of the firms in their line of business (as well as being counted as available for smaller assignments). Thus, these firms figure more prominently in the availability analysis than firms with smaller bid capacities.

Construction firms. An initial question is whether minority- and women-owned firms are as likely as majority-owned firms to have above-median bid capacity for their industry segment. The results for transportation construction firms shown in Figure F-11 indicate that, in aggregate, fewer MBEs and WBEs had an above-median bid capacity compared with majority-owned firms:

- One-third of African American-owned firms and 38 percent of other MBE construction firms[6] reported bid capacity that was higher than the median for their subindustry. Both results are lower than the 43 percent of majority-owned firms that reported above-median bid capacity.

- Only 27 percent of WBE construction firms indicated a bid capacity that was more than the median for their subindustry, which was also lower than the 43 percent found for majority-owned firms.

Engineering-related firms. The right-hand column of Figure F-11 shows the percentage of engineering-related firms reporting bid capacity that exceeded the median for their subindustry.

- African American-owned firms and other MBE engineering-related businesses were more likely than majority-owned firms to report a bid capacity that exceeded the median for their subindustry. About 42 percent of majority-owned firms in the engineering industry reported a bid capacity that exceeded the median for their subindustry. The percentages for African American-owned firms (50%) and other MBEs (47%) were higher.

- As with construction, engineering-related WBEs were less likely than other groups to report above-median bid capacity. Among engineering-related firms, 30 percent of WBEs had an above-median bid capacity.

Figure F-11.
Proportion of firms with above-median bid capacity by ownership

Source:
BBC Research & Consulting from 2011 Availability Interviews.

Firm ownership	Construction	Engineering-related
African American	34 %	50 %
Other minority	38	47
Female	27	30
Majority-owned	43	42

[6] Other minority includes Hispanic American-, Asian Pacific American-, Subcontinent Asian American- and Native American-owned firms. Answers were combined because of a relatively low number of observations for these minority groups.

Further analysis. BBC considered whether neutral factors could account for the disparities in bid capacity identified for MBE and WBE construction firms and WBE engineering-related firms.

There are a number of variables from the availability interviews that may be correlated with bid capacity — for example, annual revenue, number of employees, and whether a firm has multiple establishments in Georgia. However, the direction of causation for these factors is unclear. Do firms have greater bid capacity because they have more employees, or do they have more employees because they bid on and win larger projects?

After considering the array of firm characteristics from the availability interviews, the study team determined that the age of firms was the neutral factor that might best explain differences in bid capacity (within a subindustry) while being truly external to that capacity. Theoretically, the longer firms are in business, the larger the contracts or subcontracts they might pursue.

To test this hypothesis, the study team conducted separate logistic regression analyses for the construction and engineering-related industries to determine whether bid capacity could be at least partly explained by the age of the firm and whether minority- and women-owned firms differ from majority-owned firms of similar ages (after controlling for subindustry).

The results for the Georgia construction industry are shown in Figure F-12. The results of the logistic regression indicated the following:

- The age of the firm was a significant predictor of having above-median bid capacity. The older a firm, the more likely it is to have an above-median bid capacity.
- Minority or female ownership did not have a statistically significant effect on having above-average bid capacity for firms in the construction industry after controlling for length of time in business.

Figure F-12. Georgia transportation construction industry bid capacity model

Variable	Coefficient	Z-Statistic
Constant	-0.97	-4.16 **
Age of firm	0.03	3.39 **
Minority	-0.03	-0.09
Female	-0.49	-1.28

Note:

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

Source:

BBC Research & Consulting from 2011 Availability Interviews.

Results for the Georgia engineering-related industry are shown in Figure F-13. The logistic regression model for the industry indicated:

- Age of the firm was a significant predictor of having above-average bid capacity for engineering-related businesses. The older a firm, the more likely it is to have an above-median bid capacity.

- MBE ownership was a statistically significant predictor of having above-average bid capacity for engineering-related firms in the transportation contracting industry. Minority-owned engineering-related firms were more likely to have above-average bid capacity than other firms after controlling for subindustry and firm age.

- Female ownership did not have a statistically significant effect on having above-average bid capacity for firms in the engineering-related industry after controlling for other factors.

Figure F-13. Georgia transportation engineering-related industry bid capacity model

Variable	Coefficient	Z-Statistic
Constant	-1.53	-5.64 **
Age of firm	0.05	5.21 **
Minority	0.84	2.15 **
Female	-0.18	-0.38

Note:

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

Source:

BBC Research & Consulting from 2011 Availability Interviews.

Summary of markets, contracting roles and bid capacity. The telephone interview results show that many MBE/WBEs attempt to work as prime contractors and as subcontractors on both public and private sector contracts:

- The telephone interview results for firms in the transportation construction industry found that MBE/WBEs were more likely to have pursued work in the private sector than the public sector within the past five years.

- Many MBEs, WBEs and majority-owned construction and engineering-related firms have bid as both prime contractors and subcontractors.

Data from the availability interviews showed more indices of success for WBEs than for MBEs:

- WBEs that had bid on public and private sector construction work were more successful in obtaining at least some work compared with MBEs and majority-owned firms.

- WBEs in the engineering industry were also more successful in receiving at least some private and public sector work than MBEs and majority-owned firms.

- However, WBE engineering-related firms were less likely than majority-owned firms to bid as prime consultants.

Some results indicated certain differences for MBEs:

- For both public and private sector work, MBE construction firms were less likely than majority-owned and WBE firms to have bid as a prime contractor.

- MBEs were also less likely to report that they had been successful when pursuing public and private sector work.

There were also differences in the largest transportation-related contract and subcontract that firms had received in Georgia in the past five years. Among construction firms, more majority-owned firms than MBE/WBEs had received contracts or subcontracts worth at least $1 million. This was also true for engineering-related firms when examining contracts of $5 million or more. These differences were more pronounced for WBEs than for MBEs.

BBC also examined the largest contracts firms had bid on or received in the transportation contracting industry in Georgia in the past five years ("bid capacity").

- Minority- and women-owned construction firms were less likely than majority-owned firms to have bid capacity exceeding the median for their subindustry. Further analysis, however, found that these differences could be explained by the age of these firms.

- Minority-owned firms in the engineering industry were more likely to have above-average bid capacity than other firms with similar specializations. This difference persisted even after controlling for firm age.

- On the other hand, WBEs were less likely than other engineering-related firms to report bidding on or winning relatively large contracts. Age of firm explained most of these differences for WBEs.

Business Closures, Expansions and Contractions

Having examined different markets and contracting roles within the transportation contracting industry, Appendix F more broadly examines different businesses outcomes, including closure, expansion and contraction.

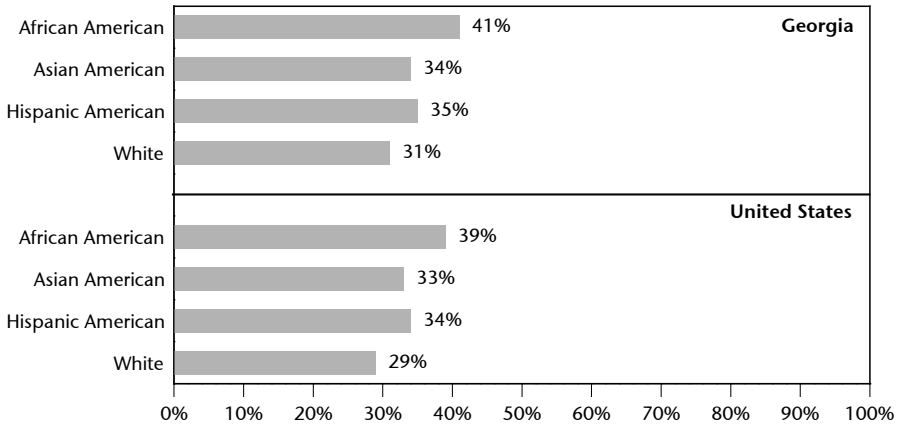
BBC used U.S. Small Business Administration (SBA) data to examine outcomes for minority- and women-owned firms in Georgia and the nation. The SBA analyses pertain to minority-owned businesses, by demographic group, in comparison with all firms.

Business closure. High rates of business failures may reflect adverse business conditions faced by minority business owners.

Rates of business closures in Georgia. A 2010 SBA report investigated business dynamics and whether minority-owned companies were more likely to close than other firms. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989-2006 Business Information Tracking Series, the SBA reported on establishment death rates in each state between 2002 and 2006 across sectors of the economy.[7]

Figure F-14 illustrates that 41 percent of African American-owned businesses operating in Georgia in 2002 had closed by the end of 2006, a higher rate than that of other groups. Hispanic American- and Asian American-owned firms also had closure rates higher than for non-minority-owned businesses during this time period. Disparities in closure rates for African American-owned firms, compared to white-owned firms, appear to have been similar in Georgia and in the United States during the same time period.

Figure F-14. Rates of business closure in Georgia and the U.S., 2002-2006



Note:

Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source:

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

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

Rates of business closures by industry. Although the SBA analysis does not include state-specific results by industry, it did examine nationwide firm closure rates by race/ethnicity for 21 industry classifications. Figure F-15 compares national rates of firm closure for two of these industry classifications: construction and professional, scientific and technical services (which includes engineering). Closure rates for all industries by race/ethnicity are also shown for comparison.

- African American-owned businesses operating in 2002 had the highest rate of closure by 2006 in the construction industry, and their closure rate in construction was higher than the African American closure rate for all industries.
- African American-owned professional, scientific and technical services firms had higher closure rates than those owned by other racial/ethnic groups.
- Compared to white-owned firms, Hispanic American-owned businesses in the United States were more likely to have closed in both the construction and professional, scientific and technical services industries.
- Asian American-owned professional, scientific and technical services businesses open in 2002 were more likely than white firms to close by 2006.

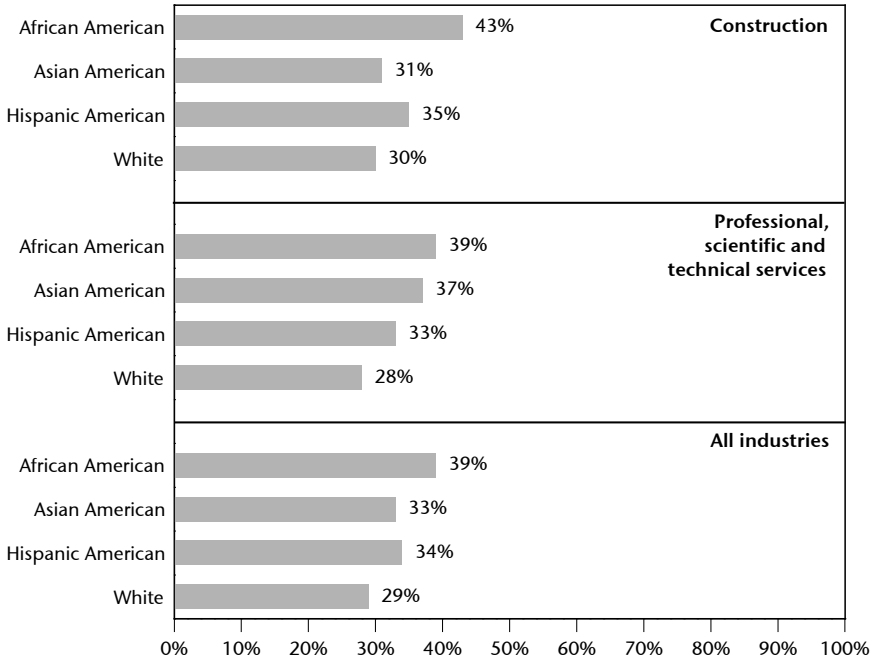
Figure F-15. Rates of business closure, 2002-2006, construction; professional, scientific and technical services; and all industries in the U.S.

Note:

Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source:

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



Successful versus unsuccessful closures. Not all firm closures can be interpreted as a business "failure." Firms may also close when an owner retires or a more profitable business alternative emerges, both of which represent successful closures.

The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify firm closures (by race/ethnicity) into successful and unsuccessful subsets.[8] The CBO survey, completed in 1996, asked owners of businesses that had closed between 1992 and 1995 the question, "Which item below describes the status of this business at the time the decision was made to cease operations?" Only the responses "successful" and "unsuccessful" were permitted. A firm that reported to be unsuccessful at time of closure was understood to have failed.

Figure F-16 on the following page shows comparative data for the proportion of firms that closed for failure in the U.S. between 1992 and 1995.[9,10] Failure rates are shown for all businesses and for the construction and professional, scientific and technical services industries.

According to the CBO, African American-owned firms were the most likely to report being "unsuccessful" at the time in which their business closed. About 77 percent of the African Americans who had owned and closed a business reported an unsuccessful business or business status. In contrast, only 61 percent of non-minority men who had owned a business said that the business was unsuccessful at time of closing.

Differences in the successful versus unsuccessful closing of firms were only somewhat narrower for other groups:

- About 71 percent of Hispanic Americans who had owned and closed businesses reported the business to be unsuccessful at time of closing, a substantial difference from the result for all firms.

- About 73 percent of other minorities who had owned and closed firms reported the business to be unsuccessful, also higher than the rate for all firms.

The difference in successful versus unsuccessful closure rates for women-owned businesses was similar to that of all businesses.

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[8] CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful closure. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

[9] All CBO data should be interpreted with caution as firms that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. "Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey." *Journal of Business & Economic Statistics*. 14(2): 231-241. This report does not include CBO data on overall firm closure rates because firms not responding to the survey were found to be much more likely to have closed than ones that did.

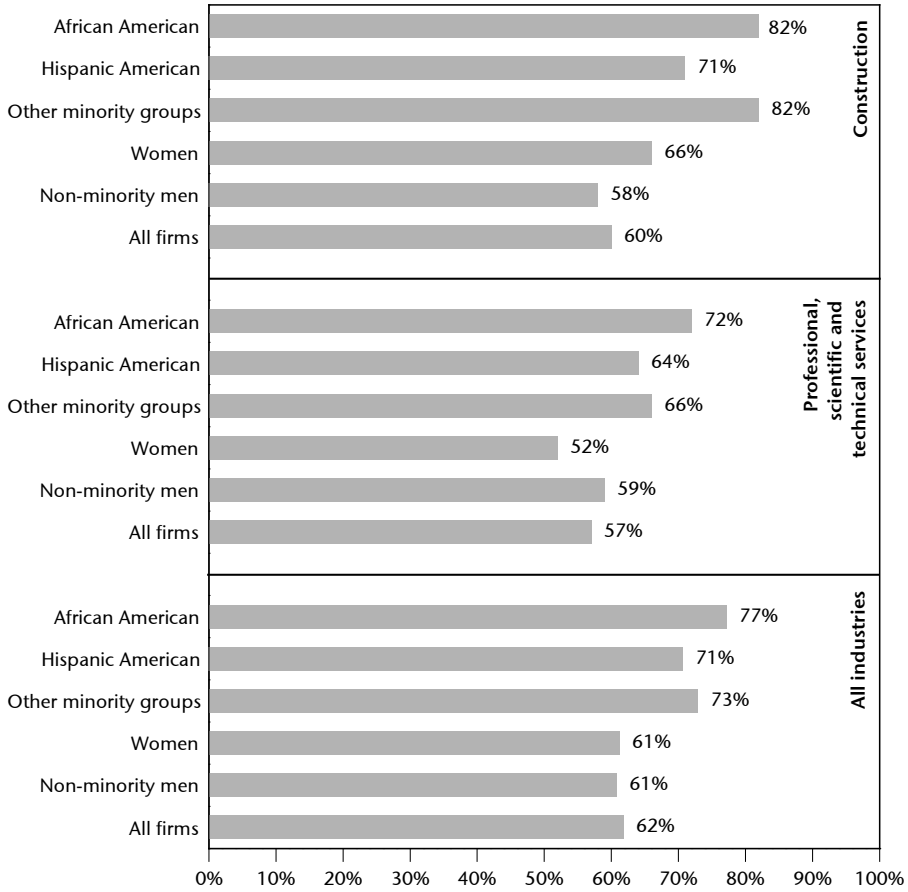
[10] This study includes CBO data on firm success because there is no compelling reason to believe that closed firms responding to the survey would have reported different rates of success/failure than those closed firms that did not respond to the survey. Headd, Brian. U.S. Small Business Administration, Office of Advocacy. 2000. *Business Success: Factors leading to surviving and closing successfully*. Washington D.C.: 12.

In the construction industry, African American- and Hispanic American-owned businesses were more likely to report an unsuccessful closure than all firms, as were businesses owned by other minorities. Women-owned businesses were also more likely to report an unsuccessful closure compared to the average for all businesses in the construction industry.

The pattern was similar in the professional, scientific and technical services industry with one exception: women-owned businesses were less likely to report an unsuccessful closure than the average for all businesses in this industry: about 57 percent of all firms but only 52 percent of women-owned businesses reported unsuccessful closure.

Figure F-16. Comparative "failure" rates for firms that closed between 1992 and 1995 in the U.S.

Source:
U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).



Reasons for differences in failure rates. Several researchers have offered explanations for higher rates of successful closure among non-Hispanic white-owned firms and higher rates of failure among minority- and women-owned businesses:

- Minority business failure is largely due to barriers in access to capital. Regression analysis has identified initial capitalization as the most significant factor in determining firm viability. Because African American-owned businesses secure smaller amounts of debt equity in the form of loans, they are more liable to fail. Difficulty in accessing capital is found to be particularly acute for minority firms in the construction industry.[11]

- Prior work experience in a family member's business or similar experiences are found to be strong determinants of business viability. Because African American business owners are much less likely to have such experience, their firms are less likely to survive.[12] Similar research has been conducted for women-owned businesses, which found gender gaps in the likelihood of business survival.[13]

- Level of education is found to be a strong determinant in business survival. Educational attainment explains a significant portion of the gap in firm closure rates between African American and non-minority firms.[14]

- Non-minority business owners have the opportunity to pursue a wider array of business activities, which increases their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.[15]

- The possession of greater initial capital and the generally higher levels of education among Asian Americans determine the high rate of survival of Asian American-owned firms compared to other minority-owned firms.[16]

In sum, national data indicate that African Americans, Hispanic Americans and other minorities who owned and closed firms are more likely than all firms to have done so because the firm was unsuccessful. Several studies have examined why business failure rates are higher for firms owned by certain minority groups at the national level.

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[11] Bates, Timothy and Caren Grown. 1991. "Commercial Lending Practices and the Development of Black-Owned Construction Companies." Center for Economic Studies, U.S. Census Bureau.

[12] Robb, A. and Fairlie, R. 2005. "Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital." University of California, Santa Cruz.

[13] Fairlie, R. and A. Robb. 2009. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." University of California, Santa Cruz.

[14] Ibid. 24.

[15] Bates, Timothy. 2002. "Analysis of Young Small Firms That Have Closed: Delineating Successful from Unsuccessful Closures." Center for Economic Studies, U.S. Census Bureau.

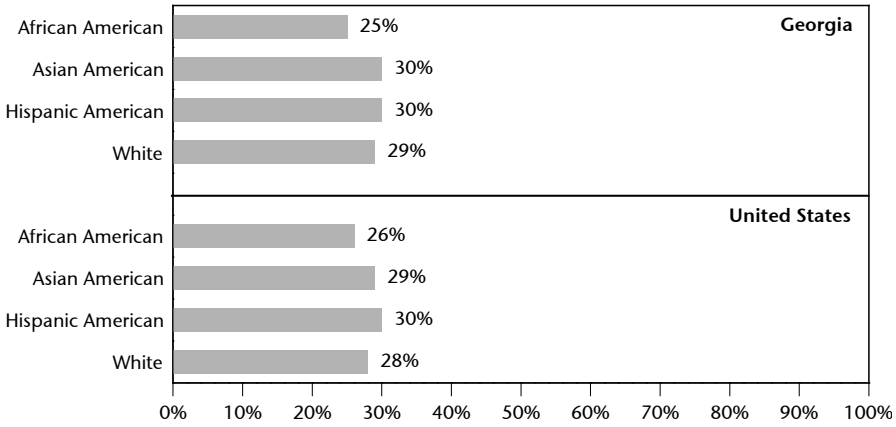
[16] Bates, Timothy. 1993. "Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses." Center for Economic Studies, U.S. Census Bureau.

Comparative rates of expansion and contraction. Comparative rates of expansion and contraction of minority-owned and majority-owned businesses are also useful indicators of the success of minority-owned businesses. Again, only some of the data available for the nation are also available at the state level.

Expansion. The 2010 SBA study of minority business dynamics from 2002-2006 referenced above also examined the relative number of Georgia businesses expanding and contracting that were not publicly-held companies.

Figure F-17 compares the percentage of businesses that increased their total employment between 2002 and 2006. According to the SBA study, 29 percent of white-owned Georgia businesses expanded. Compared to white-owned companies, African American-owned businesses were less likely to expand (25%) during the 2002-2006 time period. Asian American-owned and Hispanic American-owned businesses were more likely to expand than white-owned firms. The results were similar when considering the nation as a whole.[17]

Figure F-17. Percentage of firms expanding in Georgia and the U.S., 2002-2006



Note:

Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source:

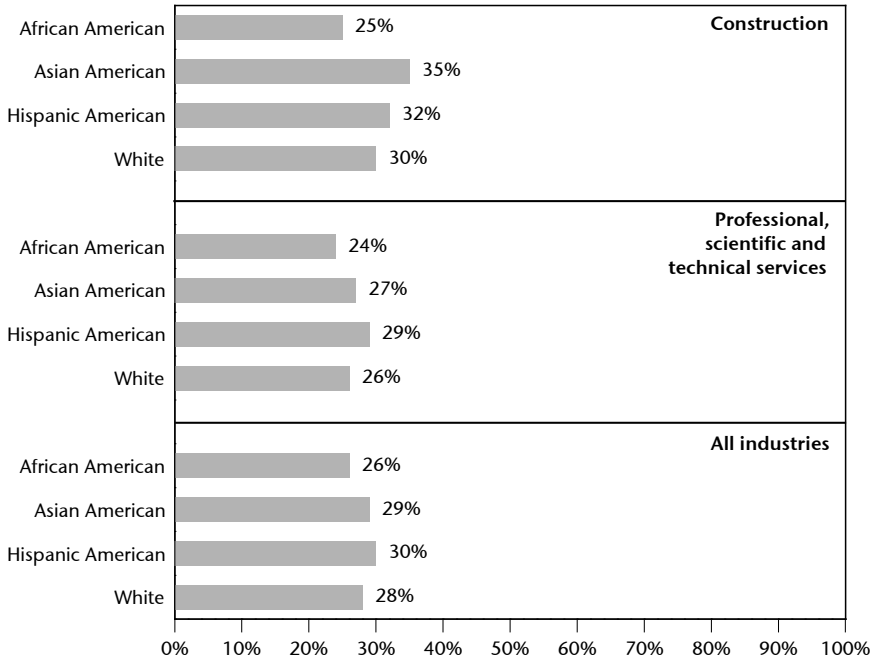
Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

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

Figure F-18 illustrates the percentage of firms expanding in the construction and professional, scientific and technical services industries in the United States. The 2010 SBA study did not separately report results for firms in individual industries at the state or local level. Nationally, the patterns evident for individual industries were similar to those observed for all industries:

- African American-owned construction and professional, scientific and technical services businesses in 2002 were less likely to have expanded by 2006 than white-owned firms.
- Hispanic American- and Asian American-owned companies in both industries were slightly more likely to have expanded than white-owned businesses.

Figure F-18. Percentage of firms expanding, 2002-2006, U.S. construction; professional, scientific and technical services; and all industries



Note:

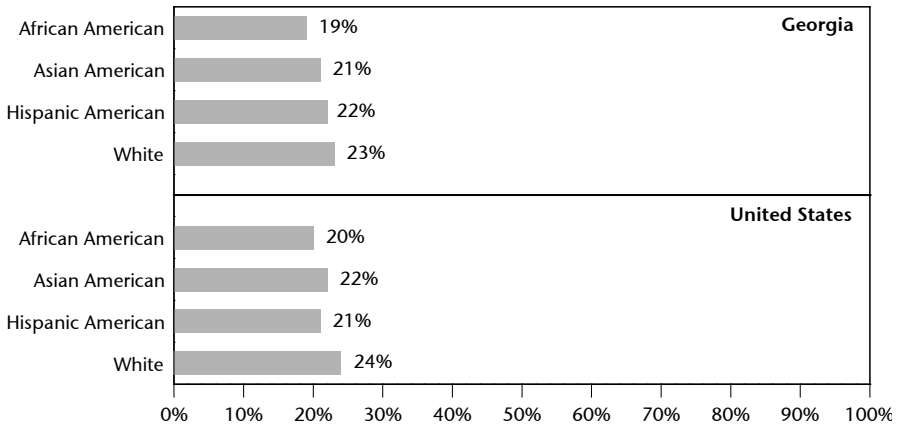
Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source:

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

Contraction. Figure F-19 shows the percentage of businesses operating in 2002 that reduced their employment between 2002 and 2006. As with the analysis of expanding firms, these data track the activity of companies that are not publicly held. In both Georgia and the United States as a whole, African American-, Asian American- and Hispanic American-owned businesses were less likely to have contracted during 2002-2006 than white-owned businesses.

Figure F-19. Percentage of firms contracting in Georgia and the U.S., 2002-2006



Note:

Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

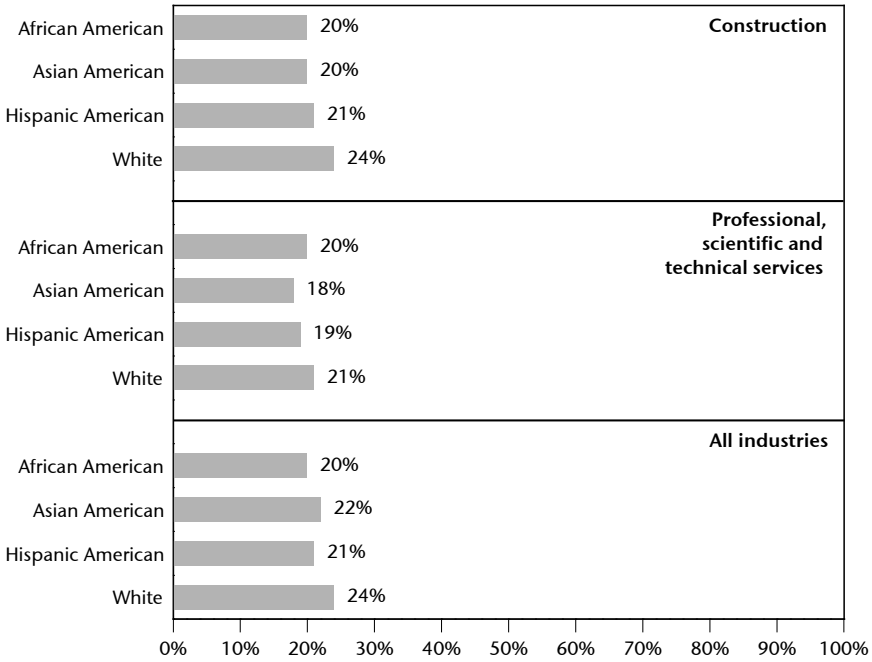
Source:

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

The SBA study did not report state-specific results relating to contraction in individual industries. However, Figure F-20 shows the share of businesses decreasing employment for the construction and professional, scientific and technical services industries at the national level.

Compared to white-owned construction firms in the United States, a similar or smaller percentage of minority-owned construction and professional, scientific and technical services businesses operating in 2002 contracted between 2002 and 2006.

Figure F-20. Rates of business contraction, 2002-2006, U.S. construction; professional, scientific and technical services; and all industries



Note:

Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source:

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

Summary of analysis of business closures, expansions and contractions. Analyses by the U.S. Small Business Administration found differences in rates of business closure, expansion and contraction for minority-owned firms between 2002 and 2006:

- Among groups examined in Georgia, African American-owned firms were the most likely to close and the least likely to expand. National data show the same pattern for African American-owned construction firms and professional, scientific and technical services firms.

- Hispanic American-owned businesses were also more likely to close than white-owned firms in Georgia. National data show higher closure rates for Hispanic American-owned firms in the construction and the professional, scientific and technical services industries.

- Asian American-owned firms were more likely to close than white-owned firms in Georgia. National data show the same pattern for Asian American-owned professional, scientific and technical services firms.

- National data indicate that closures for firms owned by African Americans, Hispanic Americans and other minority groups were much more likely to be "unsuccessful closures" compared with firms owned by non-minorities.

- Overall, minority-owned firms were less likely to contract than white-owned firms in Georgia. Hispanic American- and Asian American-owned businesses in Georgia were as likely to expand as white-owned businesses.

Business Earnings/Receipts

Annual receipts and business earnings are also an indicator of the success of a business. The study team examined:

- Business receipts data published by the U.S. Census Bureau in the 2007 SBO;

- Data on business earnings for business owners from the 2000 Census and 2007-2009 American Community Survey (ACS); and

- Annual revenue data for firms in the Georgia construction and engineering-related industries collected as part of BBC availability interviews.

Business receipts from 2007 Survey of Business Owners. BBC examined receipts for firms in Georgia and the U.S. using data from the 2007 SBO conducted by the U.S. Census Bureau. BBC also analyzed receipts for firms in individual industries. The SBO separately reports business receipts for employer firms (i.e., those with paid employees other than the business owner and family members) and for all firms. [18]

Receipts for all firms in Georgia. Figure F-21 presents 2007 mean annual receipts for firms, by race/ethnicity and gender. The SBO data for firms across all industries in Georgia indicate that

[18] We use "all firms" to denote SBO data used in this analysis; the data include incorporated and unincorporated firms, but not publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

average receipts for minority- and women-owned businesses were much lower than the average for all firms, with some groups faring worse than others.

- Businesses owned by African Americans had average receipts of $48,000, which was just 12 percent of the average for all firms in 2007 ($397,000).
- At about $147,000, average receipts for Native American-owned firms were about 37 percent of the average for all firms.
- Hispanic American-owned firms had about 46 percent of the average receipts of all firms.
- Asian American-owned firms had higher average receipts than other minority groups in 2007, although still below the average for all firms.
- Average receipts for women-owned firms were 37 percent of the average for all firms.

Consistent with the results shown in Figure F-21, a recent SBA study (2007) found similar differences when examining firms in all industries across the U.S.[19]

Figure F-21. Mean annual receipts (thousands) for all firms, by race/ethnicity and gender of owners, 2007

Note:

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

Source:

2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

[19] Lowrey, Ying. 2007. *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.

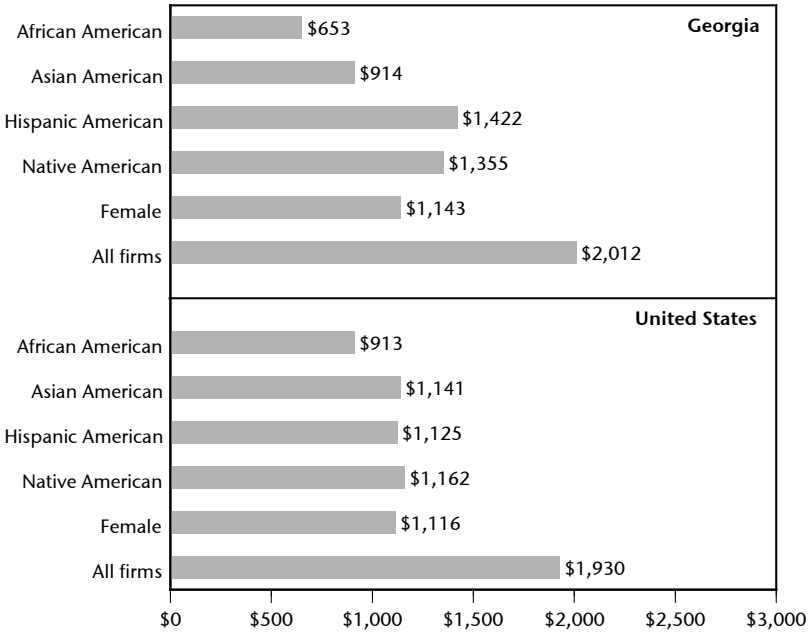
Figure F-22 shows mean annual earnings in 2007 for employer firms in Georgia and the United States. Minority- and women-owned employer firms had substantially lower average business receipts than all employer firms in the Georgia and the nation.

- African American-owned employer firms had the lowest average receipts at less than one-third of the average for all employer firms in Georgia.
- Asian American-owned employer firms had receipts at less than half of the average for all employer firms in Georgia.
- The 2007 mean annual receipts for Hispanic American- and Native American-owned employer firms in Georgia were greater than firms owned by other minority groups but still below the average for all firms ($2,012,000).
- At approximately $1,143,000, women-owned employer firms averaged about 57 percent of the mean annual receipts for all employer firms in Georgia.

Figure F-22.
Mean annual receipts (thousands) for employer firms, by race/ethnicity and gender of owners, 2007

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

Source:
2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.



Receipts for the Georgia construction industry. The study team also analyzed SBO data for firms in the construction industry and the professional, scientific and technical services industry. Figure F-23, on the following page, presents mean annual receipts in 2007 for all firms (employer and non-employer firms combined) and for just employer firms, by racial, ethnic and gender group. Results are presented for Georgia and the United States.

In the Georgia construction industry, average 2007 receipts for most minority- and women-owned firms were lower than the average for all firms. Results for all firms (combining employer and non-employer firms) indicate the following:

- African American-owned construction firms in Georgia had average receipts that were about 22 percent of the average for all firms.

- Hispanic American-owned construction firms had approximately 33 percent of the average receipts of all construction companies.
- Asian American-owned construction firms had average receipts that were 54 percent of the average for all firms.
- Native American-owned construction firms in Georgia had the highest average receipts at $426,000 — approximately $17,000 above the average for all firms.
- Average receipts for women-owned construction firms in Georgia were 71 percent of the average for all firms.

Figure F-23.
Mean annual receipts (thousands) for firms in the construction and professional, scientific and technical services industries, by race/ethnicity and gender of owners, 2007

Construction	All firms	Employer firms
Georgia		
African American	$ 88	$ 1,234
Asian American	222	1,209
Hispanic American	133	909
Native American	426	3,101
Female	290	1,704
All firms	$ 409	$ 2,102
United States		
African American	$ 105	$ 1,021
Asian American	264	1,518
Hispanic American	167	1,083
Native American	224	1,357
Female	361	1,626
All firms	$ 447	$ 1,789
Professional, scientific and technical services	**All firms**	**Employer firms**
Georgia		
African American	$ 56	$ 553
Asian American	218	749
Hispanic American	114	776
Native American	126	415
Female	92	443
All firms	$ 186	$ 734
United States		
African American	$ 77	$ 707
Asian American	198	941
Hispanic American	121	693
Native American	108	629
Female	98	543
All firms	$ 201	$ 863

Notes: Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.
Source: 2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

An examination of employer firms in construction yielded similar results: average receipts for African American-, Asian American-, Hispanic American- and women-owned firms had between 43 percent and 81 percent of the average annual receipts in Georgia in 2007.

Receipts for the Georgia professional, scientific and technical services industry. Figure F-23 also examines the Georgia professional, scientific and technical services industry. As with construction, minority- and women-owned firms had lower average receipts than all firms. Results for all firms (including employer and non-employer firms) in this industry show:

- Average receipts for firms owned by African Americans were about $56,000, which was 30 percent of the average for all firms.
- Hispanic American-owned firms had average receipts of $114,000 — 61 percent of the average for all firms.
- Native American-owned businesses had average receipts of $126,000, still substantially less than the average for all companies ($186,000).
- Asian American-owned firms had average receipts that were higher than the average for all companies.
- Women-owned firms' average receipts were less than half of the average for all companies ($92,000 versus $186,000 for all firms).

When considering only employer firms in professional, scientific and technical services, African American-, Native American- and women-owned firms had average receipts below the average for all companies in Georgia. Receipts for Asian American- and Hispanic American-owned firms were similar to all employer firms in that industry.

Business earnings for business owners. In order to assess the success of self-employed minorities and women in the study industries, BBC examined earnings using Public Use Microdata Samples (PUMS) from the 2000 U.S. Census of Population (Census) and 2007-2009 ACS. BBC analyzed incorporated and unincorporated business owners, age 16 and over, who reported positive business earnings.

Construction business owner earnings in 1999. Figure F-24 shows average earnings in 1999 for business owners in the construction industry in Georgia and the United States. The following results are based on the 2000 Census, in which individuals were asked to give their business income for the previous year:

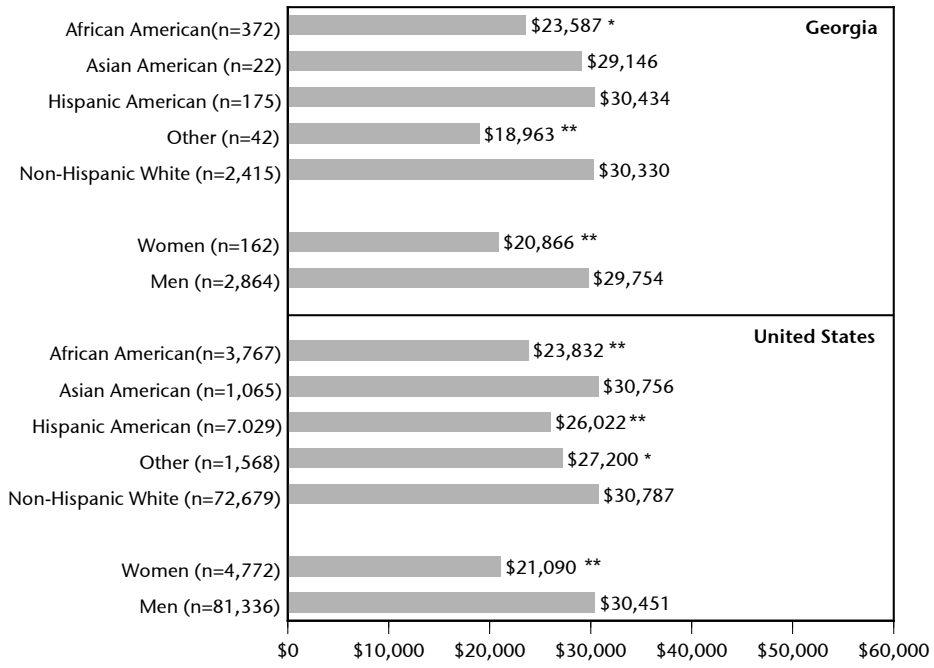
- On average, African American construction business owners in Georgia earned about $23,600, substantially less than the $30,300 average for non-Hispanic white construction business owners (a statistically significant difference at the 90 percent confidence level).

- Asian American and Hispanic American owners of construction businesses had business earnings similar to non-Hispanic whites.

- Other minority construction business owners (including Native American owners) earned an average of $19,000, much lower than the average for non-Hispanic whites and a statistically significant difference.

- Mean annual earnings for female construction business owners in Georgia (about $20,900) were less in 1999, on average, than male business owner earnings ($29,800), and the difference was statistically significant.

Figure F-24. Mean annual business owner earnings in the construction industry, 1999



Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars.

*,** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Construction business owner earnings in 2006-2009. The 2007-2009 ACS also reports business owner earnings. Due to the way each year's ACS survey is conducted, earnings for business owners reported in the 2007-2009 sample are for the previous 12 months between 2006 and 2009.[20] All dollar amounts are in 2009 dollars.

Figure F-25 shows business earnings in 2006-2009 for owners in the construction industry in Georgia and the United States.

- Similar to 2000, there were large, statistically significant disparities in earnings for construction businesses owned by African Americans, other minorities and women. For example, African American owners of construction businesses earned $25,911, on average, which was substantially below the mean earnings for non-Hispanic white business owners ($32,089).

- Unlike 2000, there was a statistically significant disparity in the earnings for Hispanic business owners.

- Asian American business owners also had lower earnings than non-Hispanic whites in 2006-2009, but the difference was not statistically significant.

Figure F-25. Mean annual business owner earnings in the construction industry, 2006-2009

Note:

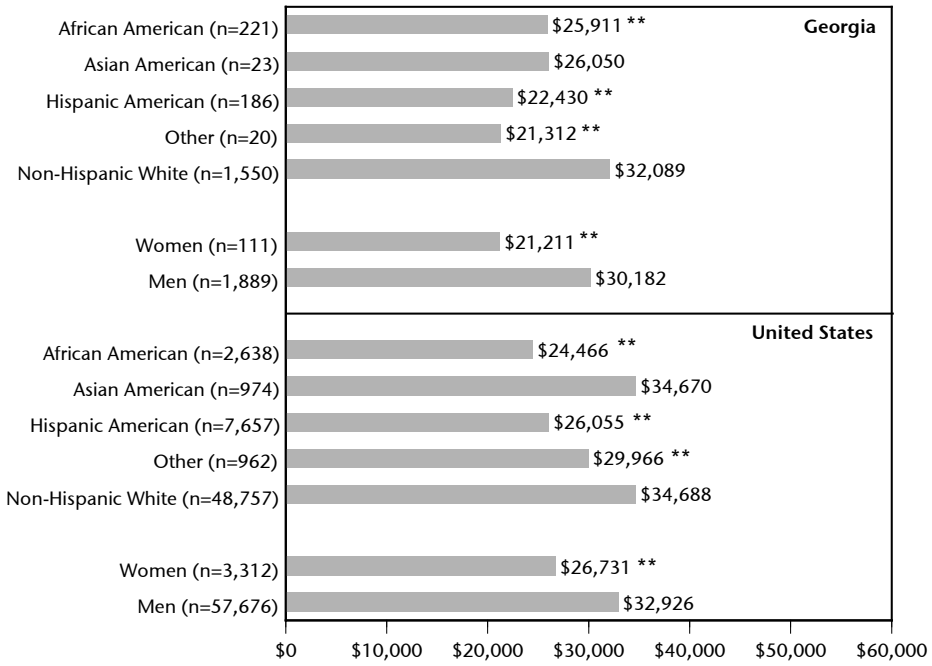
The sample universe is business owners age 16 and over who reported positive earnings.

All amounts in 2009 dollars.

*,** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2007-2009 ACS 3% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



[20] For example, if a business owner completed the survey on January 1, 2007, the figures for the previous 12 months would reference January 1, 2006 to December 31, 2006. Similarly, a business owner completing the survey December 31, 2009 would reference amounts since January 1, 2009.

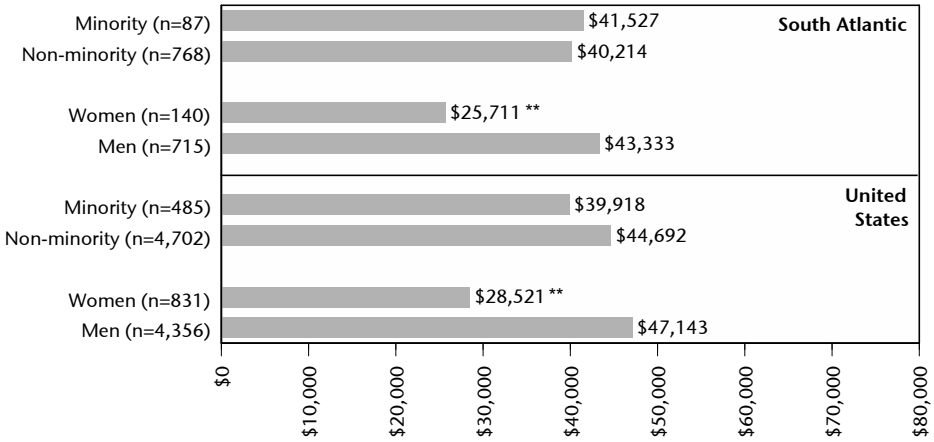
Engineering-related business owner earnings in 1999. As with the construction industry above, BBC examined average earnings in 1999 for engineering-related business owners. Due to small sample sizes, BBC was unable to report robust figures for average earnings of minority business owners in the Georgia engineering industry. Instead, Figure F-26 shows average earnings in 1999 for engineering-related business owners in the South Atlantic Census Division[21] (referred to in the following discussion as the South Atlantic region). Again, the following results are based on the 2000 Census, in which individuals were asked to give their business income for the previous year:

- On average, minorities who owned engineering-related businesses in the South Atlantic region earned $41,527 in 1999, about the same as average earnings of non-Hispanic white business owners.

- Mean annual earnings for female owners of engineering-related businesses in the South Atlantic region in 1999 ($26,000) were less, on average, than those for male business owners ($43,000), a statistically significant difference.

Figure F-26 illustrates these results.

Figure F-26.
Mean annual business owner earnings in the engineering-related industry, 1999



Note: The sample universe is business owners age 16 and over who reported positive earnings. "Minority" includes African Americans, Hispanic Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans and other minority groups. Sample sizes for these race/ethnicity groups were too small to analyze individually.

All amounts in 1999 dollars.

*,** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

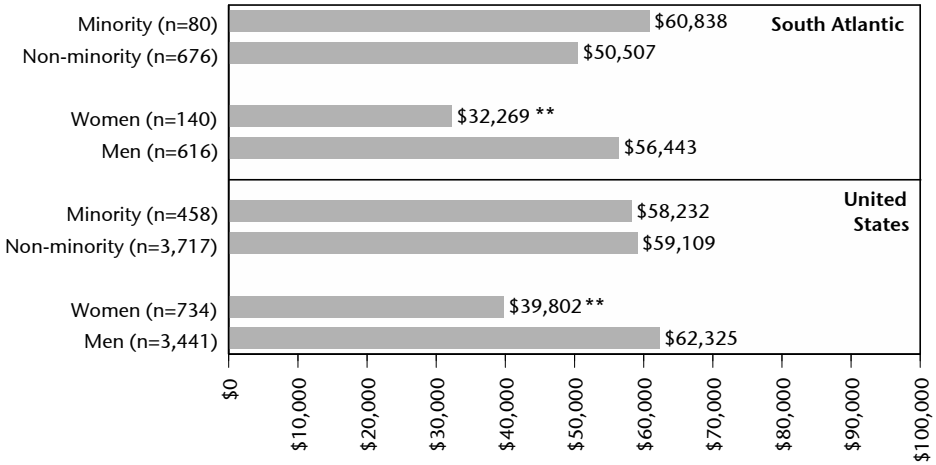
Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[21] The South Atlantic region includes Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia and West Virginia.

Engineering-related business owner earnings in 2006-2009. As noted above, earnings for business owners reported in the 2007-2009 sample are for the previous 12 months between 2006 and 2009. All dollar amounts are given in 2009 dollars. Due to small sample sizes for minority business owners in the Georgia engineering industry, BBC examined the South Atlantic region as a whole.

Figure F-27 shows lower business earnings in 2006-2009 for minority and female owners in engineering-related businesses in the South Atlantic region and the United States. The difference in business earnings for women was statistically significant.

Figure F-27.
Mean annual business owner earnings in the engineering-related industry, 2006-2009



Note: The sample universe is business owners age 16 and over who reported positive earnings. "Minority" includes African Americans, Hispanic Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans and other minority groups. Sample sizes for these race/ethnicity groups were too small to analyze individually.

All amounts in 2009 dollars.

*,** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2007-2009 ACS 3% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Regression analysis of business earnings. Differences in business owner earnings may be at least partially attributable to neutral factors such as age, marital status or educational attainment. BBC performed regression analysis using 2000 Census and 2007-2009 ACS data to examine whether disparities in business earnings for 1999 and for 2006-2009 remained after controlling for certain neutral factors.

BBC applied an ordinary least squares (OLS) regression to the data, and the model was very similar to those reviewed by the courts after other disparity studies.[22] The dependent variable in this model is the natural logarithm of business earnings. Business owners reporting zero or negative business earnings were excluded, as were observations for which the Census Bureau had imputed the value of business earnings. Along with variables for the race, ethnicity and gender of business owners, the model also included available measures from the PUMS data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

For the construction industry, the study team developed two models:

- A model for business owner earnings in 1999 for the Georgia construction industry that included 1,964 observations; and
- A model for business owner earnings in 2006-2009 for the Georgia construction industry that included 1,508 observations.

Due to small sample sizes, BBC took a different approach when examining business owner earnings in the engineering-related industry. BBC created an engineering-related industry model for the South Atlantic region that included separate terms to account for the effect of business location in Georgia. These terms included an indicator variable for location in Georgia and interaction variables that indicated minority or female business owners in the state. This approach is similar to that used by other researchers.

BBC created the following models for the engineering-related industry:

- A model for business owner earnings in 1999 for the South Atlantic region that included 681observations; and
- A model for business owner earnings in 2006-2009 for the South Atlantic region that included 664 observations.

[22] For example, National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation; and National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

Construction industry in Georgia — 1999. Figure F-28 shows the results of the OLS model for 1999 earnings in the Georgia construction industry. The model indicates that some neutral factors are statistically significant in predicting the earnings of business owners in the construction industry. Older business owners had greater earnings (but age had less of an effect for the oldest individuals) as did married business owners. Construction business owners who were disabled, business owners who did not attain at least a high school education and those who completed some college had lower earnings, on average.

After holding neutral factors equal:

- A statistically significant disparity remains for African American business owners in the Georgia construction industry in 1999.
- There was also a statistically significant disparity in construction business owner earnings for women.

Figure F-28.
Georgia construction business owner earnings model, 1999

Variable	Coefficient	t-statistic
Constant	8.068	22.74 **
Age	0.087	5.67 **
Age-squared	-0.001	-5.88 **
Married	0.122	1.76 *
Speaks English well	0.030	0.15
Disabled	-0.206	-1.99 **
Less than high school	-0.210	-3.06 **
Some college	-0.146	-1.78 *
Four-year degree	-0.112	-0.71
Advanced degree	-0.478	-1.43
African American	-0.286	-2.74 **
Asian American	-0.115	-0.33
Hispanic American	0.072	0.41
Other Minority	-0.225	-1.28
Female	-0.549	-3.62 **

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

Source: BBC Research & Consulting from 2000 Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Construction industry in Georgia — 2006 to 2009. Figure F-29 illustrates the results of the OLS model for 2006-2009 earnings in the Georgia construction industry. As in the model for 1999 earnings, this model indicates that some neutral factors are statistically significant in predicting the earnings of business owners in the construction industry. Older business owners had greater earnings (but age has less of an effect for the oldest individuals), as did married business owners. As with 1999 earnings, owners who did not attain at least a high school education had lower earnings in the Georgia construction industry, on average.

After holding neutral factors equal:

- A statistically significant disparity was observed for female business owner earnings in the Georgia construction industry.
- Differences in mean business earnings for minorities in 2006-2009 were not statistically significant, holding other factors equal.

Figure F-29.
Georgia construction business owner earnings model, 2006-2009

Variable	Coefficient	t-statistic
Constant	7.533	15.87 **
Age	0.100	4.46 **
Age-squared	-0.001	-4.83 **
Married	0.416	4.64 **
Speaks English well	-0.031	-0.18
Less than high school	-0.250	-2.76 *
Some college	0.120	1.07
Four-year degree	0.143	0.66
Advanced degree	-0.618	-0.68
African American	-0.215	-1.37
Asian American	-0.045	-0.25
Hispanic American	0.133	0.90
Other Minority	0.098	0.40
Female	-0.344	-2.24 *

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

Source: BBC Research & Consulting from 2007-2009 ACS 3% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Engineering-related industry in Georgia — 1999. Figure F-30 presents the results of the OLS model of business owner earnings specific to the South Atlantic region engineering-related industry in 1999. As explained above, BBC created an engineering-related industry model for the larger South Atlantic region (which includes Georgia) due to small sample sizes for Georgia alone. This model, however, includes interaction terms for evaluating the effect of owning a business in Georgia. A number of neutral factors are statistically significant in explaining business earnings in the South Atlantic region engineering-related industry. As in the construction models, older business owners had greater earnings (but this marginal effect declined for the oldest individuals) as did married business owners. Business owners who were disabled tended to have lower business earnings.

After accounting for neutral factors, the model indicates that:

- Female business owners earned less on average than men in the engineering-related industry (statistically significant difference).[23]

- Overall, there were no statistically significant differences in business earnings for minorities in the South Atlantic region engineering-related industry.

- African Americans in Georgia, however, earned less, on average, than similarly situated African American business owners in the engineering-related industry in the broader region.

Figure F-30.
South Atlantic region engineering-related industry business owner earnings model, 1999

Variable	Coefficient	t-statistic
Constant	6.939	5.77 **
Age	0.123	4.38 **
Age-squared	-0.001	-4.97 **
Married	-0.003	-0.02
Speaks English well	0.271	0.30
Disabled	-0.589	-2.60 **
Less than high school	0.142	0.42
Some college	0.103	0.48
Four-year degree	0.262	1.28
Advanced degree	0.299	1.37
African American	0.132	0.47
Other Minority	0.240	1.10
Female	-0.911	-5.56 **
In Georgia	0.079	0.43
African American in Georgia	-1.288	-2.29 **
Other Minority in Georgia	0.408	1.17
Female in Georgia	0.326	0.87

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

Source: BBC Research & Consulting from 2000 Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[23] The indicator variable for firms located in Georgia and the interaction terms for women business owners in Georgia suggest that women did not have significantly different earnings in the wider South Atlantic region, even after controlling for other factors.

Engineering-related industry in Georgia — 2006 to 2009. Figure F-31 presents the results of the OLS model of business owner earnings specific to the South Atlantic region engineering-related industry for 2006-2009. As in the model for 1999 earnings, this model indicates that some neutral factors are statistically significant in predicting the earnings of engineering-related business owners. Older business owners had greater earnings but this marginal effect declined for the oldest individuals. Business owners with a four-year degree and owners with an advanced degree had greater business earnings on average.

- After accounting for neutral factors, the statistically significant disparity in earnings for female business owners.
- The model did not indicate a statistically significant difference in business earnings for minority business owners.

Figure F-31.
South Atlantic region engineering-related industry business owner earnings model, 2006-2009

Variable	Coefficient	t-statistic
Constant	8.100	7.70 **
Age	0.078	2.14 *
Age-squared	-0.001	-2.52 *
Married	0.132	0.88
Speaks English well	-0.065	-0.13
Less than high school	-1.0699	-3.43 **
Some college	0.185	0.82
Four-year degree	0.650	3.03 **
Advanced degree	0.830	3.82 **
African American	-0.140	-0.32
Other Minority	0.168	1.00
Female	-0.729	-4.85 **
In Georgia	0.110	0.64
African American in Georgia	-0.403	-0.44
Other Minority in Georgia	-1.148	-1.05
Female in Georgia	-0.223	-0.44

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

Source: BBC Research & Consulting from 2006-2009 ACS 3% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

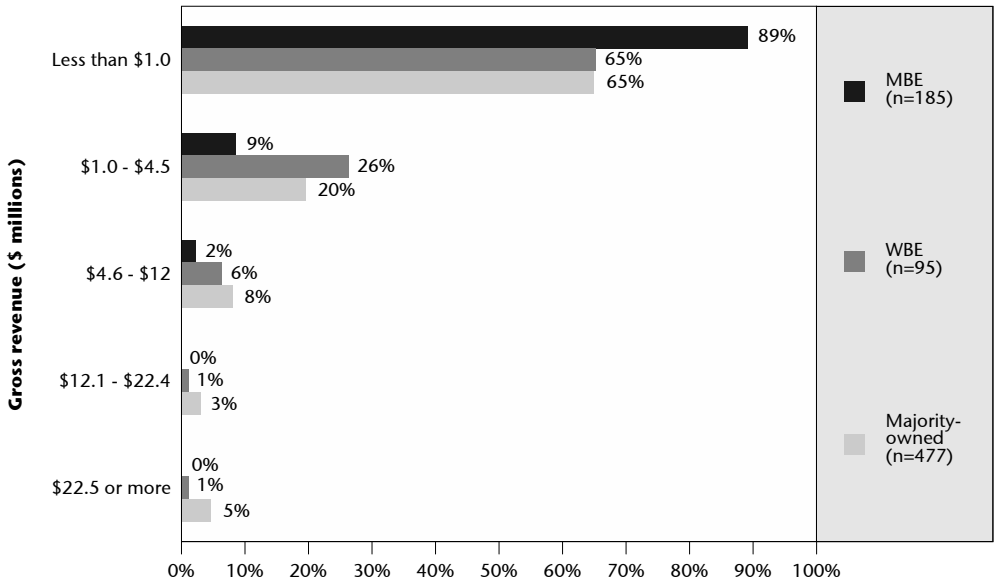
Gross revenue of construction and engineering-related firms from availability interviews. In the availability telephone interviews BBC conducted for this study, firm owners and managers were asked to identify the size range for their annual gross revenue for the past three years. A related question asked for gross revenue across all Georgia locations for multi-location firms, which is the result examined here.

Within the Georgia transportation contracting industry, BBC separately examined gross revenue of construction and engineering-related businesses.

Construction firms. Figure F-32 examines the distribution of MBEs, WBEs and majority-owned construction industry firms by revenue class.

- A disproportionately large number of MBEs (89%) reported average revenue of less than $1 million per year.
- A very small proportion of MBEs and WBEs reported average revenue of 4.6 million or more per year (2% of MBEs and 9% of WBEs) compared with results for majority-owned firms (16%). Reporting
- No MBE construction firms reported annual gross revenue of $12.1 million or more.

Figure F-32.
Gross revenue of company for all Georgia locations, construction industry



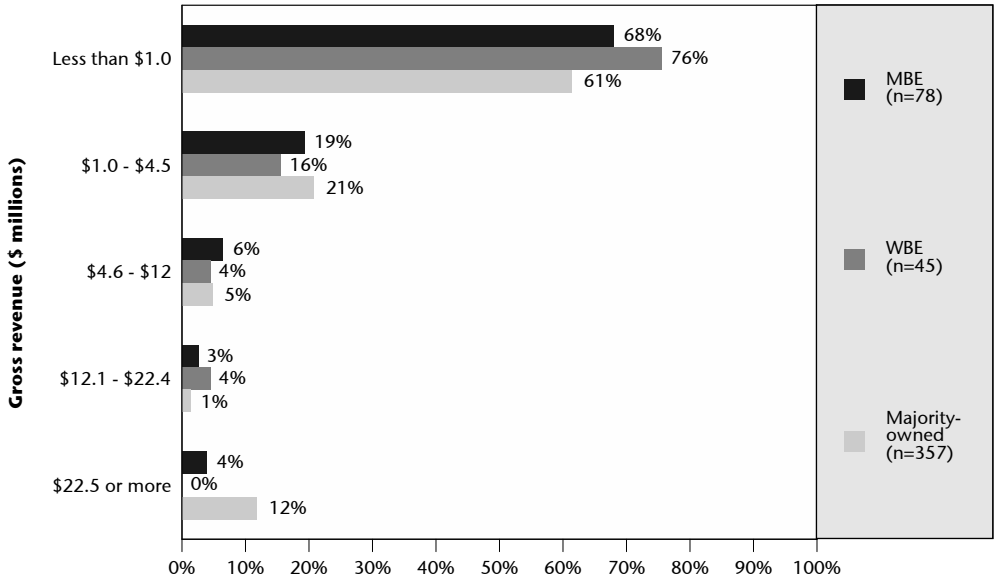
Note: WBE is white women-owned firms.

Source: BBC Research & Consulting from 2011 Availability Interviews.

Engineering-related firms. Engineering-related firms were also asked to identify gross revenue across all Georgia locations. Figure F-33 summarizes results.

- Three-quarters of WBEs reported gross revenue to be less than $1 million. Compared with other groups, relatively more WBEs reported annual revenue in this lowest revenue category.
- No WBEs reported gross revenue of $22.5 million or more in the past three years.
- Although some MBEs reported annual revenue of $22.5 million or more, they accounted for a smaller share of minority-owned firms (4%) than majority-owned firms (12%).

Figure F-33.
Gross revenue of company for all Georgia locations, engineering-related industry



Note: WBE is white women-owned firms.
Source: BBC Research & Consulting from 2011 Availability Interviews.

Summary of analysis of business receipts and earnings. BBC examined a number of different data sources for business receipts and earnings for firms in Georgia.

- Analysis of 2007 SBO data, 2000 Census data and 2007-2009 ACS data for Georgia indicate a pattern of lower receipts for minority- and women-owned firms compared will all firms in the construction and the professional, scientific and technical services industries.

- Regression analyses using Census data for business owner earnings indicate that there were statistically significant disparities in earnings for the following groups after taking account of neutral factors:

  - African American business owners tended to earn less than non-Hispanic white business owners in 1999 in the Georgia construction industry; and

  - Female business owners tended to earn less than male business owners in the Georgia construction industry and the South Atlantic region engineering-related industry in both 1999 and 2006-2009.

- BBC also analyzed revenue data for firms in the Georgia transportation contracting industry collected as part of the disparity study's availability interviews.

  - Data indicate that most businesses, MBE/WBEs and majority-owned firms alike, report annual revenue of $1 million or less.

  - However, few minority- and women-owned firms relative to majority-owned firms reach high revenue levels. This result is evident for both construction and engineering-related firms.

Difficulties and Potential Barriers to Starting or Expanding a Business

As part of the availability interviews with Georgia businesses completed in the disparity study, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business. BBC asked if:

- The size of projects had presented a barrier to bidding;

- The firm had experienced difficulties learning about bid opportunities with GDOT;

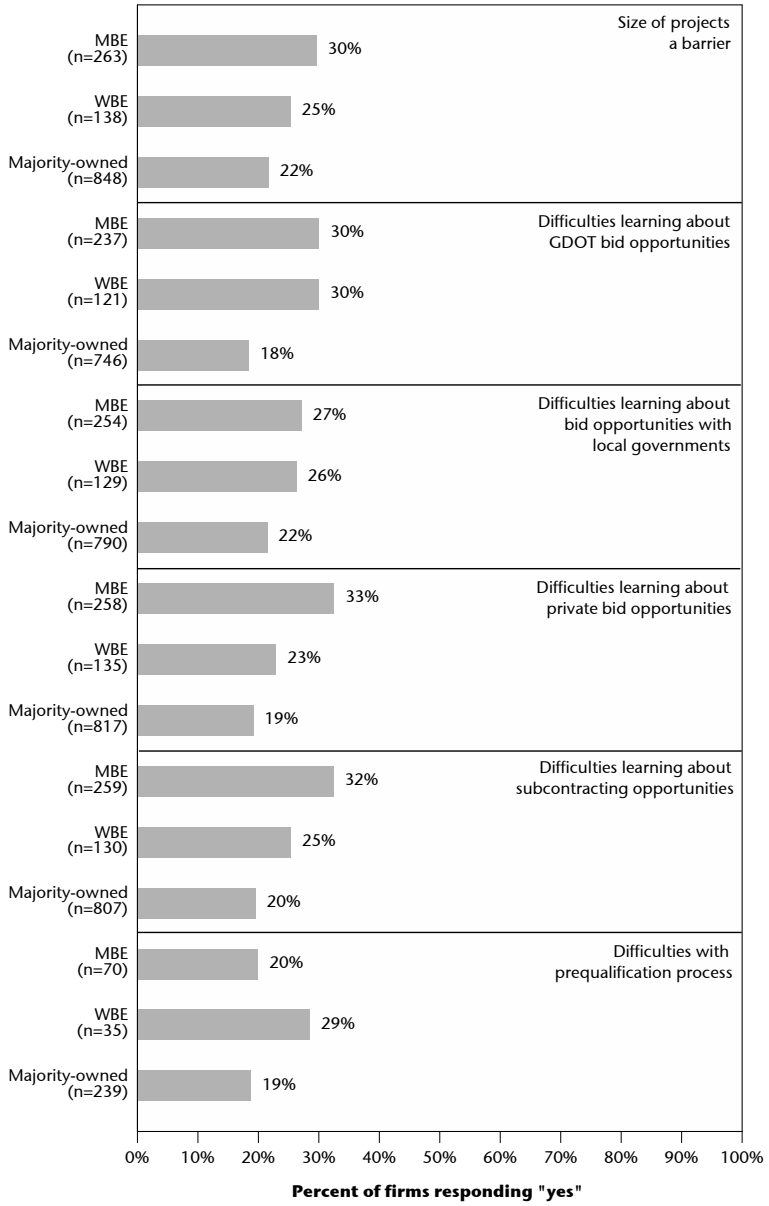
- The firm had experienced difficulties learning about bid opportunities with local governments or private companies;

- The firm had experienced difficulties learning about subcontracting opportunities in Georgia; and

- The prequalification process for GDOT work had presented difficulties for the firm.

Figure F-34 summarizes responses to these questions. Responses for construction and engineering-related firms have been combined.

Figure F-34.
Responses to 2011 availability interview questions from Georgia MBE, WBE and majority-owned construction and engineering-related firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: BBC Research & Consulting.

- As shown in Figure F-34, MBEs and WBEs were more likely than majority-owned firms to report that the size of projects had been a barrier to bidding.
- MBEs and WBEs were also more likely than majority-owned firms to report difficulties learning about:
  - GDOT bid opportunities;
  - Local government bid opportunities;
  - Private sector bid opportunities; and
  - Subcontracting opportunities.
- Among firms that had looked into or applied for prequalification for GDOT contracts, WBEs appeared to be more likely than majority-owned firms to report difficulties with the prequalification process.

BBC also asked questions related to access to capital, timely payment, bonding and insurance; Appendix G reports those results.

APPENDIX E.
Business Ownership in the Georgia Construction and Engineering-related Industries

The construction and engineering-related industries are characterized by a large number of people who own their own businesses. One out of four people working in the Georgia construction industry between 2007 and 2009 were self-employed. Fourteen percent of workers in the local engineering industry were business owners.

Focusing on these two industries, BBC examined business ownership for different racial, ethnic and gender groups in Georgia. Note that "self-employment" and "business ownership" are used as interchangeable terms in the following discussion. Firms examined include incorporated and unincorporated businesses.

Business Ownership Rates

Many studies have explored differences at the national level between minority and non-minority business ownership. Although overall self-employment rates have increased for minorities and women over time, a number of studies indicate that gender, ethnicity and race continue to affect opportunities for entrepreneurship.[1] The extent to which such individual characteristics may limit ownership opportunities differs across industries and from state to state.

BBC used Public Use Microdata Samples (PUMS) from the 1980 and 2000 U.S. Census of Population (Census) and the 2007-2009 American Community Survey 3-year estimates (ACS) to study business ownership rates in the construction and engineering industries in Georgia. BBC used historical information such as 1980 Census data to assess changes in business ownership over time.

Construction industry. Compared to other industries, construction has a large proportion of workers who are business owners. In 2007-2009, one-quarter of those in the construction industry were business owners compared with 11 percent of workers across all industries who were self-employed in Georgia.

Rates of self-employment in the Georgia construction industry vary by race, ethnicity and gender. Figure E-1 on the following page shows the percentage of workers who were self-employed in the construction industry by group for 1980, 2000 and 2007-2009 (3-year average). The table also reports corresponding sample sizes. Results for Georgia are compared with statistics for the nation.

[1] See, for example, Waldinger, Roger and Howard E. Aldrich. 1990. *Ethnicity and Entrepreneurship.* Annual Review of Sociology. 111-135.; Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations.* The Journal of Human Resources, Volume 31, Issue 4, 757-793.; Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital.* Journal of Labor Economics, 25(2), 289-323.; and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses.* Russell Sage Foundation.

Business ownership rates in 2000. The 2000 Census provides the largest sample of construction workers of any of the data sets examined. In 2000, 30 percent of non-Hispanic whites working in the Georgia construction industry were self-employed. Business ownership rates were lower for African Americans, Asian Americans and Hispanic Americans working in the local industry.

- About 9 percent of Hispanic Americans owned construction businesses, less than one-third of the rate for non-Hispanic whites and a statistically significant difference.
- African Americans had a business ownership rate of about 19 percent, a statistically significant difference from non-Hispanic whites.
- In Georgia, 20 percent of Asian Americans working in the construction industry were self-employed — lower than the rate for non-Hispanic white construction workers but not a statistically significant difference due to the sample size for Asian American workers.
- Compared with about 26 percent of men, 20 percent of women working in the construction industry in Georgia were self-employed (a statistically significant difference).

Figure E-1.
Percentage of workers in the construction industry who were self-employed, 1980, 2000 and 2007-2009

Georgia	1980	2000	2007-2009	Sample size 1980	Sample size 2000	Sample size 2007-2009
Race/ethnicity						
African American	9.2 % **	19.5 % **	19.8 % **	1,635	2,407	1,374
Asian American	18.8	19.8	29.6	16	97	101
Hispanic American	7.9 **	8.8 **	12.3 **	63	2,023	1,805
Other minority	17.2	37.5	32.0	29	148	83
Non-Hispanic white	20.7	30.3	30.6	6,437	10,963	6,927
Gender						
Female	7.8 % **	20.0 % **	18.0 % **	639	1,475	1,085
Male	19.2	26.1	25.2	7,541	14,163	9,205
All individuals	**18.3 %**	**25.7 %**	**24.5 %**	**8,180**	**15,638**	**10,290**

United States	1980	2000	2007-2009	Sample size 1980	Sample size 2000	Sample size 2007-2009
Race/ethnicity						
African American	9.0 % **	15.2 % **	18.2 % **	24,357	26,752	5,044
Asian American	10.4 **	20.7 **	23.1 **	2,604	6,471	1,857
Hispanic American	10.6 **	12.2 **	15.5 **	19,590	66,531	19,455
Other minority	11.0 **	20.3 **	20.5 **	2,819	9,563	1,789
Non-Hispanic white	19.4	25.4	27.3	281,094	371,152	78,678
Gender						
Female	9.8 % **	16.8 % **	17.4 % **	26,096	46,791	10,794
Male	18.7	23.3	24.4	304,368	433,678	96,029
All individuals	**18.0 %**	**22.6 %**	**23.8 %**	**330,464**	**480,469**	**106,823**

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: BBC Research & Consulting from 1980 and 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Changes in business ownership rates since 2000. Between 2000 and 2007-2009, business ownership rates changed very little for non-Hispanic whites in the Georgia construction industry. Over the same period, self-employment rates for Hispanic Americans increased but continued to lag rates for all other groups. Ownership rates for African Americans grew by less than half a percentage point. A statistically significant difference remained between these minority groups and non-Hispanic whites.

- In 2007-2009, a substantially smaller proportion of Hispanic Americans (12%) than non-Hispanic whites (31%) were business owners in the Georgia construction industry (a statistically significant difference).

- The business ownership rate for African Americans was about 20 percent, a statistically significant difference from the rate for non-Hispanic whites.

- At about 30 percent, the 2007-2009 self-employment rate for Asian Americans was similar to non-Hispanic whites.

- Statistically significant differences in business ownership rates between women and men persisted in the local construction industry in 2007-2009.

Engineering industry. BBC also examined business ownership rates in the engineering industry. (In this and other marketplace appendices, the engineering industry refers to architectural, engineering and related services.) The results in Figure E-2 combine all minority groups except African Americans when analyzing business ownership rates due to small sample sizes for individual groups.

Business ownership rates in 2000. In 2000, 14 percent of non-Hispanic whites working in the Georgia engineering industry were self-employed.

- About 8 percent of African Americans and 8 percent of other minorities working in this industry in 2000 owned businesses, but these differences from non-Hispanic whites are not statistically significant due to small sample sizes for minority groups.

- During the same year, about 9 percent of women were self-employed compared with 15 percent of men in the local engineering industry (a statistically significant difference).

The differences in engineering business ownership rates in Georgia were similar to patterns found for the nation.

Changes in business ownership rates since 2000. Figure E-2 also examines business ownership rates in 2007-2009.

- There was a disparity in the business ownership rate for African Americans working in the Georgia engineering industry in 2007-2009. The ownership rate for African Americans was 7 percent – less than half the rate for non-Hispanic whites (a statistically significant difference).

- About 14 percent of other minorities working in the Georgia engineering industry in 2007-2009 owned businesses, about the same result as for non-Hispanic whites for that time period.

- Statistically significant disparities in business ownership rates persisted for women in 2007-2009.

Figure E-2.
Percentage of workers in the engineering industry who were self-employed, 1980, 200 and 2007-2009

Georgia	1980	2000	2007-2009	Sample size 1980	Sample size 2000	Sample size 2007-2009
Race/ethnicity						
African American	3.2 % **	8.1 %	6.7 % **	31	154	172
Other minority	5.9	8.3	14.3	17	99	113
Non-Hispanic white	15.9	14.2	15.4	527	1,256	1,182
Gender						
Female	3.3 % **	8.8 % **	9.3 % **	120	399	419
Male	18.0	14.6	16.0	455	1,110	1,048
All individuals	**15.0 %**	**13.6 %**	**14.0 %**	**575**	**1,509**	**1,467**

United States	1980	2000	2007-2009	Sample size 1980	Sample size 2000	Sample size 2007-2009
Race/ethnicity						
African American	5.1 % **	5.2 % **	4.0 % **	906	2,206	657
Other minority	8.4 **	8.7 **	9.4 **	2,290	7,195	2,279
Non-Hispanic white	15.8	14.2	13.5	25,673	48,823	13,801
Gender						
Female	4.5 % **	7.5 % **	7.6 % **	6,090	15,191	4,497
Male	17.7	15.1	14.2	22,779	43,033	12,240
All individuals	14.9 %	13.2 %	12.5 %	28,869	58,224	16,737

Note: "Other minority" includes Hispanic Americans, Asian Americans, Native Americans and other minority groups. Sample sizes for these race/ethnicity groups were too small to analyze individually. The data presented in this table include all workers in the engineering industry.
*, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: BBC Research & Consulting from 1980 and 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Potential causes of differences in business ownership rates. Researchers have examined whether there are disparities in business ownership rates after consideration of other personal characteristics such as education and age. A number of studies have found that disparities in business ownership still exist when accounting for such neutral factors.

Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found a positive relationship between start-up capital and business formation, expansion and survival.[2] One study found that housing appreciation measured at the Metropolitan Statistical Area (MSA) level is a positive determinant of becoming self-employed.[3] Unexplained differences still exist, however, when controlling for these factors.[4]

- Education has a positive effect on the probability of business ownership in most industries. However, findings from multiple studies indicate that minorities are still less likely to own a business than non-minority counterparts with the same levels of education.[5]

- Intergenerational links affect one's likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minority groups.[6]

- Time since immigration and assimilation into American society are important determinants of self-employment, but unexplained differences in minority-business ownership still exist when accounting for these factors.[7]

Race, ethnicity and gender can affect opportunities for business ownership, even when accounting for other personal characteristics such as education, age and familial ties. To further examine this topic, BBC developed multivariate statistical models to explore patterns of business ownership in Georgia. These models estimate the effect of race/ethnicity and gender on the probability of self-employment while controlling for other potentially influential factors.

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[2] See Lofstrom, Magnus and Chunbei Wang. 2006. *Hispanic Self-Employment: A Dynamic Analysis of Business Ownership.* Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor).; and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses.* Russell Sage Foundation.

[3] Fairlie, Robert W. and Harry A. Krashinksy. 2006. Liquidity Constraints, Household Wealth and Entrepreneurship Revisited.

[4] Lofstrom, Magnus and Chunbei Wang. 2006. *Hispanic Self-Employment: A Dynamic Analysis of Business Ownership.* Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor).

[5] See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations.* The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment.* Sociological Perspectives. 79-94.

[6] See Fairlie, Robert W. and Alicia M. Robb. 2006. Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. Russell Sage Foundation; and Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital.* Journal of Labor Economics, 25(2), 289-323.

[7] See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations.* The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment.* Sociological Perspectives. 79-94.

Business Ownership Regression Analysis

An extensive body of literature examines whether race- and gender-neutral factors such as access to financial capital, education, age, and family characteristics (e.g., marital status) help explain differences in business ownership. This subject has also been examined in other disparity analyses. For example, prior studies in Minnesota[8], Illinois[9] and California[10] have conducted econometric analyses investigating whether disparities in business ownership among race/ethnicity and gender groups in the combined construction and engineering industry remain after controlling for other personal characteristics. These studies have incorporated probit econometric models using PUMS data from the 2000 Census and have been among materials submitted to courts in subsequent litigation concerning state implementation of the Federal DBE Program.

BBC used similar probit regression models to predict business ownership from multiple independent or "explanatory" variables.[11] Independent variables include:

- Personal characteristics potentially linked to the likelihood of business ownership (age, age-squared, marital status, number of children and elderly people in the household and English-speaking ability);
- Indicators of educational attainment;
- Measures and indicators related to personal financial resources and constraints (home ownership, home value, monthly mortgage payment, dividend and interest income and additional household income from a spouse or unmarried partner); and
- Variables representing the race/ethnicity and gender of the individual.

[8] National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

[9] National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

[10] BBC Research & Consulting. 2007. *Availability and Disparity Study*. Prepared for the California Department of Transportation.

[11] Probit models estimate the effects of multiple independent or "predictor" variables in terms of a single, dichotomous dependent or "outcome" variable — in this case, business ownership. The dependent variable is binary, coded as "1" for individuals in a particular industry who are self-employed; "0" for individuals who are not self-employed. The model enables estimation of the probability that a worker in a given estimation sample is self-employed. The study team excluded observations where the Census Bureau had imputed values for the dependent variable of business ownership.

BBC developed four models using PUMS data from the 2000 Census and 2007-2009 ACS:

- A probit regression model for the Georgia construction industry in 2000 that included 12,677 observations;
- A probit regression model for the Georgia construction industry in 2007-2009 that included 9,610 observations;
- A probit regression model for the Georgia engineering industry in 2000 that included 1,329 observations; and
- A probit regression model for the Georgia engineering industry in 2007-2009 that included 1,369 observations.

Results specific to the Georgia construction industry. BBC developed probit regression models of business ownership in the Georgia construction industry for 2000 and 2007-2009.

Georgia construction industry in 2000. Figure E-3 presents the coefficients and t-statistics for the 2000 probit model for individuals working in the Georgia construction industry.

The model indicates that several neutral factors were important and statistically significant in predicting the probability of business ownership for workers in this industry:

- Older individuals were more likely to be business owners;
- Married individuals were more likely to be business owners;
- The number of children in the worker's household was positively associated with business ownership;
- The number of elderly (people over 65) in the worker's household was negatively associated with business ownership;
- Home ownership and the value of the home owned by the worker were both associated with higher probability of business ownership;
- Greater income from a spouse or partner increased workers' likelihood of owning a business;
- The ability to speak English well increased the probability of business ownership; and
- A four-year degree decreased the likelihood of being self-employed in the construction industry in 2000.

After controlling for neutral factors in the 2000 data, statistically significant disparities in rates of business ownership remained for African Americans, Hispanic Americans and women working in the Georgia construction industry. Figure E-3 below shows these results.

Figure E-3.
Georgia construction industry business ownership model, 2000

Variable	Coefficient	t-statistic
Constant	-2.6397	-14.67 **
Age	0.0529	6.95 **
Age-squared	-0.0004	-4.24 **
Married	0.0836	2.29 **
Disabled	-0.0683	-1.51
Number of children in household	0.0717	4.96 **
Number of people over 65 in household	-0.1368	-2.83 **
Owns home	0.0765	1.91 *
Home value ($000s)	0.0012	6.62 **
Monthly mortgage payment ($000s)	-0.0294	-0.83
Interest and dividend income ($000s)	0.0002	0.10
Income of spouse or partner ($000s)	0.0013	2.30 **
Speaks English well	0.4692	4.81 **
Less than high school education	-0.0390	-1.10
Some college	0.0440	1.18
Four-year degree	-0.1045	-1.83 *
Advanced degree	-0.1147	-1.05
African American	-0.3258	-7.21 **
Asian American	-0.1548	-0.84
Hispanic American	-0.2857	-3.81 **
Other minority	0.2987	2.18 **
Female	-0.3782	-7.45 **

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

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

The probit modeling approach allows for simulation of business ownership rates for minorities and females as if they had the same probability of self-employment as similarly situated non-Hispanic whites and males, respectively. To conduct this next step in the analysis, BBC performed a probit regression predicting business ownership using only non-Hispanic white (or non-Hispanic white male) construction workers in the dataset.[12] The study team then applied the coefficients from this version of the model to the mean characteristics of minorities (or women) working in the Georgia construction industry to estimate the probability of business ownership in the absence of any racial/ethnic (or gender) differences in the likelihood of self-employment.

BBC performed these calculations for only those groups where race/ethnicity or gender was a statistically significant negative factor in business ownership (as shown in Figure E-3).

[12] This version of the model excludes the race/ethnicity indicator variables since the value for all of those variables would be the same.

Figure E-4 shows these simulated ("benchmark") business ownership rates, comparing them to the actual, observed mean probability of business ownership for African Americans, Hispanic Americans and non-Hispanic white women. Similar simulation approaches have been incorporated in other disparity studies reviewed by courts.

Comparing actual, observed mean self-employment rates of African Americans in the Georgia construction industry with a benchmark based on business ownership rates of non-Hispanic white construction workers, there were about 66 percent as many African American-owned businesses as would be expected. Hispanic Americans (disparity index of 62) also owned businesses at rates substantially lower than would be expected compared to the average business ownership rates of non-Hispanic white construction workers. To focus on the effects of gender, BBC's analysis compared actual and predicted rates for non-Hispanic white women — white women working in the local construction industry owned businesses at rates substantially lower than would be expected (disparity index of 66).

Figure E-4.
Comparison of actual business ownership rates to simulated rates for Georgia construction workers, 2000

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
African American	18.6%	28.3%	66
Hispanic American	8.9%	14.4%	62
White female	23.0%	34.6%	66

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure E-1.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Georgia construction industry in 2007-2009. Figure E-5 presents the coefficients and t-statistics from the probit model predicting business ownership in the Georgia construction industry in 2007-2009.

From the 2007-2009 model, it appears that many of the same neutral factors important in predicting business ownership in the 2000 model also had an impact in 2007-2009. Increased age, higher home value and higher income of a spouse or partner are associated with a greater likelihood of self-employment. Although not significant in 2000, higher interest and dividend income was associated with higher likelihood of business ownership in 2007-2009. The importance of educational attainment to ownership of a construction business persisted as well, with attainment of a four-year degree as a statistically significant predictor of business ownership in 2007-2009.

After controlling for neutral factors, a statistically significant difference persisted in the rates of business ownership for African American, Hispanic American and female construction workers.

Figure E-5.
Georgia construction industry business ownership model, 2007-2009

Variable	Coefficient	t-statistic
Constant	-2.3946	-8.93 **
Age	0.0519	5.05 **
Age-squared	-0.0003	-2.90 **
Married	0.0294	0.60
Number of children in household	0.0261	1.54
Number of people over 65 in household	-0.0125	-0.26
Owns home	0.0521	1.06
Home value ($000s)	0.0010	7.07 **
Monthly mortgage payment ($000s)	0.0143	0.47
Interest and dividend income ($000s)	0.0040	2.39 *
Income of spouse or partner ($000s)	0.0014	2.34 *
Speaks English well	0.1524	1.22
Less than high school education	0.0418	0.95
Some college	-0.0133	-0.31
Four-year degree	-0.1877	-3.07 **
Advanced degree	-0.2621	-2.09
African American	-0.2092	-4.28 **
Asian American	-0.1610	-0.90
Hispanic American	-0.3017	-3.67 **
Other minority	0.1879	0.94
Female	-0.5263	-10.74 **

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

Source: BBC Research & Consulting from 2007-2009 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Using the same approach as for the 2000 data, the study team used the 2007-2009 results to simulate business ownership rates if minorities and women had the same probability of self-employment as similarly situated non-Hispanic whites and non-Hispanic white males, respectively. Figure E-6 shows actual and simulated ("benchmark") business ownership rates for Hispanic American and white women construction workers in Georgia. Again, BBC performed these calculations for only those groups where race/ethnicity or gender was a statistically significant factor in business ownership (as shown in Figure E-5).

In 2007-2009, there were about 76 percent as many African American-owned businesses as would be expected, up from 66 percent in 2000. Hispanic Americans had an actual, observed self-employment rate of about 12 percent, substantially lower than the predicted rate of 25 percent from the study team's simulation. This translates into a disparity index of 50, which suggests that nearly twice as many Hispanic American construction workers would be business owners if they had the same self-employment rate as similarly situated non-Hispanic whites.

Results in 2007-2009 for women were similar to those in 2000. Based on the simulation, about 37 percent of white women would own businesses in the construction industry if gender did not have an impact on self-employment. However, the actual 2007-2009 self-employment rate for women was 20 percent (disparity index of 56).

Figure E-6.
Comparison of actual business ownership rates to simulated rates for Georgia construction workers, 2007-2009

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
African American	21.2%	28.0%	76
Hispanic American	12.3%	24.8%	50
White female	20.4%	36.7%	56

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure E-1.

Source: BBC Research & Consulting from 2007-2009 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Results specific to the Georgia engineering industry. BBC developed a separate business ownership model for the engineering industry using 2000 Census data and 2007-2009 ACS data for Georgia. As with ownership rates in the engineering industry, individual minority groups other than African Americans were combined into a single "other minority" category.

Georgia engineering industry in 2000. Figure E-7 presents the coefficients and t-statistics from the probit model predicting business ownership in the Georgia engineering industry in 2000.

The following neutral factors were statistically significant in predicting business ownership for the engineering industry in Georgia in 2000:

- Higher home values (for homeowners) were associated with a greater likelihood of business ownership; and
- Lower mortgage payments (for homeowners) were associated with higher rates of self-employment.

After accounting for neutral factors, the Georgia engineering model for 2000 indicated that minorities and women had lower rates of business ownership but that the differences were not statistically significant.

Figure E-7.
Georgia engineering industry business ownership model, 2000

Variable	Coefficient	t-statistic
Constant	-2.6785	-3.87 **
Age	0.0243	0.86
Age-squared	0.0000	0.13
Married	0.1166	0.85
Disabled	0.0870	0.47
Number of children in household	0.0696	1.27
Number of people over 65 in household	0.0377	0.26
Owns home	0.0969	0.58
Home value ($000s)	0.0017	3.81 **
Monthly mortgage payment ($000s)	-0.2763	-3.03 **
Interest and dividend income ($000s)	0.0026	0.90
Income of spouse or partner ($000s)	0.0011	0.96
Speaks English well		
Less than high school education	0.4696	1.40
Some college	0.1508	0.74
Four-year degree	0.2709	1.33
Advanced degree	0.0085	0.04
African American	-0.0674	-0.35
Other minority	-0.2935	-1.19
Female	-0.2118	-1.63

Note: *,** Denote statistical significance at the 90% and 95% confidence levels, respectively.
"Speaks English well" exhibits perfect colinearity. Thus it was dropped from the regression.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Georgia engineering industry in 2007-2009. Figure E-8 presents the coefficients and t-statistics from the probit model predicting business ownership in the Georgia engineering industry in 2007-2009.

As with the 2000 model, higher home values were important in predicting business ownership in the engineering industry in 2007-2009. No other neutral factors were significant in the 2007-2009 model.

- When holding neutral factors constant, the Georgia engineering model for 2007-2009 indicates that women and African Americans working in the industry were less likely than men and non-Hispanic whites to own businesses. However, these differences were not statistically significant.

- In contrast to the construction industry, race/ethnicity and gender were not statistically significant predictors of business ownership in the engineering-related field.

Figure E-8.
Georgia engineering industry business ownership model, 2007-2009

Variable	Coefficient	t-statistic
Constant	-2.8385	-4.34 **
Age	0.0237	0.84
Age-squared	0.0000	0.07
Married	0.1724	1.30
Number of children in household	0.1106	2.02
Number of people over 65 in household	0.1339	0.96
Owns home	0.0298	0.19
Home value ($000s)	0.0014	4.66 **
Monthly mortgage payment ($000s)	-0.0655	-1.01
Interest and dividend income ($000s)	0.0002	0.11
Income of spouse or partner ($000s)	0.0000	-0.03
Speaks English well		
Less than high school education		
Some college	0.1438	0.83
Four-year degree	0.2386	1.58
Advanced degree	-0.0555	-0.29
African American	-0.1730	-0.84
Other minority	0.0404	0.24
Female	-0.1925	-1.36

Note: *,** Denote statistical significance at the 90% and 95% confidence levels, respectively.
"Speaks English well" and "Less than high school education" both exhibit perfect colinearity. Both were dropped from the regression.

Source: BBC Research & Consulting from 2007-2009 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Summary of Business Ownership in the Construction and Engineering Industries

Disparities in business ownership were present in the Georgia construction industry:

- In both 2000 and 2007-2009, business ownership rates for African Americans and Hispanic Americans were substantially lower than that of non-Hispanic whites (statistically significant differences). Business ownership rates were lower for Asian Americans as well, but this difference was not statistically significant in part due to small sample size of Asian Americans in the datasets.

- After statistically controlling for a number of neutral factors affecting business ownership, substantially fewer minorities owned firms than would be expected if they owned businesses at the same rate as similarly situated non-minorities. This was true for African Americans and Hispanic Americans working in the local construction industry in both 2000 and 2007-2009 (statistically significant differences).

- In 2000 and in 2007-2009, women working in the local construction industry had substantially lower rates of business ownership than men. Statistically significant disparities persisted for women after controlling for a number of neutral factors.

BBC also identified disparities in business ownership in the engineering industry:

- African Americans working in the Georgia engineering industry were self-employed at substantially lower rates than non-Hispanic whites in both 2000 and 2007-2009. (This difference was statistically significant in the 2007-2009 data only). Business ownership rates were also lower for other minorities, but this difference was not statistically significant in part due to small sample sizes of these groups.

- In 2000 and in 2007-2009, women working in the engineering industry in Georgia also had substantially lower self-employment rates than men (statistically significant differences).

- BBC used regression models to investigate the presence of race/ethnicity and gender disparities in business ownership in the engineering industry after accounting for the effects of neutral factors. Analyses for 2000 and 2007-2009 did not identify statistically significant disparities for minorities and women.

APPENDIX D.
Entry and Advancement in the Georgia Construction and Engineering-related Industries

Appendix D examines entry and advancement in the Georgia construction and engineering-related industries. Appendix E explores business formation; Appendix F considers the success of businesses. Related to both of these topics, an examination of access to capital can be found in Appendix G. Together, these appendices present an overview of marketplace conditions in the Georgia construction and engineering-related industries, referred to as "study industries" in this report. Appendix H discusses data sources used in these appendices.

In Appendix D and other marketplace appendices, engineering-related work refers to architectural, engineering and related services.[1] Each reference to the "engineering industry" refers to these types of services.

Introduction

BBC examined whether there were barriers to formation of minority- and women-owned businesses in Georgia. Business ownership often results from ascending the ranks within a particular industry. Within this process of entry and advancement in the Georgia construction and engineering-related industries, there may be some barriers that limit opportunities for minorities and women. This appendix uses 1980 and 2000 Census data and 2007-2009 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that influence the likelihood of forming a business. Where possible, BBC used these data to examine the construction and engineering-related industries separately, as entrance requirements and opportunities for advancement often differ across industries. BBC used historical data, such as 1980 Census data, in order to assess changes over time.

Representation of minorities among workers and business owners in Georgia. As a starting point, the study team examined how business owners in Georgia and the United States differed from the entire labor force with respect to the representation of racial and ethnic minorities. Based on 2000 and 2007-2009 data, Figure D-1 on the following page shows the demographics of the overall labor force in Georgia and the United States, business owners in Georgia and the U. S., and business owners in the study industries. Results for Georgia in 2007-2009 show the following:

- African Americans represented about 29 percent of workers, 17 percent of all business owners, but less than 12 percent of business owners in study industries;
- About 8 percent of workers, about 7 percent of all business owners and 12 percent of business owners in study industries were Hispanic Americans;

[1] "Architectural, engineering and related services" was coded under the 1980 and 2000 Census industrial classification system as 882 and 729, respectively. In the 2007-2009 ACS, it was coded as 7290.

- Asian-Pacific Americans were about 2 percent of all workers and 3 percent of business owners, but a smaller proportion of business owners in study industries (1%);

- Subcontinent Asian Americans and other minority groups represented less than 1 percent of workers and business owners in the study industries in Georgia;

- Native Americans comprised less than 1 percent of all workers, all business owners and business owners in study industries; and

- Non-Hispanic whites made up about 60 percent of the Georgia workforce and 71 percent of Georgia business owners. In study industries, non-Hispanic whites comprised an even larger share of business owners (74%).

Representation of women among workers and business owners in Georgia. Figure D-1 also presents the proportion of workers and business owners that were women in Georgia and in the United States overall. In 2007-2009, women made up about 47 percent of the Georgia labor force and 34 percent of business owners. However, only 7 percent of business owners in the study industries were women during these years.

In the United States, women also comprised a very small percentage of business owners in study industries (7%), especially compared to their representation in the entire workforce (47%).

Figure D-1.
Demographic distribution of the workforce and business owners, 2000 and 2007-2009

Georgia	Workforce in all industries		Business owners in all industries		Business owners in study industries	
	2000 (n=200,033)	2007-09 (n=141,189)	2000 (n=18,345)	2007-09 (n=14,543)	2000 (n=4,224)	2007-09 (n=3,032)
Race/ethnicity						
African American	25.9 %	29.2 %	13.7 % **	16.7 % **	11.4 % **	11.5 % **
Asian-Pacific American	1.7	2.2	1.8	3.4 **	0.5 **	1.0 **
Subcontinent Asian American	0.7	1.0	0.8	1.5 **	0.2	0.1 **
Hispanic American	5.3	7.5	3.4 **	6.6 **	5.0	11.8 **
Native American	0.6	0.5	0.7	0.5	1.2	0.6
Other minority group	0.2	0.3	0.4	0.3	0.3	0.5
Total minority	34.4 %	40.7 %	20.8 %	28.9 %	18.5 %	25.5 %
Non-Hispanic white	65.6	59.3	79.2 **	71.1 **	81.5 **	74.4 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	46.2 %	47.1 %	31.9 % **	33.7 % **	7.9 % **	7.3 % **
Male	53.8	52.9	68.1 **	66.3 **	92.1 **	92.7 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
United States	**Workforce in all industries**		**Business owners in all industries**		**Business owners in study industries**	
	2000 (n=6,832,970)	2007-09 (n=1,513,063)	2000 (n=676,804)	2007-09 (n=159,643)	2000 (n=119,227)	2007-09 (n=29,627)
Race/ethnicity						
African American	10.9 %	11.7 %	4.9 % **	5.7 % **	4.0 % **	4.3 % **
Asian-Pacific American	3.4	4.1	3.4	4.2 **	1.3 **	1.7 **
Subcontinent Asian American	0.7	1.0	0.7	1.0	0.2 **	0.2 **
Hispanic American	10.7	14.3	7.3 **	12.0 **	7.7 **	14.9 **
Native American	1.1	1.0	1.0 **	0.9 **	1.2	1.1
Other minority group	0.4	0.2	0.5	0.2	0.5	0.2
Total minority	27.3 %	32.3 %	17.7 %	24.0 %	14.9 %	22.4 %
Non-Hispanic white	72.7	67.7	82.3 **	76.1 **	85.1 **	77.6 **
Total	100.0 %	100.0 %	100.0 %	100.1 %	100.0 %	100.0 %
Gender						
Female	46.5 %	46.7 %	33.6 % **	34.2 % **	7.9 % **	7.4 % **
Male	53.5	53.3	66.4 **	65.8 **	92.1 **	92.6 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between all workers and business owners (or business owners in study industries) for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Construction Industry

BBC first examined the construction industry and how education, training, employment and advancement may affect the number of businesses owned by different race/ethnicity and gender groups in Georgia.

Education. Formal education beyond high school is not a prerequisite for most construction jobs. For this reason, the construction industry often attracts individuals who have less formal education.

- Based on the 2007-2009 ACS data, 39 percent of workers in construction were high school graduates with no post-secondary education, and 30 percent had not finished high school.

- Only about 10 percent of those in the construction industry had a four-year college degree or higher, compared to 29 percent of all workers.

Based upon 2007-2009 data, Hispanic Americans, African Americans and Native Americans in Georgia are less likely to have education beyond high school than non-Hispanic whites. Based on minimal formal educational requirements for entry-level jobs, one might expect high representation of Hispanic Americans, African Americans and Native Americans in the Georgia construction industry.

On the other hand, Asian-Pacific Americans and Subcontinent Asian Americans in Georgia have more formal education, on average, than non-Hispanic whites. Among workers age 25 or older in Georgia, 45 percent of Asian-Pacific Americans and 76 percent of Subcontinent Asian Americans had at least a four-year college degree in 2007-2009. By comparison, about 37 percent of non-Hispanic whites, 15 percent of Hispanic Americans and 24 percent of African Americans had a bachelor's degree or higher. Given this relatively high educational attainment, Asian-Pacific Americans and Subcontinent Asian Americans might be expected to have lower representation in construction relative to other minority groups.

In Georgia, female workers were as likely as men to have an education beyond high school. Among workers 25 years or older in 2007-2009, 31 percent of men and 33 percent of women (an increase from 2000) had at least a bachelor's degree.

Training in the construction industry is largely on-the-job or through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school include laborers, helpers or apprentices. Higher-skilled positions in the construction industry may require additional training through a technical or trade school or through an apprenticeship or other employer-provided training program. Such apprenticeship programs can be developed by employers, trade associations, trade unions and other groups. Workers often enter these programs from high school or a trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.[2] Opportunities for these programs across race/ethnicity are discussed later in this appendix.

Employment. With educational attainment among minorities and women as a context, the study team examined employment in the Georgia construction industry. Based on data from 1980, 2000 and 2007-2009, Figure D-2 compares the demographic composition of workers in the construction industry with that of the entire labor force in Georgia and in the United States.

Of the people working in the Georgia construction industry in 2007-2009:

- 25 percent were Hispanic Americans;
- About 15 percent were African Americans;
- Less than 1 percent were Asian-Pacific Americans;
- Less than 1 percent were Subcontinent Asian Americans; and
- Less than 1 percent were Native Americans.

[2] Bureau of Labor Statistics, U.S. Department of Labor. 2010-11. "Construction." C*areer Guide to Industries.* http://www.bls.gov/oco/cg/cgs003.htm (accessed May 24, 2010).

In 2007-2009, Hispanic Americans made up a greater share of workers in construction than in the overall Georgia workforce. About 25 percent of construction workers were Hispanic Americans, compared to 8 percent of workers in all industries. As discussed above, Hispanic Americans had less education, on average, than all workers Georgia; this difference could explain the relatively large number of Hispanic Americans in the construction industry.

Representation of African Americans in construction was lower compared to all industries in 2007-2009, a statistically significant difference. Educational requirements for construction jobs did not exceed the average educational attainment for African Americans in 2000, so other factors may be behind the relatively low number of African American workers in this industry. For example, a number of studies throughout the United States have argued that racial discrimination by construction unions has held down employment of African Americans in construction trades.[3] However, less than 10 percent of people working in construction in Georgia were union members or represented by unions in 2003-2005, so unions may not currently have as much effect as in more highly-unionized states.[4]

As one might expect given differences in education, representation of Asian-Pacific Americans in construction was lower than for the Georgia workforce as a whole. Asian-Pacific Americans made up less than 1 percent of the construction workforce but about 2 percent of all Georgia workers in 2007-2009. Subcontinent Asian Americans also represented a smaller portion of Georgia construction workers than workers in all Georgia industries in 2007-2009.

[3] See, for example, Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

[4] CPWR - The Center for Construction Research and Training. *The Construction Chart Book, The U.S. Construction Industry and its Workers*. 2007. produced with support from the National Institute for Occupational Safety and Health grant number OH008307.

Figure D-2.
Demographics of workers in construction and all industries, 1980, 2000 and 2007-2009

Georgia	All industries			Construction		
	1980 (n=127,356)	2000 (n=200,033)	2007-09 (n=141,189)	1980 (n=8,180)	2000 (n=15,630)	2007-09 (n=10,290)
Race/ethnicity						
African American	22.9 %	25.9 %	29.2 %	20.0 % **	15.2 % **	14.7 % **
Asian-Pacific American	0.4	1.7	2.2	0.1 **	0.6 **	0.8 **
Subcontinent Asian American	0.1	0.7	1.0	0.1 **	0.1 **	0.1 **
Hispanic American	1.1	5.3	7.5	0.8 **	14.8 **	24.5 **
Native American	0.2	0.6	0.5	0.3	0.8	0.4
Other minority group	0.1	0.2	0.3	0.0	0.3	0.4 **
Total minority	24.8 %	34.4 %	40.7 %	21.3 %	31.8 %	40.8 %
Non-Hispanic white	75.2	65.6	59.3	78.7 **	68.2 **	59.1
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	43.6	46.2	47.1	7.8 % **	9.4 % **	9.0 % **
Male	56.4	53.8	52.9	92.2 **	90.6 **	91.0 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
United States	**All industries**			**Construction**		
	1980 (n=5,287,471)	2000 (n=6,832,970)	2007-09 (n=1,513,063)	1980 (n=330,464)	2000 (n=480,280)	2007-09 (n=106,823)
Race/ethnicity						
African American	10.1 %	10.9 %	11.7 %	7.4 % **	6.2 % **	5.8 % **
Asian-Pacific American	1.5	3.4	4.1	0.7 **	1.3 **	1.5 **
Subcontinent Asian American	0.2	0.7	1.0	0.1 **	0.2 **	0.2 **
Hispanic American	5.7	10.7	14.3	5.9 **	15.0 **	23.9 **
Native American	0.5	1.1	1.0	0.8 **	1.5 **	1.2 **
Other minority group	0.1	0.4	0.2	0.1	0.4	0.3
Total minority	18.1 %	27.2 %	32.3 %	15.0 %	24.6 %	33.0 %
Non-Hispanic white	81.9	72.7	67.7	85.1 **	75.5 **	67.0 **
Total	100.0 %	99.9 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	42.2	46.5	46.7	7.9 % **	9.9 % **	9.2 % **
Male	57.8	53.5	53.3	92.1 **	90.1 **	90.8 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in the construction industry and workers in all industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 1980 and 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Considering their representation in the entire Georgia labor force, relatively few women work in the Georgia construction industry. Women represented about 47 percent of the labor force in 2007-2009 but only 9 percent of construction workers during this period (see Figure D-2).

These patterns seen in the Georgia construction industry in 2000 and 2007-2009 were also evident in the United States during the same years.

Importance of unions in entering the construction industry. Labor scholars characterize construction as a historically volatile industry sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.[5] The temporary nature of construction work often results in uncertain job prospects, and the high turnover of laborers presents a disincentive for construction companies to invest in training. Some scholars claim that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap

[5] Applebaum, Herbert. 1999. *Construction Workers, U.S.A.* Westport: Greenwood Press.

social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.[6] This may have been particularly true for African Americans.[7]

Construction unions aim to provide a reliable source of labor for employers and to preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be the best path for African American and other under-represented groups into the industry. However, there is evidence that the role of unions in the advancement of minorities and women in the construction industry has been both positive and negative. While recent studies provide evidence of unions playing a positive role in supporting and training minority and female workers, earlier research has shown how trade unions historically prevented minorities from obtaining employment in skilled trades.[8]

Several studies provide evidence of historical discrimination by trade unions. For example:

- A Department of Justice report in 1996 found that unions had used admissions criteria that adversely affected minorities. Federal courts ruled in the 1970s that standardized testing requirements unfairly disadvantaged minority applicants who had less exposure to testing, and that requirements that new union members have relatives in the union perpetuated the effects of past discrimination. The same report identified discriminatory practices in employee referral procedures that precluded minorities from having the same access to construction work as their white counterparts.[9]

- In 1999, a national study by Herbert Applebaum reported that, of those minority individuals who had been admitted to unions, a disproportionately low number were admitted into apprenticeship programs coordinated by unions. Apprenticeship programs are important means of producing skilled construction laborers, and the reported exclusion of African Americans from these programs may have severely limited their access to skilled occupations in the construction industry in the past.[10]

- According to testimony from African American union members reported in a 1994 study, even when unions implemented meritocratic mechanisms of apportioning employment to laborers, white workers were often allowed to circumvent procedures and received preference for construction jobs.[11]

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[6] Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

[7] Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41(4): 562-584.

[8] U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042.

[9] Ibid. See United States v. Iron Workers Local 86 (1971), Sims v. Sheet Metal Workers International Association (1973), and United States v. International Association of Bridge, Structural and Ornamental Iron Workers (1971).

[10] Applebaum, Herbert. 1999. *Construction Workers, U.S.A.* Westport: Greenwood Press.

[11] Feagin and Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41(4): 562-584.

More recent research, however, suggests that the relationship between minorities and unions has been changing. As a result, these historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (organized by unions and employers together) with rates in employer-only programs. Many of these studies conclude that the impact of union involvement is generally positive or neutral for minorities and women compared to non-Hispanic white males:

- In a 2005 study, Robert Glover and Cihan Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during the period 1996-2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had "much higher enrolments and participation of women and ethnic/racial minorities" and exhibited "markedly better performance for all groups on rates of attrition and completion" compared to programs run only by employers.[12]

- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to become members of highly-skilled construction professions as a result of enrollment in joint programs, as opposed to employer-only programs. Moreover, the positive effect of union involvement in apprenticeship training was higher for African American women than for white women.[13]

- A recent study on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer program. However, Hispanic Americans were less likely to be in a joint program than in an employer-only program.[14] These data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Other data also indicate a more positive relationship between construction unions and minority workers than that which may have prevailed in the past. For example, 2007 Current Population Survey (CPS) data indicate that union membership rates for African Americans are similar to those of non-Hispanic whites.[15] The CPS asked participants "Are you a member of a labor union or of an employee association similar to a union?" CPS data show union membership for African Americans in construction to be 11 percent and non-Hispanic whites to be 12 percent — not a statistically significant difference. On the other hand, based on these national data, only 7 percent of Hispanic Americans are union members.

Even if the influence of unions on minority opportunities in construction is now positive, or at least neutral, any past barriers to entry and advancement may have lingering effects on the construction workforce and the pool of potential construction business owners.

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[12] Glover, Robert and Bilginsoy, Cihan. 2005. "Registered Apprenticeship Training in the U.S. Construction Industry." *Education & Training,* Vol. 47, 4/5, p 337.

[13] Günseli Berik, Cihan Bilginsoy. 2006. "Still a wedge in the door: women training for the construction trades in the USA", *International Journal of Manpower*, Vol. 27 Iss: 4, pp.321 - 341

[14] Bilginsoy, Cihan. 2005. "How Unions Affect Minority Representation in Building Trades Apprenticeship Programs." *Journal of Labor Research, 57(1).*

[15] 2006 Current Population Survey (CPS), U.S. Census Bureau and Bureau of Labor Statistics.

Advancement in the Georgia construction industry. To research opportunities for advancement in the construction industry, the study team examined the representation of minorities and women in different construction occupations, as defined by the U.S. Bureau of Labor Statistics.[16]

Race and ethnic composition of construction occupations. Figures D-3 and D-4 show the demographics of construction workers and those of particular construction occupations in 2000 and 2007-2009, respectively. The study team examined specific occupations to measure minority and female representation among workers in entry-level positions (e.g., construction laborers), specific skilled occupations (e.g., pipelayers and electricians) and higher-ranking occupations (e.g., first-line supervisors).

As a single group, minorities comprised about 41 percent of the Georgia construction workforce in 2007-2009, an increase from 2000 (32%). There were large differences in the demographic composition of workers in different construction occupations in 2007-2009. For example, about two-thirds of construction laborers in Georgia were minorities in 2007-2009, while just 22 percent of first-line supervisors were minorities.

Compared to the minority representation in the Georgia construction industry as a whole, a number of occupations had lower minority representation in 2007-2009:

- Electricians (24%);
- Pipelayers, plumbers, pipefitters and steamfitters (30%);
- Sheet metal workers (25%);
- Structural iron and steel workers (16%);
- Equipment operators (30%); and
- First-line supervisors (22%).

Minorities represented a larger proportion of workers in the following construction occupations:

- Construction laborers (67%);
- Brick masons, block masons and stonemasons (81%);
- Cement masons, concrete finishers and terrazzo works (74%);
- Fence erectors (61%); and
- Highway maintenance workers (56%).

Similar patterns are observed for Georgia construction occupations for 2000. Minorities comprised about 32 percent of the Georgia construction workforce but just 20 percent of first-line supervisor occupations. In contrast, about 56 percent of construction laborers in the Georgia construction industry were minority workers in 2000.

Most minorities working in the Georgia construction industry in 2007-2009 were Hispanic Americans. Representation of Hispanic Americans was substantially greater among construction laborers (50%) than among all construction workers (25%). In Georgia in 2007-2009, only 8 percent of first-line supervisors were Hispanic American.

[16] Bureau of Labor Statistics, U.S. Department of Labor. 2001. "Standard Occupational Classification Major Groups." http://www.bls.gov/soc/soc_majo.htm (accessed September, 2011).

Figure D-3.
Demographics of all construction workers and selected occupations in Georgia, 2000

Georgia	All construction occupations (n=15,630)	Construction laborers (n=2,193)	Brickmasons, blockmasons and stonemasons (n=394)	Cement masons, concrete finishers and terazzo workers (n=149)	Electricians (n=721)	Pipelayers, plumbers, pipefitters and steamfitters (n=586)	Sheet metal workers (n=116)	Structural iron and steel workers (n=74)	Fence erectors (n=58)	Equipment operators (n=664)	Highway maintenance workers (n=94)	First-line supervisors (n=1,491)
Race/ethnicity												
African American	15.2 %	22.4 % **	35.2 % **	46.2 % **	15.2 %	13.3 %	13.3 %	19.3 %	26.7 %	18.2 %	47.4 % **	10.9 % **
Hispanic American	14.8	31.7 **	27.3 **	24.2	4.9 **	6.0 **	7.7	12.5	11.1	4.1 **	10.2	6.7 **
Other minority group	1.8	1.4	1.1	0.0	1.1	1.1	0.0	0.0	0.0	0.2	0.0	2.3
Total minority	31.8 %	55.5 %	63.6 %	70.4 %	21.3 %	20.3 %	21.0 %	31.9	37.7 %	22.6 %	57.6 %	19.9 %
Non-Hispanic white	68.2	44.5 **	36.4 **	29.6 **	78.7 **	79.6 **	79.0	68.1	62.3	77.4 **	42.4 **	80.1 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0	100.0 %	100.0 %	100.0 %	100.0 %
Gender												
Female	9.4 %	4.0 % **	1.8 % **	1.7 % **	2.1 % **	2.3 % **	0.5 % **	0.0 % **	0.0 % **	2.5 % **	4.4 %	3.7 % **
Male	90.6	96.0 **	98.2 **	98.3 **	97.9 **	97.7 **	99.5 **	100.0 **	100.0 **	97.5 **	95.6	96.3 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-4.
Demographics of all construction workers and selected occupations in Georgia, 2007-2009

Georgia	All construction occupations (n=10,290)	Construction laborers (n=1,583)	Brickmasons, blockmasons and stonemasons (n=179)	Cement masons, concrete finishers and terazzo workers (n=75)	Electricians (n=758)	Pipelayers, plumbers, pipefitters and steamfitters (n=355)	Sheet metal workers (n=50)	Structural iron and steel workers (n=43)	Fence erectors (n=22)	Equipment operators (n=372)	Highway maintenance workers (n=51)	First-line supervisors (n=988)
Race/ethnicity												
African American	14.7 %	15.7 %	31.7 % **	44.3 % **	13.8 %	17.0 %	7.0 %	3.5 % **	2.1 %	20.2 % **	46.1 % **	11.8 %
Hispanic American	24.5	49.6 **	47.9 **	29.3	8.8 **	9.8 **	18.2	11.7 **	58.8	9.3 **	9.9 **	8.3 **
Other minority group	1.7	1.5	1.3	0.0 **	1.2	3.2	0.0 **	0.7	0.0	0.2 **	0.3 **	1.8
Total minority	40.9 %	66.8 %	80.9 %	73.6 %	23.8 %	30.0 %	25.2 %	15.9	60.8 %	29.7 %	56.2 %	21.9 %
Non-Hispanic white	59.1	33.2 **	19.1 **	26.4 **	76.2 **	70.0 **	74.8 **	84.1 **	39.2	70.3 **	43.7	78.1 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0	100.0 %	100.0 %	100.0 %	100.0 %
Gender												
Female	9.0 %	2.6 % **	1.3 % **	0.0 % **	1.3 % **	0.8 % **	4.9 %	0.0 % **	12.3 %	2.4 % **	3.5 %	2.4 % **
Male	91.0	97.4 **	98.7 **	100.0 **	98.7 **	99.2 **	95.1	100.0 **	87.7	97.6	96.5	97.6 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2007-2009 ACS Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

African Americans made up about 16 percent of the total construction workforce in 2007-2009 and 12 percent of first-line supervisors, but this difference was not statistically significant. (A larger difference in 2000 was statistically significant.)

Women in construction trades. Figure D-3 also compares the representation of women in the construction workforce with their representation in specific construction occupations. Overall, 9 percent of workers in the Georgia construction industry were women in 2007-2009.

Considering their representation in the full construction workforce, women comprised a small percentage of workers in most construction occupations. For example, women comprised only 3 percent of construction laborers and 2 percent of first-line supervisors in 2007-2009. Women working in the industry were highly concentrated in administrative or support roles: about 90 percent of office and administrative support occupations in the Georgia construction industry in 2007-2009 were women.[17]

Percentage of minorities and women in construction who are managers. To further assess advancement opportunities for minorities and women, the study team examined differences between demographic groups in the proportion of construction workers that were managers.

Figure D-5 presents the percentage of construction workers that reported being a construction manager in 2000 and 2007-2009.

Figure D-5. Percentage of construction workers who worked as a manager, 2000 and 2007-2009

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from the 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Georgia	2000		2007-09		Sample size 2000	Sample size 2007-09
Race/ethnicity						
African American	2.9 %	**	5.7 %	**	2,404	1,374
Asian American	4.0		12.5		79	89
Hispanic American	1.2	**	1.8	**	2,020	1,805
Native American	7.3		1.5	**	112	49
Non-Hispanic white	8.1		11.2		10,961	6,927
Gender						
Female	4.0 %	**	5.9 %	**	1,474	1,085
Male	6.5		8.3		14,156	9,205

United States	2000		2007-09		Sample size 2000	Sample size 2007-09
Race/ethnicity						
African American	3.1 %	**	4.8 %	**	26,736	5,044
Asian American	7.4		8.0	**	5,744	1,646
Hispanic American	2.5	**	3.0	**	66,495	19,455
Native American	4.6	**	5.4	**	7,633	1,546
Non-Hispanic white	7.5		10.0		371,025	78,678
Gender						
Female	4.1 %	**	5.8 %	**	46,778	10,794
Male	6.7		8.1		433,502	96,029

[17] Workers in "office and administrative support occupations" include those with an IPUMS occupation code (OCC) between 500 and 593. More information regarding occupations can be found on IPUMS website: http://usa.ipums.org/usa/.

In 2000, about 8 percent of non-Hispanic whites in the Georgia construction industry were managers. A smaller proportion of minorities than non-Hispanic whites were managers, ranging from 1 percent for Hispanic Americans to 7 percent for Native Americans.

In 2007-2009, the percentage of African Americans, Hispanic Americans and Native Americans who were construction managers in Georgia remained below that of non-Hispanic whites.

- About 6 percent of African Americans working in the construction industry were managers, compared to 11 percent of non-Hispanic whites (a statistically significant difference);
- About 2 percent of Hispanic Americans were managers (also a statistically significant difference compared to the rate for non-Hispanic whites); and
- Two percent of Native Americans were construction managers (a statistically significant difference).

For African Americans, Asian-Pacific Americans and Hispanic Americans, the proportion of construction workers who were managers increased between 2000 and 2007-2009. It appears that fewer Native Americans working in the construction industry were managers in the later years, although the sample size in 2007-2009 for Native Americans was small.

Construction managers working in Georgia had, on average, more education than workers in other construction occupations. For example, 11 percent of construction managers in 2007-2009 had at least a bachelor's degree compared to 4 percent of construction laborers. However, it does not appear that educational attainment can explain the racial/ethnic disparities in advancement to manager.

Female construction workers were also less likely than their male counterparts to be managers in 2000 and 2007-2009 (a statistically significant difference in both years). About 6 percent of women in the Georgia construction industry were managers compared to 8 percent of men in 2007-2009.

Engineering Industry

BBC next examined how education and employment may influence ownership opportunities for different race/ethnicity and gender groups in the engineering industry.[18]

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the engineering industry, as many occupations require at least a four-year college degree. Based on Census data for 2007-2009, 62 percent of individuals working in the Georgia engineering industry had at least a four-year college degree. Barriers to such education, therefore, can restrict employment opportunities, advancement and ultimately business ownership. Low numbers of minority- and women-owned engineering business may, in part, be due to differences in education across race, ethnicity and gender groups.[19]

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[18] As discussed on the first page of this appendix, "engineering industry" refers to the federally-defined architectural, engineering and related services sector.

[19] Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 42 (4): 562-584.

Based on 2000 Census data and 2007-2009 ACS data, Figure D-6 presents the percentage of workers, age 25 and older, with at least a four-year degree in Georgia and the United States. A smaller share of African Americans, Hispanic Americans and Native Americans had a bachelor's degree than non-Hispanic whites in Georgia.

Compared with 37 percent of all non-Hispanic white workers age 25 and older who had at least a four-year degree in 2007-2009:

- About 24 percent of African Americans had at least a four-year college degree;
- 15 percent of Hispanic Americans were college graduates; and
- 27 percent of Native Americans had reached this level of educational attainment.

Some groups in Georgia were more likely than non-Hispanic whites to be college graduates in 2007-2009. About 45 percent of Asian-Pacific Americans and 76 percent of Subcontinent Asian Americans had at least a bachelor's degree. In 2007-2009, a larger percentage of women (33%) had a bachelor's degree than men (31%), a statistically significant difference.

Figure D-6. Percentage of labor force 25 and older with at least a four-year degree, 2000 and 2007-2009

Note:

** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male gender groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

			Sample size	
Georgia	**2000**	**2007-09**	**2000**	**2007-09**
Race/ethnicity				
African American	20.3 % **	23.8 % **	41,575	30,689
Asian-Pacific American	39.8 **	45.2 **	2,569	2,898
Subcontinent Asian American	68.6 **	76.0 **	968	1,404
Hispanic American	15.9 **	14.6 **	6,557	6,872
Native American	22.0 **	26.7 **	951	590
Other minority group	36.7	32.5	330	246
Non-Hispanic white	33.0	36.9	114,715	80,543
Gender				
Female	28.9 %	33.0 % **	78,455	59,605
Male	29.8	31.3	89,210	63,637
			Sample size	
United States	**2000**	**2007-09**	**2000**	**2007-09**
Race/ethnicity				
African American	19.1 % **	22.2 % **	552,222	118,247
Asian-Pacific American	44.9 **	48.6 **	186,301	53,173
Subcontinent Asian American	68.4 **	73.8 **	37,266	13,250
Hispanic American	13.4 **	14.9 **	533,233	145,484
Native American	17.1 **	19.7 **	67,317	14,391
Other minority group	30.0 **	33.8 **	22,378	2,532
Non-Hispanic white	32.5	36.2	4,368,674	964,403
Gender				
Female	29.3 % **	33.4 % **	2,680,051	624,267
Male	30.2	31.7	3,087,340	687,213

Employment. Figure D-7 compares the demographic composition of the Georgia engineering industry workforce (with and without a college degree) to that of all workers age 25 and older with a college degree. In 2007-2009, minorities comprised 22 percent of workers in the Georgia engineering industry, an increase from 2000 (19%).

Of those working in the Georgia engineering industry in 2007-2009:

- 15 percent were African Americans;
- 2 percent were Asian-Pacific Americans;
- 2 percent were Subcontinent Asian American;
- 3 percent were Hispanic Americans; and
- Less than 1 percent were Native Americans.

In 2007-2009, 15 percent of workers in engineering industry were African American compared with 21 percent of all workers with a four-year college degree (a statistically significant difference). The representation of Asian-Pacific Americans and Subcontinent Asian Americans in the Georgia engineering industry was also lower than what might be expected given educational attainment. Women represented 49 percent of workers with a college degree in 2007-2009 but just 30 percent of engineering industry workers, a statistically significant difference. (Due to limited sample size, the study team did not examine specific occupations in the industry.)

Figure D-7.
Demographic distribution of engineering industry workers and workers age 25 and older with a four-year college degree in all industries, 1980, 2000 and 2007-2009

Georgia	Workers 25+ with college degree			Engineering industry workforce		
	1980 (n=18,225)	2000 (n=46,103)	2007-09 (n=42,851)	1980 (n=575)	2000 (n=1,509)	2007-09 (n=1,467)
Race/ethnicity						
African American	12.1 %	17.4 %	21.2 %	5.4 % **	11.7 % **	15.0 % **
Asian-Pacific American	0.6	2.4	3.2	1.0	2.6	2.1 **
Subcontinent Asian American	0.4	1.6	2.5	0.5	1.0	1.5 **
Hispanic American	0.9	2.4	3.3	1.0	2.2	3.1
Native American	0.1	0.4	0.4	0.2	0.6	0.5
Other minority group	0.1	0.3	0.3	0.2	0.6	0.1 **
Total minority	14.2 %	24.4 %	30.8 %	8.3 %	18.7 %	22.3 %
Non-Hispanic white	85.8	75.6	69.2	91.7 **	81.3 **	77.7 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	36.6 %	45.5 %	48.5 %	20.9 % **	25.9 % **	29.5 % **
Male	63.4	54.5	51.5	79.1 **	74.1 **	70.5 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

United States	Workers 25+ with college degree			Engineering industry workforce		
	1980 (n=858,511)	2000 (n=1,631,919)	2007-09 (n=445,915)	1980 (n=28,869)	2000 (n=58,221)	2007-09 (n=16,737)
Race/ethnicity						
African American	5.3 %	6.8 %	7.8 %	3.1 % **	4.2 % **	5.0 % **
Asian-Pacific American	2.7	5.2	6.2	2.8	4.6 **	5.1 **
Subcontinent Asian American	0.6	1.7	2.5	1.1 **	1.3 **	1.5 **
Hispanic American	2.5	4.4	6.2	3.5 **	5.5 **	6.8 **
Native American	0.2	0.6	0.6	0.3 **	0.7	0.6
Other minority group	0.1	0.4	0.2	0.1	0.4	0.2
Total minority	11.4 %	19.1 %	23.5 %	11.1 %	16.7 %	19.2 %
Non-Hispanic white	88.6	80.9	76.4	88.9	83.3 **	80.8 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	34.7 %	45.6 %	47.9 %	21.1 % **	26.0 % **	26.8 % **
Male	65.3	54.4	52.1	78.9 **	74.0 **	73.2 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between engineering industry workers and workers age 25 or older with a four-year degree in all industry groups for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 1980 and 2000 U.S. Census 5% sample and 2007-2009 ACS Public Use Microdata Sample. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Summary of Entry and Advancement in the Construction and Engineering-Related Industries

BBC's analysis suggests that barriers to entry in the construction and engineering industries in Georgia may help explain the relatively low number of businesses owned by certain minority groups and women.

- In 2000 and 2007-2009, relatively fewer African Americans worked in the Georgia construction industry compared to all industries.
- In 2000 and 2007-2009, women were represented in the Georgia construction industry in particularly low numbers considering their representation among all workers.
- Lack of education appears to be a barrier to entry into the Georgia engineering industry for African Americans, Hispanic Americans and Native Americans. In 2000 and 2007-2009, workers in each of these groups were less likely to have a bachelor's degree compared to non-Hispanic whites. After controlling for a college education, however, a smaller number of African Americans, Asian-Pacific Americans and Subcontinent Asian Americans were working in the Georgia engineering industry compared with representation of these groups among people with a college degree.
- In 2000 and 2007-2009, only about one-in-four workers in the Georgia engineering industry were women, despite the fact that women comprised nearly one-half of the population with a college degree.

Barriers to advancement in the construction industry may also be an important reason for the relatively low number of minority and female business owners. In 2000 and 2007-2009:

- There were large differences in the representation of African Americans among construction occupations, suggesting barriers to entry or advancement into certain construction fields. This was also true for Hispanics and for women (often in the same occupations).
- There is some evidence of barriers to advancement based on the relative number of minorities and women working in the industry who were first line supervisors and managers.

APPENDIX C.
Collection and Analysis of Availability Information

The study team analyzed MBE/WBE availability for GDOT construction and engineering-related contracts and subcontracts. Appendix C expands on the analysis presented in Chapter 5 by explaining:

A. Overall approach;

B. Development of list of business establishments;

C. Development of questionnaire;

D. Interview execution and performance; and

E. Additional considerations.

A. Overall Approach

BBC contracted with Customer Research International (CRI) to conduct telephone interviews with business establishments in the state of Georgia. The business establishments interviewed were those identified in a Dun & Bradstreet (D&B) database as doing work in fields closely related to the types of construction and engineering-related work related to GDOT contracts. D&B strives to list every company in business — its list of businesses and phone numbers represents the most comprehensive list of business establishments BBC could obtain.

The study team attempted to contact every listing in relevant industry codes rather than drawing a sample of listings from the D&B database.

- CRI attempted to reach 14,614 business listings via telephone. Repeated attempts were made to reach each business listing.
- The study team successfully contacted 4,571 business establishments, about 48 percent of the establishments with valid phone listings (about 5,000 listings were non-working, duplicate or wrong numbers).
- About 2,500 establishments that were successfully contacted indicated they were not interested in participating in a discussion of availability for GDOT or local government work.
- More than 2,100 firms completed interviews about firm characteristics, their interest and qualifications for work in GDOT, and other topics.
- After screening for qualifications, interest in future construction and engineering-related work, and other factors, BBC identified 929 firms as available for GDOT construction and engineering-related work for purposes of the disparity study.

B. Development of List of Business Establishments

BBC developed a list of business establishments to contact for availability interviews based on a D&B database of establishments with locations in the state of Georgia. The study team determined business specializations that accounted for most GDOT construction and engineering-related work. BBC then identified the 8-digit D&B industry codes best corresponding to that work and collected information about Georgia firms that D&B listed as having their primary lines of business within those industries.

- The study team did not expect every firm in these lines of business to report that they were available for GDOT construction or engineering-related work. In some subindustries, BBC anticipated that relatively few firms would perform that type of work.
- In the same vein, the study team did not design the research effort so that every firm possibly performing construction or engineering-related work would be called as part of the interviews. To do so would have required including subindustries that are only marginally related to GDOT construction and engineering-related contracts.
- Some firms did not respond to the interview effort after multiple attempts to contact the firm. It is also possible that some firms were not included in the D&B database or were inaccurately coded within the database.
- Finally, only firms with Georgia locations were included in the interviews.

For the above reasons, the interviews do not represent a complete census of all firms possibly available for GDOT construction and engineering-related work. The study team's objective was to develop accurate, unbiased estimates of the relative availability of minority- and women-owned firms (MBE/WBEs) among firms doing business in Georgia within the lines of work principally involved in GDOT construction and engineering-related contracting. Although the interviews are not a complete census, the availability analysis might approach one when considering statistical reliability of results, as explained further in this appendix.

Identifying the relevant subindustries for GDOT construction and engineering-related contracting. BBC determined the types of firms involved in GDOT construction and engineering-related contracts by reviewing the dollar value of GDOT prime contracts and subcontracts going to different types of businesses. Appendix B describes the study team's collection and analysis of GDOT contract and subcontract data.

D&B has developed 8-digit industry codes that provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that have been prepared by the federal government. Figure C-1 on the following page lists industry codes for construction and engineering-related firms that were contacted as part of the telephone interview process.

Figure C-1.
Construction and engineering-related work types included in the availability interviews

Industry code	Industry description	Industry code	Industry description
Construction			
Highway and street construction		**Bridge and elevated highway construction**	
1611-0000	Highway and street construction	1622-0000	Bridge, tunnel, and elevated highway construction
1611-0200	Surfacing and paving		
1611-0203	Grading	**Water, sewer, and utility lines**	
1611-0204	Highway and street paving contractor	1623-0000	Water, sewer, and utility lines
1611-0205	Resurfacing contractor	1623-0300	Water and sewer line construction
1771-0300	Driveway, parking lot, and blacktop contractors	1623-0302	Sewer line construction
1771-0301	Blacktop (asphalt) work		
		Electrical work	
Concrete work		1731-0000	Electrical work
1611-0202	Concrete construction: roads, highways, sidewalks, etc.		
1771-0000	Concrete work	**Fences, guardrails and signs**	
1771-0200	Curb and sidewalk contractors	1611-0101	Guardrail construction, highways
1771-0201	Curb construction	1611-0102	Highway and street sign installation
Asphalt, concrete and other paving materials		**Painting, striping and marking**	
2951-0000	Asphalt paving mixtures and blocks	1721-0303	Pavement marking contractor
Grading, excavation, drainage and land prep		**Trucking, hauling and storage**	
1794-0000	Excavation work	4212-0000	Local trucking, without storage
Engineering-related			
Engineering		**Traffic control systems**	
8711-0000	Engineering services	8744-0000	Facilities support services
8711-0400	Construction and civil engineering		
8711-0402	Civil engineering	**Construction management**	
8711-9903	Consulting engineer	8741-9902	Construction management
8712-0100	Architectural engineering	8742-0402	Construction project management consultant
8712-0101	Architectural engineering		
8713-9901	Photogrammetric engineering	**Environmental services**	
		8748-9905	Environmental consultant
Transportation planning			
8742-0410	Transportation consultant	**Surveying and mapping**	
8748-0204	Traffic consultant	8713-0000	Surveying services

Note: 8-digit industry codes were developed by Dun & Bradstreet.
Source: BBC Research & Consulting from Dun & Bradstreet Marketplace, 2011.

Determining list of establishments to be contacted. Each Georgia business establishment within relevant subindustries for which D&B had a phone number was included in the list purchased from D&B. There was no "sampling" of business establishments from the D&B list. BBC purchased contact information for 14,614 business establishments for the availability interviews. This number included 10,483 construction-related establishments and 4,131 engineering-related establishments.

Because D&B organizes its database by "business establishment," not by "firm," BBC purchased the business listings in that fashion. Therefore, multiple Georgia locations for a single firm were obtained in the list of establishments to be called. The study team attempted to contact each establishment by telephone. (BBC's methods for consolidating information for multiple establishments into a single record for a firm are described later in this appendix.)

C. Development of Questionnaire

The study team drafted a telephone interview guide to collect business information from construction and engineering-related firms. Before the interview guide was used in the field, GDOT staff reviewed the questionnaire. BBC has successfully used similar questionnaires as part of other disparity studies.

Figure C-4 provides the basic interview document for construction firms at the end of this appendix. BBC slightly modified the questionnaire for certain subindustries based on line of work in order to use the terms commonly employed in those fields. For example, the words "prime consultant" and "subconsultant" were substituted for "prime contractor" and "subcontractor" when interviewing engineering-related firms.

A fax/email version of the questionnaire was developed for firms that, once contacted, preferred to complete the questionnaire in hard copy format. Those firms returned completed questionnaires to BBC via fax or e-mail.

Interview structure. Questions in each section of the survey were asked of all firms. Interviewers did not know race/ethnicity/gender ownership status when calling a firm. The questionnaires included the following sections.

Identification of purpose. The interviews began by identifying GDOT as the survey sponsor and by describing the purpose of the study.

Verification of correct firm name. The interviewer verified that he or she had reached the correct business, and if not, inquired about the correct contact information for that business. When the firm name was not correct, interviewers asked if the respondent knew how to contact the company. The BBC study team followed up with the desired company based on the new contact information (see areas "X" and "Y" of the Availability Questionnaire in Figure C-4).

Performance of construction or engineering-related work. Firms were asked, "First, I want to confirm that your firm does work or provides materials related to construction, maintenance or design of roads and highways. Is this correct?" Interviewers continued with firms responding "yes" to this question (Question A1). BBC instructed interviewers that "doing work" included trying to sell that work.

Verification of for-profit business status. The interviewer also asked whether the organization was a for-profit business as opposed to a government or nonprofit entity (Question A2). Interviewers continued with firms responding "yes" to this question.

Confirmation of main line of business. Construction firms were asked to identify types of work they perform from a list developed based on GDOT's prequalification work code classification (Questions A3b and A3c). They also confirmed their primary line of business according to D&B records (Question A4). Firms seeking to change or clarify this description were then asked to identify their primary line of business (Question A4b). (After the interview was complete, BBC coded the new information on primary line of business into appropriate industry codes.) Engineering-related firms were also asked to identify their main line of business according to GDOT prequalification work classes, and BBC coded any new information appropriately.

Sole location, or multiple locations. Because the study team interviewed business establishments, business owners and managers were asked if they had other locations (Question A5). They were also asked if the establishment was an affiliate or subsidiary of another firm (Question A8). (A discussion of how BBC consolidated this information into a single response for a firm is presented later in this appendix.)

Past bids or work with governments and the private sector. The interviewer inquired about bids or work on past government and private sector projects. This area of questions also asked whether the firm had bid or worked as a prime contractor (prime consultant), as a subcontractor (subconsultant) or as a supplier or trucker (Questions B1–B8).

Qualifications and interest in future transportation work. Firm representatives were asked about their qualifications and interest in future work for GDOT or for cities, counties or other local transportation agencies. Separate questions asked about qualifications and interest in this work as a prime contractor and/or as a subcontractor (Questions B9–B15).

Geographic areas. The interviewer asked a series of questions about the geographic areas in which firms could work. The geographic areas included GDOT districts (Questions C1a–C1f).

Year firm established. Interviewers asked firms to identify the approximate year that the firm was established (Question D1).

Largest contracts. Interviewers asked firms to identify the largest prime contract or subcontract they had been awarded in Georgia in the past five years. They were also asked about the largest prime contract or subcontract that they had bid on in Georgia in the past five years (Questions D2–D4).

Ownership. Firms were asked whether they were at least 51 percent owned and controlled by women and/or minorities (Questions E1–E3). If firms indicated that they were minority-owned, they were also asked about the race/ethnicity of ownership.

Business background. Several questions collected information on revenues in the past three years and number of employees in the past 12 months (Questions F1–F6). For firms with multiple establishments, the interview also asked about revenue and employee numbers for all locations.

Comments about the marketplace and doing business with GDOT. Near the end of the interview, CRI asked a series of questions concerning general insights on the marketplace and GDOT contracting practices (Question G1a–G1m). This set of questions was introduced with the following statement: "Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as we ask you these questions."

The interview also included an open-ended question about the Georgia marketplace (Question G2): "Finally, we're asking for general insights on starting and expanding a business in your field or winning work as a prime or subcontractor. Do you have any thoughts to offer on these topics?"

Contact information. The interview concluded by collecting complete contact information for the establishment (Questions H1–H6).

D. Interview Execution and Performance

Customer Research International (CRI) has completed tens of thousands of similar telephone interviews for BBC as part of disparity studies and other BBC assignments throughout the country. BBC routinely holds planning sessions with CRI executives and training sessions with CRI interviewers as part of BBC's ongoing relationship with the firm. CRI programmed and conducted the interviews and provided daily reports on results. BBC instructed CRI to make at least five attempts to reach a person at each phone number. This design is intentionally persistent to minimize non-response.

BBC instructed CRI staff to identify and interview an available company representative such as the owner, manager, chief financial officer or other key official who could answer questions about the company's line of business, past contracts, financial and employment figures, interest in work with various clients, and ownership status. The interviews were conducted from August 2011 through November 2011.

Performance. The interview process began with a very large number of D&B business listings for organizations in Georgia in certain lines of work related to construction and engineering. At the end of the availability analysis process, firms reporting that they were available for and interested in GDOT or city, county or other local transportation agency construction or engineering-related work, and had bid on or had performed construction or engineering-related work, were included in the database used for the availability analysis.

Valid business listings. Some of the business listings purchased from D&B were:

- Duplicate numbers (171 listings);
- Non-working phone numbers (3,920 listings); or
- Wrong numbers for the desired businesses (933 listings that could not be reached through follow-up calls).

Figure C-2 presents how the beginning set of 14,614 listings became a set of 9,590 establishments with working phone numbers by eliminating listings with duplicate, non-working or incorrect phone numbers. Some non-working phone numbers and some wrong numbers for the desired businesses reflect firms going out of business or changing their names and phone numbers between the time that D&B listed them in its database and the time that the study team attempted to contact them.

Figure C-2 also shows the final disposition of the 9,590 business establishments that CRI attempted to contact:

- Slightly less than 13 percent of business establishments could not be reached after a minimum of five phone calls (1,214 establishments). Call-backs to these business establishments were made at different times of day and different days of the week in order to maximize response.
- About 36 percent of business establishments could not provide a staff member to complete the interview after a minimum of five phone calls (3,409 establishments).

- Interviews were only conducted in English. Less than one-half of 1 percent of business establishments could not communicate with the interviewer due to language barriers (33 establishments).
- About 4 percent of business establishments asked the study team to send the questionnaire via fax or e-mail but did not successfully obtain the fax or e-mail (after multiple attempts) or received the questionnaire but did not return a completed interview to BBC (363 establishments).

In sum, BBC successfully contacted 4,571 business establishments, or about 48 percent of the business establishments with valid phone listings.

Figure C-2. Disposition of attempts to interview D&B business listings

Note:

* After multiple attempts to complete interview.

Source:

BBC Research & Consulting from 2011 availability interviews.

	Number of firms	Percent of business listings
Beginning list	**14,614**	
Less duplicate numbers	171	
Less non-working phone numbers	3,920	
Less wrong number/business	933	
Unique business listings with working phone numbers	**9,590**	**100.0 %**
Less no answer	1,214	12.7
Less could not reach responsible staff member	3,409	35.5
Less language barrier	33	0.3
Less unreturned fax/email	363	3.8
Establishments successfully contacted	**4,571**	**47.7 %**

Establishments not interested in discussing availability for GDOT work. Figure C-3 shows that among the 4,571 business establishments successfully contacted, 2,460 establishments were not interested in discussing availability for GDOT or local agency work. The interviews stopped at that point for those firms. The balance of the business establishments (2,111 establishments) completed interviews about firm characteristics.

Firms that report being available for construction and engineering-related work. Among the business establishments that completed interviews, only a portion was deemed available for any type of GDOT construction or engineering-related work, as explained below:

- About one-third of the firms that completed an interview indicated they did not perform work related to construction, maintenance or design of roads and highways (751 establishments). The interview ended when a business owner or manager reported that the business did not do that type of work.
- Of the establishments that completed an availability interview, 56 indicated that they were an organization other than a for-profit business. Nonprofit and public sector organizations were not included in the availability analysis. The interview ended when a respondent reported that his or her establishment was not a for-profit business.
- Forty-nine individual establishments of multi-location firms completed the interview. Prior to analyzing results, BBC combined responses from these multiple establishments into a single response (described below). This removed 27 establishments from the availability analysis (about 1 percent of total completed interviews).

- Nineteen of the interviewed establishments indicated that they were involved in construction or engineering-related work but reported main lines of work that were well outside the scope of the availability analysis. For example, a firm identified by D&B as an environmental consulting firm reported in the interview that they did engineering-related work but that their primary line of business was industrial cleaning, which is outside the scope of the study. CRI completed the full interview with these firms. Prior to analyzing results, BBC removed them from the final data set.
- About 15 percent of firms that were interested in future work with GDOT were not counted as firms available for GDOT projects because they had not bid on or received awards for similar projects in Georgia within the past five years (309 establishments).
- Twenty additional firms were not counted as firms available for GDOT projects because they said they were not interested in either prime contracting or subcontracting opportunities on such projects.

After these refinements, the interview effort produced a database of 929 firms for the availability analysis (see Figure C-3).

Figure C-3. Screening of completed business telephone interviews for possible inclusion in the availability analysis

Source:
BBC Research & Consulting from 2011-2012 Availability Interviews.

	Number of firms
Establishments successfully contacted	**4,571**
Less establishments not interested in discussing availability for GDOT work	2,460
Establishments that completed interviews about firm characteristics	**2,111**
Less no road and highway related work	751
Less not a for-profit business	56
Less multiple establishments	27
Less line of work outside scope	19
Less no past bid/award	309
Less no interest in future work	20
Firms available for GDOT work	**929**

BBC used the database in both the availability analyses and in certain analyses of the local marketplace. When some firms did not answer the questions employed in a particular marketplace analysis, the number of responses that were usable in that analysis was less than 929.

Study team identification and coding of responses from multi-location firms. Multiple responses from different establishments operating under the same firm name were combined into a single summary case according to the following rules:

- If any of the establishments reported bidding or working on a contract within a particular sector, the firm summary for that variable was coded to an affirmative response for the corresponding subindustry;
- The role of work (prime contractor, subcontractor, supplier or trucker) that establishments reported were summed to a single variable, again corresponding to the appropriate subindustry;
- Except when there was a large discrepancy among the individual responses in a set of establishments' self-reported founding dates, BBC used the earliest founding date provided by the multiple establishments;

- The values for the firm summary variables for contract sizes and firm revenue are the largest dollar amounts indicated by any of its establishments;
- The summary number of firm employees is equal to the most common or the mean response of the multiple establishments; and
- Firms with multiple locations were re-coded as women- or minority-owned if duplicate establishments indicated such status.

E. Additional Considerations

The study team explored several possible limitations in its approach to estimating relative availability. They include:

- Assessing relative MBE/WBE availability and not providing a count of all firms available for GDOT work;
- Use of D&B as the sample frame;
- Selection of specific industry;
- Non-response bias;
- Language; and
- Reliability of answers to interview questions.

Not providing a count of all firms available for GDOT work. The purpose of the availability interviews was to estimate the *percentage* of firms available for GDOT construction and engineering-related work that were minority- and women-owned and controlled (i.e., "relative" MBE/WBE availability). The interviews provided such information. The interviews do not provide a comprehensive listing of every firm available for GDOT work and should not be used as such.

The interview approach of measuring relative availability has been approved by federal courts (see, for example, the Seventh Circuit decision on *Northern Contracting*) when considering state implementation of the Federal DBE Program.[1] Use of a survey is recommended as an approach to measuring availability in the USDOT guidance on goal-setting.[2]

For statistical purposes, the large number of completed interviews ensures that availability results approach those of a complete census. For example, 30 percent of firms in the availability database were MBE/WBEs. After applying a finite population correction factor (which is standard when the number of completed interviews is high relative to the size of the population), one can be confident that this figure is within about 2 percentage points of what would be found if all firms in the population had completed an interview.

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

[2] USDOT. *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program* http://www.osdbu.dot.gov/dbeprogram/tips.cfm

Use of D&B list. D&B provides the most comprehensive private database of business listings in the United States. Even so, this database does not include all establishments operating in Georgia.

- **New businesses.** There can be a lag between formation of a new business and inclusion in the database. This means that the newest firms are underrepresented in the sample frame. Based on the firms successfully interviewed, newly formed firms are more likely than older firms to be minority- or women-owned, which suggests that MBEs and WBEs might be slightly underrepresented in the final database of interviewed firms.
- **Home-based businesses.** The D&B database is more likely to miss a business working out of the home than a firm with a distinct business office. Small, home-based firms are more likely than large firms to be MBE/WBEs, which again suggests that MBEs and WBEs might be slightly underrepresented in the final availability data set.

Selection of specific industry. Defining an industry based on specific industry codes (e.g., SIC, NAICS or D&B industry codes) is a standard step when analyzing an economic sector. Government and private sector economic data are typically organized according to industry codes. As with any such research, there are limitations when choosing the specific industry codes to define sets of establishments to be interviewed. For example, it was not possible for BBC to include all industries possibly related to construction and engineering-related work without interviewing firms in nearly every industry in Georgia.

A further limitation to the use of D&B codes to classify businesses, or any other work type classification method, is that some codes are imprecise and overlap with other business specialties. Even though BBC used D&B's own 8-digit industry codes, D&B does not maintain a detailed 8-digit code for each firm in its database. When firm owners and managers were asked to identify primary lines of business, they often gave broad answers. For these reasons, BBC collapsed many of the industry codes into broader work categories in the final database of firms available for construction and engineering-related work.

Non-response bias. Analysis of non-response bias considers whether firms not successfully interviewed are different from those successfully interviewed and included in the final data set. There are opportunities for non-response bias in any primary research effort. The study team considered the potential for non-response bias due to:

- Research sponsorship; and
- Work specializations.

Research sponsorship and introduction. Interviewers introduced themselves by identifying GDOT as interview sponsors in order to encourage firms that performed construction and engineering-related work to participate in the interview. Firms would be less likely to answer somewhat sensitive business questions asked by an interviewer who was unable to identify the sponsor of the interview. In fact, some firms asked to check with GDOT to verify sponsorship prior to participating in the interview. Analysis of interview refusal rates suggests that sponsorship had a positive effect on response rates.

Work specializations. Businesses in highly-mobile fields, such as trucking, may be more difficult to reach than firms more likely to work out of a fixed office (e.g., engineering firms). This suggests that response rates will differ by business specialization.

If all interviewed firms were simply counted to determine relative MBE/WBE availability, this would lead to estimates that relied too heavily on fields that could be easily contacted by telephone. This potential non-response bias is minimal in this study because the availability analysis compares firms within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete an interview is less important because the number of MBE/WBE trucking firms completing interviews is compared with total number of trucking firms, not all firms across all fields.

Language. GDOT contracting documents are in English and no other languages. The study team made the decision to only include businesses able to provide a representative who could complete the interview in English in the availability analysis to remove language barriers as a potential explanation for any differences in outcomes observed between MBE/WBEs and majority-owned firms.

Individuals who could not communicate in English well enough to complete the interview and could not locate another individual to answer interview questions in English were not captured in the availability analysis.

Response reliability. Firm owners and managers were asked questions that may be difficult to answer, including firm revenues and employment. For this reason, the study team prompted them with D&B information for their establishment and asked them to confirm that information or provide more accurate estimates. Further, respondents were typically not asked to give absolute figures for difficult questions such as firm revenues. Rather, they were given ranges of dollar figures for firm revenue.

BBC explored reliability by analyzing consistency of interview responses for the firm revenues and firm employment questions. BBC found interview responses to these difficult questions to be internally consistent. For example, firms with smaller employee numbers reported revenues consistent with their employment levels.

Summary

"Custom census" approaches to availability that begin with D&B data have been reviewed positively by federal courts. The study team's methodology for analyzing MBE/WBE availability took the previous custom census approach as a starting point and added several layers of additional screening when determining firms available for GDOT construction and engineering-related work.

The study team attempted to complete interviews with all Georgia firms that, according to D&B, have a primary line of business within relevant construction and engineering-related industry codes. (There was no "sampling" from the sample frame in preparing the list of firms to be interviewed.) The study team attempted to contact 14,614 business listings, about 5,000 of which were found to be invalid listings. More than 4,500 business establishments were successfully contacted.

BBC examined several potential sources of non-response bias. It is possible that MBEs and WBEs were slightly under-represented in the final database of available firms. However, BBC concludes that this potential under-representation of MBE/WBEs does not significantly affect the analyses.

Figure C-4.
Interview Instrument [Construction]

Georgia DOT Disparity Study
Availability Survey Instrument [Construction]

Hello. My name is [*interviewer name*] from CRI. We are calling on behalf of the Georgia Department of Transportation (GDOT).

GDOT is developing a list of companies interested in construction, maintenance, or design on a wide range of road, highway and other state or local government transportation projects. Who can I speak with to get the information we need from your firm?

[AFTER REACHING THE OWNER OR AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO GDOT'S EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE DEPARTMENT]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=RIGHT COMPANY – SKIP TO A1

2=NOT RIGHT COMPANY

3=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. Can you give me any information about [*firm name*]?

1=Yes, same owner doing business under a different name – SKIP TO Y4

2=Yes, can give information about named company

3=Company bought/sold/changed ownership – SKIP TO Y4

4=No, does not have information – TERMINATE

5=Refused to give information – TERMINATE

Y1. ENTER NEW NAME

1=VERBATIM

Y2. Can you give me the phone number of [*firm name*]?

(ENTER UPDATED PHONE OF NAMED COMPANY)

1=VERBATIM

Y3. Can you give me the complete address or city for [*firm name*]?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:)

. STREET ADDRESS
. CITY
. STATE
. ZIP)

1=VERBATIM

Y4. And what is the new name of the business that used to be [*firm name*]?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y6. Can I have a telephone number for them?

(ENTER UPDATED PHONE)

1=VERBATIM

Y7. Can you give me the complete address or city for [*new firm name*]?

1=VERBATIM

Y8. Do you work for this new company?

1=YES

2=NO – TERMINATE

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance or design of roads and highways. Is this correct?

(NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTAINENCE OR DESIGN SUCH AS BUILDING AND PARKING FACILITIES, PAVING AND CONCRETE, TUNNELS, BRIDGES AND ROADS. IT ALSO INCLUDES DESIGN, ENGINEERING, PLANNING, ENVIRONMENTAL ASSESMENT OR RELATED PROFESSIONAL SERVICES.)

(NOTE TO INTERVIEWER - INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS)

1=Yes

2=No - TERMINATE

A2. Let me confirm that [*firm name / new firm name*] is a business, as opposed to a non-profit organization, a foundation or a government office. Is that correct?

1=Yes, a business

2=No, other – TERMINATE

(NOTE TO INTERVIEWER – THE SURVEY SHOULD CONTINUE IF THE ENTITY IS A TRIBALLY-OWNED CONCERN)

A3. Next, we're interested in the types of work that [*firm name / new firm name*] performs.

A3a. First, does your firm just sell construction materials, just do construction work, or both?

1=Sell materials only – SKIP TO A3c

2=Do construction work

3=Both

98= (DON'T KNOW)

99= (REFUSED)

A3b. Does your firm do: [READ, MULTIPUNCH]

1 = Grading, excavation, drainage or other land prep

2 = Paving, concrete work or other heavy construction related to road work

3 = Bridge or elevated highway construction or repair

4 = Underground utilities

5 = Electrical work related to highways such as lighting and signal installation

6 = Painting, striping or pavement marking

7 = Installation of highway fences, guardrails or signs

8 = Temporary traffic control

9 = Trucking and hauling for road projects

10 = Grassing or erosion control

11 = [IF NONE OF THE ABOVE] Other types of construction work involved in road, highway and other transportation projects that we haven't named.
IDENTIFY _____

IF ANSWERED "2" TO A3A, SKIP TO A4

A3c. Does your firm sell: [READ, MULTIPUNCH]

1=Asphalt, concrete or other paving materials

2=Erosion control materials

3=Traffic or highway signs

4=Traffic signals

5=Fence, guardrail materials

6=Steel

7=Petroleum

8=OTHER [IF NONE OF ABOVE]
IDENTIFY_____

A4a. Let me also confirm what your primary line of business is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is this correct?

(NOTE TO INTERVIEWER - IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY)

1=Yes – SKIP TO A5

2=No

98= (DON'T KNOW)

99= (REFUSED)

A4b. What would you say is the main line of business at [*firm name* / *new firm name*]?

(ENTER VERBATIM RESPONSE)

1=VERBATIM

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98= (DON'T KNOW)

99= (REFUSED)

A8. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98= (DON'T KNOW) – SKIP TO B1

99= (REFUSED) – SKIP TO B1

A9. What is the name of your parent company?

1=ENTER NAME

98= (DON'T KNOW)

99= (REFUSED)

A9. ENTER NAME OF PARENT COMPANY

1=VERBATIM

B1. Next, I have a few questions about your company's role in construction, maintenance or design work related to roads and highways. During the past five years, has your company submitted a bid or a price quote for any part of a state or local government project in Georgia?

1=Yes

2=No – SKIP TO B3

98= (DON'T KNOW) – SKIP TO B3

99= (REFUSED) – SKIP TO B3

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? [MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/Hauler

4=Supplier (or manufacturer)

98= (DON'T KNOW)

99= (REFUSED)

B3. During the past five years, has your company received an award for work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier to any part of a state or local government project in Georgia?

1=Yes

2=No – SKIP TO B9

98= (DON'T KNOW) – SKIP TO B9

99= (REFUSED) – SKIP TO B9

B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? [MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/Hauler

4=Supplier (or manufacturer)

98= (DON'T KNOW)

99= (REFUSED)

B5. Again thinking about construction, maintenance or design work related to roads and highways during the past five years, has your company submitted a bid or a price quote for any part of a private sector contract in Georgia?

1=Yes

2=No – SKIP TO B11

98= (DON'T KNOW) – SKIP TO B11

99= (REFUSED) – SKIP TO B11

B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? [MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/Hauler

4=Supplier (or manufacturer)

98= (DON'T KNOW)

99= (REFUSED)

B7. During the past five years, has your company received an award for work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier for any part of a private sector contract in Georgia?

1=Yes

2=No – SKIP TO B13

98= (DON'T KNOW) – SKIP TO B13

99= (REFUSED) – SKIP TO B13

B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or a supplier? [MULTIPUNCH]

1=Prime contractor
2=Subcontractor
3=Trucker/Hauler
4=Supplier (or manufacturer)
98= (DON'T KNOW)
99= (REFUSED)

B9. Is your company qualified and interested in working with the Georgia Department of Transportation as a prime contractor?

1=Yes
4=No
98= (DON'T KNOW)
99= (REFUSED)

B10. Is your company qualified and interested in working with cities, counties or other local transportation agencies as a prime contractor?

1=Yes
4=No
98= (DON'T KNOW)
99= (REFUSED)

B14. Is your company qualified and interested in working with the Georgia Department of Transportation as a subcontractor, trucker/hauler or supplier?

1=Yes
4=No
98= (DON'T KNOW)
99= (REFUSED

B15. Is your company qualified and interested in working with cities, counties or other local transportation agencies as a subcontractor, trucker/hauler or supplier?

1=Yes
4=No
98= (DON'T KNOW)
99= (REFUSED

C1. I now want to ask you about the geographic area your company serves within Georgia.

C1a. Could your company do work or serve customers in the Atlanta Metro Area (GDOT District 7)?

ATLANTA METRO AREA INCLUDES FULTON, DEKALB, ROCKDALE, CLAYTON, COBB AND DOUGLAS COUNTIES.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

C1b. Could your company do work or serve customers in Northwest Georgia (GDOT District 6)?

NORTHWEST GEORGIA EXTENDS FROM THE CHATTANOOGA VALLEY TO CARTERSVILLE.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

C1c. Could your company do work or serve customers in Northeast Georgia (GDOT District 1)?

NORTHEAST GEORGIA INCLUDES GAINESVILLE, LAWRENCEVILLE AND ATHENS.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

C1d. Could your company do work or serve customers in Middle Georgia (GDOT Districts 2 and 3)?

MIDDLE GEORGIA EXTENDS FROM COLUMBUS TO AUGUSTA.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

C1e. Could your company do work or serve customers in Southeast Georgia (GDOT District 5)?

SOUTHEAST GEORGIA EXTENDS FROM SAVANNAH TO THE FLORIDA BORDER.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

C1f. Could your company do work or serve customers in Southwest Georgia (GDOT District 4)?

SOUTHWEST GEORGIA INCLUDES ALBANY AND VALDOSTA.

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

D1. About what year was your firm established?

(RECORD FOUR-DIGIT YEAR, e.g., '1977')

(9998 = DON'T KNOW)

(9999 = REFUSED)

1=NUMERIC (1600-2008)

D2. In rough dollar terms, what was the largest transportation-related contract or subcontract your company was awarded in Georgia during the past five years?

(NOTE TO INTERVIEWER - INCLUDES ANY GOVERNMENT OR PRIVATE SECTOR CONTRACTS AND CONTRACTS NOT YET COMPLETE)

(NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY)

1=$100,000 or less

2=More than $100,000 to $500,000

3=More than $500,000 to $1 million

4=More than $1 million to $2 million

5=More than $2 million to $5 million

6=More than $5 million to $10 million

7=More than $10 million to $20 million

8=$20 million to $50 million

9=Greater than $50 million

97= (NONE)

98= (DON'T KNOW)

99= (REFUSED)

D3. Was this the largest transportation contract or subcontract that your company [*bid* || *proposed*] on or submitted quotes for in Georgia during the past five years?

1=Yes – SKIP TO E1

2=No

98= (DON'T KNOW) – SKIP TO E1

99= (REFUSED) – SKIP TO E1

D4. What was the largest contract or subcontract that your company [*bid* || *proposed*] on or submitted quotes for in Georgia during the past five years?

(READ CATEGORIES IF NECESSARY)

1=$100,000 or less

2=More than $100,000 to $500,000

3=More than $500,000 to $1 million

4=More than $1 million to $2 million

5=More than $2 million to $5 million

6=More than $5 million to $10 million

7=More than $10 million to $20 million

8=$20 million to $50 million

9=Greater than $50 million

97= (NONE)

98= (DON'T KNOW)

99= (REFUSE

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is [*firm name* / *new firm name*] a woman-owned business?

1=Yes

2=No

98= (DON'T KNOW)

99= (REFUSED)

E2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is [*firm name* || *new firm name*] a minority-owned business?

1=Yes

2=No – SKIP TO F1

3= (OTHER GROUP - SPECIFY)

98= (DON'T KNOW)

99= (REFUSED)

E2. OTHER GROUP - SPECIFY

1=VERBATIM

E3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=African-American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6= (OTHER - SPECIFY)

98= (DON'T KNOW)

99= (REFUSED)

E3. OTHER - SPECIFY

1=VERBATIM

F1. Dun & Bradstreet indicates that your company has about [*number*] employees working out of just your location. Is that a fairly accurate average thinking about the past 12 months?

(NOTE TO INTERVIEWER - INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION)

1=Yes – SKIP TO F3

2=No

98= (DON'T KNOW)

99= (REFUSED) – SKIP TO F3

F2. About how many employees did you have working out of just your location, on average, over the course of last 12 months?

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

F3. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [*dollar amount*]. Is that an accurate estimate for the past three years?

1=Yes – SKIP TO F5

2=No

98= (DON'T KNOW)

99= (REFUSED) – SKIP TO F5

F4. Roughly, what was the average annual gross revenue of your company, just considering your location, in the past three years? Would you say . . . (READ LIST)

(NOTE TO INTERVIEWER – IF BUSINESS OPEN LESS THAN THREE YEARS, ASK FOR BEST ESTIMATE OF AVERAGE ANNUAL GROSS REVENUE)

1=Less than $1 Million

2=$1 Million - $4.5 Million

3=$4.6 Million - $7 Million

4=$7.1 Million - $12 Million

5=$12.1 Million - $16.5 Million

6=$16.6 Million - $18.5 Million

7=$18.6 Million - $22.4 Million

8=$22.5 Million or more

98= (DON'T KNOW)

99= (REFUSED)

F5. Over the past three years, about how many employees did you have, on average, for all of your locations?

1= (ENTER RESPONSE)

98= (DON'T KNOW)

99= (REFUSED)

F5. RECORD NUMBER OF EMPLOYEES

1=VERBATIM

F6. Roughly, what was the average annual gross revenue of your company, for all of your locations in the past three years? Would you say . . . (READ LIST)

(NOTE TO INTERVIEWER – IF BUSINESS OPEN LESS THAN THREE YEARS, ASK FOR BEST ESTIMATE OF AVERAGE ANNUAL GROSS REVENUE)

1=Less than $1 Million

2=$1 Million - $4.5 Million

3=$4.6 Million - $7 Million

4=$7.1 Million - $12 Million

5=$12.1 Million - $16.5 Million

6=$16.6 Million - $18.5 Million

7=$18.6 Million - $22.4 Million

8=$22.5 Million or more

98= (DON'T KNOW)

99= (REFUSED)

G1. Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as we ask you these questions.

G1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1b. Has your company obtained or tried to obtain a bond for a project?

1=Yes

2=No [SKIP TO G1d]

98= (Don't know) [SKIP TO G1d]

99= (Does not apply) [SKIP TO G1d]

G1c. Has your company had any difficulties obtaining bonds needed for a project?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1d. Have any insurance requirements on projects presented a barrier to bidding?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1e. Has the size of large projects presented a barrier to bidding?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1f. Has your company experienced any difficulties learning about bid opportunities with the Georgia Department of Transportation?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1g. Has your company experienced any difficulties learning about bid opportunities with local governments in Georgia?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1h. Has your company experienced any difficulties learning about bid opportunities in the private sector in Georgia?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1h. Has your company experienced any difficulties learning about subcontracting opportunities in Georgia?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1i. Has your company experienced any difficulties receiving payment in a timely manner?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1j. Has your company looked into or applied for prequalification or registration for Georgia Department of Transportation prime contracts or subcontracts?

1=Yes

2=No [SKIP TO G1m]

98= (Don't know) SKIP TO G2

99= (Does not apply) SKIP TO G2

G1k. Has your company experienced any difficulties with the Georgia Department of Transportation prequalification or registration process?

1=Yes

2=No

98= (Don't know)

99= (Does not apply)

G1l. What were those difficulties?

_____[OPEN-ENDED TO START, WILL CLOSE AFTER INITIAL SURVEYS]

98= (Don't know)

GO TO G2

G1m. Why not?

_____[OPEN-ENDED TO START, WILL CLOSE AFTER INITIAL SURVEYS]

98= (Don't know)

G2. Finally, we're asking for general insights on starting and expanding a business in your field or winning work as a prime or subcontractor. Do you have any thoughts to offer on these topics?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97= (NOTHING/NONE/NO COMMENTS)

98= (DON'T KNOW)

99= (REFUSED)

H1. Just a few last questions. What is your name and position at [*firm name* / *new firm name*]?

(RECORD FULL NAME)

1=VERBATIM

H2. What is your position?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9= (OTHER - SPECIFY)

99= (REFUSED)

H2. OTHER - SPECIFY

1=VERBATIM

H3. For purposes of receiving information from GDOT, is your mailing address [*firm address*]:

1=Yes – SKIP TO H5

2=No

98= (DON'T KNOW)

99= (REFUSED)

H4. What mailing address should they use to get any materials to you?

1=VERBATIM

H5. What fax number could they use to fax any materials to you?

1=NUMERIC (1000000000-9999999999)

H6. What e-mail address could they use to get any materials to you?

1=ENTER E-MAIL

97= (NO EMAIL ADDRESS)

98= (DON'T KNOW)

99= (REFUSED)

H6. (RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)

1=VERBATIM

Thank you very much for your participation. If you have any questions, please contact Patricia Flowers at the Georgia Department of Transportation. Her phone number is 404-631-1972. If you would like to contact her via email, her email address is pflowers@dot.ga.gov.

APPENDIX B.
Utilization and Case Study Data Collection

The utilization analysis in the disparity study examines the percentage of contract dollars going to minority- and women-owned firms on GDOT contracts awarded from January 1, 2009 through June 2011. Federally-funded and state-funded construction and engineering-related contracts were the focus of the research. The analysis counted DBE-certified as well as non-certified firms when calculating utilization of minority- and women-owned firms, and also examined utilization of firms not owned by minorities and women ("majority-owned firms"). Therefore, BBC sought sources of GDOT contract data that would consistently include prime contractors and subcontractors regardless of DBE certification status. (DBE utilization reports alone were not sufficient for this analysis as non-DBE subcontractors are not recorded.)

Beginning with contracts awarded in 2009, GDOT required that all subcontractors be identified and registered with GDOT. GDOT also requires subconsultants working on engineering-related contracts to be identified and registered. Because these GDOT contract data sources identify subcontractors without regard to DBE certification status, for both federally- and state-funded contracts, they were well-suited for the utilization data analysis.

This appendix describes utilization data collection and review processes in four parts:

A. Utilization data for construction contracts;

B. Utilization data for engineering-related contracts;

C. Contract case study data; and

D. GDOT review.

A. Utilization Data for Construction Contracts

Data request. BBC requested that GDOT provide contract information from the TRNSPORT database system and the TPRO project management system for construction contracts awarded by GDOT and by local agencies during the study period.

GDOT provided the following information for construction contracts awarded during the January 1, 2009 through June 30, 2011 study period:

- Contract ID;
- TRNSPORT Project ID;
- TPRO Project ID;
- Contract letting number;

- Contract award date;
- TPRO project description;
- Name of GDOT project manager;
- Name of prime contractor awarded the work;
- Vendor ID of prime contractor awarded the work;
- Original contract award amount;
- Amended contract award amount;
- Name of subcontractors awarded the work;
- Vendor IDs of subcontractors awarded the work;
- DBE status of subcontractors awarded the work;
- County of location where contract work was performed;
- GDOT District where contract work was performed;
- Funding source of contract;
- For GDOT-let contracts, the GDOT-estimated subcontract amount for each subcontract associated with each prime construction contract; and
- For locally-let construction contracts, the name and contact information of the local agencies that administered the contract. (GDOT was only able to provide limited information on locally-let construction contracts that were not found in the TRNSPORT database).

Contract data. GDOT provided the prime and subcontract data BBC requested from the TRNSPORT database and the TPRO project management system. GDOT collects and enters subcontract data into TRNSPORT as of the prime contract award; subcontract agreements not in place at the time of award are not required to be entered into TRNSPORT. BBC analyzed first-tier subcontract award data provided in TRNSPORT and requested further review by GDOT district staff to collect subcontract data not entered into the TRNSPORT system.

For locally-let construction contracts with information in the TRNSPORT database, GDOT district personnel reviewed the provided contract data and provided additional prime contract and subcontract information as available. In addition, local agencies and prime contractors were contacted for certain locally-let construction contracts with data in the TRNSPORT system.

To perform the availability analysis in the disparity study, BBC requires information on general type of work involved in each GDOT prime contract and subcontract. BBC coded types of work for GDOT construction prime contracts based upon project descriptions provided in GDOT databases, interviews with contractors about their primary line of business, information about firms in Dun & Bradstreet and review by GDOT staff. BBC coded types of work involved for subcontracts based upon the primary line of business of the subcontractor (from interviews with firms and D&B data). Because Dun & Bradstreet was used as one information source on firm specialization, and D&B has developed 8-digit codes describing specific subindustries, BBC used the D&B industry classification system as a basis for assigning general types of work.[1] GDOT staff reviewed BBC's classifications.

Firm data. GDOT provided contact and other information on firms utilized as prime contractors and subcontractors on GDOT construction contracts during the study period. These data were sourced from the TRNSPORT system and the BizTrak system used by the GDOT EEO office. These data included race, gender, and ethnicity of the owners of DBE-certified businesses. GDOT provided the following information about utilized firms:

- Firm name;
- Vendor ID;
- Address and phone number;
- Firm email address;
- MBE/WBE/DBE information; and
- DBE certification status.

BBC obtained additional information about utilized firms from business lists that the study team purchased from Dun & Bradstreet and from telephone interviews with prime contractors and subcontractors. BBC obtained the following additional information about firms:

- Primary line of work;
- Firm size;
- Year in which firm was established; and
- Additional contact information.

[1] For construction, general work types are highway and street construction; bridges and elevated highway construction; concrete work; grading, excavation, drainage and land prep; electrical and lighting; fences, guardrails and signs; painting, striping and marking; grassing and erosion control; water, sewer and utility lines; trucking and hauling; asphalt, concrete and other paving materials; other construction materials; and other construction.

MBE/WBE status. For the purposes of the study, BBC relied on race/ethnicity definitions used in the Federal DBE Program:

- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Hispanic American; and
- Native American.

BBC relied on several sources of information to determine the ownership status for firms, including:

- Current Georgia State BizNet UCP Directory;
- Past BizNet UCP directories;
- Locally-compiled directories (City of Atlanta, City of Savannah, DeKalb County, and others);
- GDOT TRNSPORT and BizTrak databases;
- Telephone interviews with firm owners and managers;
- GDOT staff review; and
- Information from Dun & Bradstreet and other sources.

B. Utilization Data for Engineering-related Contracts

As with analysis of GDOT construction contracts, BBC examined data on GDOT federally- and state-funded engineering-related contracts to determine the percentage of contract dollars going to minority- and women-owned firms. Because GDOT does not generally provide funds for local agency engineering-related contracts, the analysis focused on GDOT-awarded contracts.

Data request. BBC requested that GDOT provide contract information from the CMIS database system and the TPRO project management system for engineering-related contracts. As with BBC's analysis of construction contracts, the study period for engineering-related contracts was January 1, 2009 through June 30, 2011. For this time period, BBC attempted to examine each contract award and each task order, including task orders issued on previously-awarded contracts.

GDOT provided the following information for each engineering-related contract:

- Contract ID;
- Project ID;
- Contract executed date;
- TPRO project description;
- Name of prime consultant;
- CMIS Consultant ID of prime consultant;
- TRNSPORT Vendor ID of prime consultant (of those firms also found in the TRNSPORT database);
- Original contract award amount;
- Amount invoiced by prime consultant;
- Name of consultant awarded the work;
- CMIS Consultant IDs of subconsultants awarded the work;
- DBE status of subconsultants awarded the work;
- Location (county) covered by the work;
- GDOT district for the work;
- Funding source of contract; and
- If available in CMIS, subconsultant invoice amounts for each subcontract associated with each prime consulting contract. (CMIS did not include these data for task order consulting contracts, so BBC compiled this subcontract information from hard-copy records.)

Contract data. BBC analyzed first-tier subcontract invoice data provided by GDOT for engineering-related professional services contracts. GDOT provided prime and subcontract data from the CMIS database and the TPRO project management system. For task-order contracts, subcontract dollar amounts are not entered into CMIS; BBC compiled subcontract dollar amounts using invoice data.

BBC identified type of work involved in a prime contract primarily from the codes included in the project number GDOT assigned to each engineering-related contract. BBC identified type of work involved in a subcontract based upon the primary line of work performed by the firm (from interviews with the firm, Dun & Bradstreet information and other sources). As in coding construction contracts, BBC utilized the Dun & Bradstreet coding system for professional services work to identify work types.[2] GDOT reviewed preliminary subindustry coding.

Firm data. GDOT maintains contact and other information for firms involved as prime consultants and subconsultants on its engineering-related contracts (in the CMIS system and in the BizTrak system used by the GDOT EEO office). GDOT provided the following information about utilized firms:

- Firm name;
- CMIS Consultant ID and TRNSPORT Vendor ID (if available);
- Address and phone number;
- Firm email address;
- Approved area classes; and
- DBE certification status.

BBC obtained additional information about utilized firms from business lists that the study team purchased from Dun & Bradstreet and from telephone interviews with prime consultants and subconsultants. BBC obtained the following additional information about firms:

- Primary line of work;
- Firm size;
- Year in which firm was established; and
- Additional contact information.

[2] For engineering-related contracts, general work types were engineering; traffic control systems; construction management; transportation planning; environmental services; surveying and mapping; environmental and materials testing; and other engineering-related services.

MBE/WBE status. For engineering-related professional services firms, BBC relied on race/ethnicity definitions and prioritized certification sources in the same fashion as described above for construction contractors. BBC relied on several sources of information to determine the ownership status for firms, including:

- Current Georgia State BizNet UCP Directory;
- Past BizNet UCP directories;
- Locally-compiled directories (City of Atlanta, City of Savannah, DeKalb County, and others);
- GDOT TRNSPORT and BizTrak databases;
- Telephone interviews with firm owners and managers;
- GDOT staff review; and
- Information from Dun & Bradstreet and other sources.

C. Contract Case Study Data

BBC analyzed bids and proposals for construction and engineering-related professional services contracts that GDOT awarded during the study period. GDOT provided bid, proposal, and other information to the BBC study team.

Construction bid data. GDOT maintains electronic data for bid tabulations for the construction contracts it awards. BBC analyzed bid data for each of the 730 contract lettings for which the electronic data were available within the study period.

Engineering-related professional services. For engineering-related contracts, the study team collected available proposal information for 40 requests for qualifications (RFQs) during the study period, and BBC analyzed proposal data for all 40 RFQs. The RFQ information collected by the BBC study team represented all available proposal information for RFQs during the study period.

D. GDOT Review

There were several stages of GDOT staff review of BBC's utilization data during the study process. The BBC study team met several times with staff at GDOT headquarters to review the data collection process, control totals and other summary results. Headquarters staff also reviewed contract and firm-level information. At key junctures in the process, GDOT district staff assisted by reviewing contract information and providing additional data on prime contracts and subcontracts.

BBC incorporated feedback from GDOT staff in the final contract and firm data used in the disparity study.

In sum, the disparity study compiled and analyzed the most comprehensive set of data on GDOT prime contracts and subcontracts assembled to date.

APPENDIX A.
Legal Framework and Analysis

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APPENDIX A
Legal Framework and Analysis

A. Introduction

In this section Holland & Knight LLP analyzes recent cases regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("SAFETEA" and "SAFETEA-LU"),[1] the United States Department of Transportation regulations promulgated to implement the TEA-21 known as the Federal Disadvantaged Business Enterprise ("DBE") Program,[2] and local minority and women-owned business enterprise ("MBE/WBE") programs to provide a summary of the legal framework for the disparity study as applicable to the Georgia DOT ("GDOT").

This section begins with a review of the landmark United States Supreme Court decision in City of Richmond v. J. A. Croson.[3] Croson sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in Adarand Constructors, Inc. v. Pena,[4] ("Adarand I"), which applied the strict scrutiny analysis set forth in Croson to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decision in Adarand I, provides a basis for the legal analysis in connection with GDOT's participation in the Federal DBE Program.

The legal framework then analyzes and reviews significant recent court decisions that have followed, interpreted, and applied Croson and Adarand I to the present and that are applicable to GDOT's disparity study and the strict scrutiny analysis. This analysis reviews recent United States Court of Appeals for the Eleventh Circuit decisions and Federal District Court decisions in the Eleventh Circuit. In addition, the analysis reviews the recent federal cases that have considered the validity of the Federal DBE Program and a state's implementation of the DBE program, including Northern Contracting, Inc. v. Illinois DOT,[5] Sherbrooke Turf, Inc. v. Minn DOT, Gross Seed v. Nebraska Department of Roads,[6] Western States Paving Co. v. Washington State DOT[7], Geod Corporation v. New Jersey Transit Corporation[8], South Florida Chapter of the A.G.C. v. Broward County, Florida[9], and Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.[10]

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[1] Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; reauthorized by Surface Transportation Extension Act of 2011, Pub. L 112-5, Title I, § 101, March 4, 2011, 125 Stat. 14; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

[2] 49 C.F.R. Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").

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

[4] Adarand Constructors, Inc. v. Pena, 515 U. S. 200 (1995).

[5] 473 F. 3d 715 (7th Cir. 2007).

[6] 345 F. 3d 964 (8th Cir. 2003), cert. denied, 541 U. S. 1041 (2004).

[7] 407 F. 3d 983 (9th Cir. 2005).

[8] 746 F.Supp. 2d 642, 2010 WL 4193051 (D. N.J. October 19, 2010).

[9] 544 F. Supp. 2d 1336 (S.D. Fla. 2008).

[10] U.S.D.C., E.D.Cal, Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011).

The analyses of these and other recent cases are instructive to GDOT and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26.[11] They also are applicable in terms of the preparation of DBE Programs by the members of GDOT submitted in compliance with the Federal DBE regulations.

Following Western States Paving, it is noteworthy that the USDOT, in particular for states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of Federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.[12] The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26. The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.[13] The USDOT's "Guidance" is recognized by the federal regulations as "valid and binding, and constitutes the official position of the Department of Transportation "[14] for states in the Ninth Circuit. Although GDOT is not in the Ninth Circuit, this Guidance along with the cases discussed below are instructive.

The analysis of the recent court decisions involving challenges to MBE/WBE programs are also instructive to GDOT and the disparity study because they include significant cases construing the validity of government programs applying "strict scrutiny" and the "compelling interest" and "narrow tailoring" tests.

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[11] See Northern Contracting, Inc. v. Illinois DOT, 473 F. 3d 715 (7th Cir. 2007); Western States Paving, 407 F. 3d 983 (9th Cir. 2005); Sherbrooke Turf, Inc. v. Minn. DOT, 345 F. 3d 964 (8th Cir. 2003), cert. denied, 541 U. S. 1041 (2004); Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147 (10th Cir. 2000) ("Adarand VII").

[12] Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation (January 2006) [hereinafter USDOT Guidance], available at

http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; see 49 C.F.R. § 26.9.

[13] Id.

[14] Id., 49 C.F.R. § 26.9.

B. U. S. Supreme Court Cases

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

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

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

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

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

The Court 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, … [i]t could take affirmative steps to dismantle such a system." 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." The Supreme Court noted 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."

2. Adarand Constructors, Inc. v. Pena ("Adarand I"), 515 U. S. 200 (1995)

In Adarand I, the U. S. Supreme Court extended the holding in Croson and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster. The cases interpreting Adarand I are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program by recipients of federal funds.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding the Federal DBE Program and state and local MBE/WBE programs, and their implications for a disparity study. The recent decisions involving the Federal DBE Program are instructive to the GDOT and the disparity study because they concern the strict scrutiny analysis and legal framework in this area, and implementation of the DBE Program by recipients of federal financial assistance (like GDOT) based on 49 C.F.R. Part 26.

After the Adarand decision, the U. S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.[15] Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub. L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 C.F.R. Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in both 2003 and 2005. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub. L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"), which has been reauthorized by the Surface Transportation Extension Act of 2011, Pub. L 112-5, Title I, § 101, March 4, 2011, 125 Stat. 14.

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures. 49 C.F.R. § 26.51.

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The new Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE program. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 C.F.R. § 26.45.

Provided in 49 C.F.R. § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs. 49 C.F.R. § 26.45(a), (b), (c). This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market. Id. Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal. Id. at § 26.45(d). There are many types of

[15] *Appendix*-The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter "The Compelling Interest"; see Adarand VII, 228 F. 3d at 1167-1176, *citing* The Compelling Interest.

evidence considered when determining if an adjustment is appropriate, according to 49 C.F.R. § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training. Id. This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination. 49 C.F.R. § 26.45(b)-(d).

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts. 49 C.F.R. § 26.51.

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented. 49 C.F.R. § 26.51(b). A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 C.F.R. § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 C.F.R. § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations. 49 C.F.R. §§ 26.21-26.37.

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 C.F.R. §§ 26.61-26.73.

U.S. DOT New Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) amending the Federal DBE Program at 49 C.F.R. Part 26. According to the United States DOT, the Rule increases accountability for recipients with respect to meeting overall goals, modifies and updates certification requirements, adjusts the personal net worth threshold for inflation to $1.32 million dollars, provides for expedited interstate certification, adds provisions to foster small business participation, provides for additional post-award oversight and monitoring, and addresses other matters. 76 F.R. 5083-5101.

In particular, the new Final Rule provides that a recipient's DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose. See C.F.R. § 26.37, 76 F.R. at 5097.

In addition, the new Final Rule adds a Section 26.39 to Subpart B to provide for fostering small business participation.[16] The recipient's DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval by February 28, 2012.[17] The new Final Rule provides a list of

[16] 76 F.R. at 5097, January 28, 2011.

[17] Id.

"strategies" that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient's overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.[18] The new Final Rule provides that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient's DBE program.[19]

The new Final Rule also provides that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.[20] The new Final Rule sets out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.[21] The new Final Rule provides a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.[22]

The Department states in the new Final Rule with regard to disparity studies and in calculating goals, that it agrees "it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."[23]

The United States DOT in the new Final Rule states that there is a continuing compelling need for the DBE program.[24] The DOT concludes that, as court decisions have noted, the DOT's DBE regulations and the statutes authorizing them, "are supported by a compelling need to address discrimination and its effects."[25] The DOT says that the "basis for the program has been established by Congress and applies on a nationwide basis…", notes that both the House and Senate FAA Reauthorization Bills contained findings reaffirming the compelling need for the program, and references additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and

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[18] Id. at 5097, amending 49 C.F.R. § 26.39(b)(1)-(5).

[19] Id. at 5097, amending 49 C.F.R. § 26.39(c).

[20] 76 F.R. at 5098, amending 49 C.F.R. § 26.47(c).

[21] Id. amending 49 C.F.R. § 26.47(c)(1)-(5).

[22] Id. amending 49 C.F.R. § 26.47(c)(5).

[23] 76 F.R. at 5092.

[24] 76 F.R. at 5095.

[25] 76 F.R. at 5095.

Women-Owned Businesses."[26] This information, the DOT states, "confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.[27]

1. Strict Scrutiny Analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[28] GDOT's implementation of the Federal DBE Program also is subject to the strict scrutiny analysis if it utilizes race- and ethnicity-based efforts. The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.[29]

a. The Compelling Governmental Interest Requirement

The first prong of the strict scrutiny analysis requires a governmental entity to have a "**compelling governmental interest**" in remedying past identified discrimination in order to implement a race- and ethnicity-based program. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[30] 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.[31]

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.[32] The federal courts 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 C.F.R. Part 26).[33] Specifically, the federal courts found Congress

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[26] Id.

[27] Id.

[28] Croson, 448 U. S. at 493.

[29] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); 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.; Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II"), 214 F. 3d 730 (6th Cir. 2000); Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County, 122 F. 3d 895 (11th Cir. 1997); Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"), 6 F. 3d 990 (3d Cir. 1993); Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051 (D.N.J. October 19, 2010); Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F. Supp. 1232, 1237-1238.

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

[31] Id. see e.g., H. B. Rowe, 615 F. 3d 233; N. Contracting, 473 F. 3d at 721; Western States Paving, 407 F. 3d at 991; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051 (D.N.J. October 19, 2010); South Florida Chapter of AGC, 544 F. Supp. 2d 1336.

[32] 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; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051 (D.N.J. October 19, 2010); South Florida Chapter of AGC, 544 F. Supp. 2d 1336.

[33] Id. In the case of Rothe Dev. Corp. v. U. S. Dept. of Defense, 545 F. 3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (i. e. whether a compelling interest was satisfied). 413 F. 3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. Rothe considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in N. Contracting, Sherbrooke Turf, Adarand VII,

"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."[34] 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).[35] The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of "old boy" networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.[36]

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.[37]

- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.[38]

- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinue, 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.[39]

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and Western States Paving held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in Rothe on August 10, 2007 issued its order denying plaintiff Rothe's Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. Rothe Devel. Corp. v. U. S. Dept. of Defense, 499 F. Supp. 2d 775 (W. D. Tex. Aug 10, 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in Sherbrooke Turf, Adarand VII, and Western States Paving in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F. 3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F. 3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in Rothe below in Section G.

[34] Sherbrooke Turf, 345 F. 3d at 970, (*citing* Adarand VII, 228 F. 3d at 1167 – 76); Western States Paving, 407 F. 3d at 992-93.

[35] See, e. g, Adarand VII, 228 F. 3d at 1167– 76; see also Western States Paving, 407 F. 3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts".

[36] Adarand VII, 228 F. 3d. at 1168-70; Western States Paving, 407 F. 3d at 992.

[37] Adarand VII at 1170-72.

[38] Id at 1172-74.

[39] Id at 1174-75.

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.[40]If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[41] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[42]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i. e. to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[43] "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[44]

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.[45] The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owner firms may raise an inference of discriminatory exclusion.[46] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[47]

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[48] There is authority that measures of availability may be approached with different levels of specificity and the practicality of

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[40] See H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (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, 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; Hershell Gill Consulting Engineers, Inc. v. Miami Dade County, 333 F. Supp. 2d 1305, 1316 (S. D. Fla. 2004).

[41] Adarand VII, 228 F. 3d at 1166; Eng'g Contractors Ass'n, 122 F. 3d at 916; see e.g., H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051.

[42] See, e.g., Adarand VII, 228 F. 3d at 1166; Eng'g Contractors Ass'n, 122 F. 3d at 916; see also H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Sherbrooke Turf, 345 F. 3d at 971; N. Contracting, 473 F. 3d at 721; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051.

[43] See, e.g., Croson, 488 U. S. at 509; H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); N. Contracting, 473 F. 3d at 718-19, 723-24; Western States Paving, 407 F. 3d at 991; Adarand VII, 228 F. 3d at 1166.

[44] Croson, 488 U. S. at 501, *quoting* Hazelwood School Dist. v. United States, 433 U. S. 299, 307-08 (1977).

[45] Croson, 448 U. S. at 509; see H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (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.

[46] See, e. g, Croson, 488 U. S. at 509; H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Rothe, 545 F. 3d at 1041; Concrete Works II, 321 F. 3d at 970; see Western States Paving, 407 F. 3d at 1001.

[47] Western States Paving, 407 F. 3d at 1001.

[48] See, e. g, Croson, 448 U. S. at 509; 49 C.F.R. § 26.35; H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Rothe, 545 F. 3d at 1041-1042; N. Contracting, 473 F. 3d at 718, 722-23; Western States Paving, 407 F. 3d at 995.

various approaches must be considered.[49] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[50]

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[51]

- **Disparity index.** An important component of statistical evidence is the "disparity index."[52] A disparity index is defined as the ratio of the percentage utilization to the percentage 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."[53]

- **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.[54]

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.[55] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[56] 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.[57]

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[49] Contractors Ass'n of Easton Pennsylvania, Inc. v. City of Philadelphia ("CAEP II"), 91 F. 3d 586, 603 (3d Cir. 1996).

[50] Id.

[51] See H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Eng'g Contractors Ass'n, 122 F. 3d at 912; N. Contracting, 473 F. 3d at 717-720; Sherbrooke Turf, 345 F. 3d at 973; Geod, 2010 WL 419 3051.

[52] E.g., H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Eng'g Contractors Ass'n, 122 F. 3d at 914; W. H. Scott Constr. Co. v. City of Jackson, 199 F. 3d 206, at 218 (5th Cir. 1999); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F. 3d 990, at 1005 (3rd Cir. 1993).

[53] See, e.g., Ricci v. DeStefano, U. S., __ U.S. __, 129 S. Ct. 2658, 2678, 2009 WL 1835138 at 18 (2009); H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); 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.

[54] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (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 (7thCir. 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.

[55] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Eng'g Contractors Ass'n, 122 F. 3d at 924-25; Coral Constr. Co. v. King County, 941 F. 2d 910, 919 (9th Cir. 1991); O'Donnel Constr. Co. v. District of Columbia, 963 F. 2d 420, 427 (D. C. Cir. 1992).

[56] See, e. g, H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Eng'g Contractors Ass'n, 122 F. 3d at 925-26; Concrete Works, 36 F. 3d at 1520; Contractors Ass'n, 6 F. 3d at 1003; Coral Constr. Co. v. King County, 941 F. 2d 910, 919 (9th Cir. 1991).

[57] Concrete Works I, 36 F. 3d at 1520.

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/WBE's 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.[58]

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.[59]

b. The Narrow Tailoring Requirement

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[60]

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular recipient's contracting and procurement market.[61] The narrow tailoring requirement has several components.

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[58] See, H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Northern Contracting, 2005 WL 2230195, at 13-15 (N. D. Ill. 2005), affirmed, 473 F. 3d 715 (7thCir. 2007); e.g., Concrete Works, 321 F. 3d at 989; Adarand VII, 228 F. 3d at 1166-76. For additional examples of anecdotal evidence, see Eng'g Contractors Ass'n, 122 F. 3d at 924; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051; Florida A. G. C. Council, Inc. v. State of Florida, 303 F. Supp. 2d 1307, 1325 (N. D. Fla. 2004); Concrete Works, 36 F. 3d at 1520; Cone Corp. v. Hillsborough County, 908 F. 2d 908, 915 (11th Cir. 1990).

[59] See, e. g, H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); 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).

[60] See, e. g, H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Rothe, 545 F. 3d at 1036; Eng'g Contractors Ass'n, 122 F. 3d at 927 (internal quotations and citations omitted).

[61] Western States Paving, 407 F3d at 995-998; Sherbrooke Turf, 345 F. 3d at 970-71.

It should be pointed out that in the Northern Contracting decision (2007), the Seventh Circuit Court of Appeals cited its earlier precedent in Milwaukee County Pavers v. Fielder to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."[62] The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in Western States Paving and the Eighth Circuit Court of Appeals decision in Sherbrooke Turf, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.[63] The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.[64] The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 C.F.R. Part 26).[65] Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program. See the discussion of the Northern Contracting decision below in Section E, and the district court decisions following Northern Contracting in Geod Corporation v. New Jersey Transit Corporation, and South Florida Chapter of the AGC v. Broward County also discussed below.

The District Courts in South Florida Chapter of the AGC v. Broward County, and in Geod Corp. v. New Jersey Transit Corp., followed the Seventh Circuit Court of Appeals decision in Northern Contracting, holding that compliance with the federal regulations at 49 CFR Part 26 is the appropriate analysis for determining the validity of a government's implementation of the Federal DBE Program. The court in South Florida Chapter concluded that the Sixth and Tenth Circuit Courts of Appeal also concurred with this approach.[66]

According to Western States Paving, the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.[67] Thus, the Ninth Circuit held in Western States Paving that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.[68]

In Western States Paving, the court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity -conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal

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[62] 473 F. 3d at 722; see Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051; South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[63] Id. at 722; see, e.g., Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051; South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

[64] Id. at 723-24.

[65] Id.

[66] 544 F. Supp. 2d at 1340-1341.

[67] Western States Paving, 407 F. 3d at 997-98, 1002-03.

[68] Id. at 995-1003. The Seventh Circuit Court of Appeals stated in a footnote in Northern Contracting that the court in Western States Paving "misread" the decision in Milwaukee County Pavers 473 F. 3d at 722, n. 5.

DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[69]

The Eleventh Circuit described the "the essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences … must only be a 'last resort' option."[70]Courts have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[71]

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.'"[72]

The Supreme Court in Parents Involved in Community Schools v. Seattle School District, 127 S. Ct. 2738, 2760-61 (2007) also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." 127 S. Ct. at 2760-61; See also Grutter v. Bollinger, 539 U. S. 305 (2003). The Court found that the District failed to show it seriously considered race-neutral measures.

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[69] See, e.g., Western States Paving, 407 F. 3d at 998; Sherbrooke Turf, 345 F. 3d at 971; Adarand VII, 228 F. 3d at 1181; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051; Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F. Supp. 2d at 1247-1248.

[70] 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).

[71] 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 Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); N. Contracting; Virdi 135 Fed. Appx at 264, 2005 WL 138942; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051.

[72] Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II)", 214 F. 3d 730, 738 (6th Cir. 2000).

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve a local or state government's implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

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

The courts require that a local or state government seriously consider workable race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[73] 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.[74]

The Court in Croson, followed by Eleventh Circuit decisions and by decisions from other 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."[75] Accordingly, the Eleventh Circuit held in Engineering Contractors Association:

> [i]f a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem. " See Croson, 488 U. S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").[76]

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 C.F.R. Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.[77] The courts have also found "the regulations require a state to 'meet the maximum feasible portion of [its] overall goal by using race neutral means.[78]

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[73] See, e.g., H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); N. Contracting; Western States Paving, 407 F. 3d at 993; Sherbrooke Turf, 345 F. 3d at 972; Adarand VII, 228 F. 3d at 1179; Eng'g Contractors Ass'n, 122 F. 3d at 927; Virdi, 135 Fed. Appx. at 268; Coral Constr, 941 F. 2d at 923; Geod Corporation v. New Jersey Transit Corporation, et al., 746 F.Supp. 2d 642, 2010 WL 4193051; Webster, 51 F. Supp. 2d at 1380.

[74] 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.

[75] Croson, 488 U. S. at 509-510.

[76] 122 F. 3d at 927.

[77] 49 C.F.R. § 26.51(a) requires recipients of federal funds to "meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation."See, e.g., Adarand VII, 228 F. 3d at 1179; Western States Paving, 407 F. 3d at 993; Sherbrooke Turf, 345 F. 3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the "Commission" issued its report entitled "Federal Procurement After Adarand" setting forth its findings pertaining to federal agencies' compliance with the constitutional standard enunciated in Adarand United States Commission on Civil Rights: Federal Procurement After Adarand (Sept. 2005), available at http://www. usccr. gov. The Commission found that 10 years after the Court's Adarand decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination. See discussion of USCCR Report at Section G. below.

[78] See, e.g., Northern Contracting, 473 F. 3d at 723 – 724; Western States Paving, 407 F. 3d at 993 (*citing* 49 C.F.R. § 26.51(a)).

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- "How to do business" seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.[79]

49 C.F.R. § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does "require serious, good faith consideration of workable race-neutral alternatives.[80]

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.[81] For example, to be considered narrowly tailored,

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[79] See 49 C.F.R. § 26.51(b); see, e.g., Croson, 488 U. S. at 509-510; N. Contracting, 473 F. 3d at 724; Adarand VII, 228 F. 3d 1179; 49 C.F.R. § 26.51(b); H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Eng'g Contractors Ass'n, 122 F. 3d at 927-29.

[80] Western States Paving, 407 F. 3d at 993; See, e.g., H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010).

[81] Eng'g Contractors Ass'n, 122 F. 3d at 927.

courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[82] (2) a good faith efforts provisions;[83] (3) waiver provisions;[84] (4) a rational basis for goals;[85] (5) graduation provisions;[86] (6) remedies only for groups for which there were findings of discrimination;[87] (7) sunset provisions;[88] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[89]

2. Intermediate Scrutiny Analysis

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.[90] The courts including the Eleventh Circuit, have interpreted this standard to require that gender-based classifications be:

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

2. Substantially related to the achievement of that underlying objective.[91]

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.[92]

Intermediate scrutiny, as interpreted by certain federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, the intermediate scrutiny standard it has been held does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[93] And the Eleventh

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[82] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); CAEP I, 6 F. 3d at 1009; Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality ("AGC of Ca."), 950 F. 2d 1401, 1417 (9th Cir. 1991); Coral Constr. Co. v. King County, 941 F. 2d 910, 923 (9th Cir. 1991); Cone Corp. v. Hillsborough County, 908 F. 2d 908, 917 (11th Cir. 1990).

[83] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); CAEP I, 6 F. 3d at 1019; Cone Corp, 908 F. 2d at 917.

[84] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); CAEP I, 6 F. 3d at 1009; AGC of Ca., 950 F. 2d at 1417; Cone Corp, 908 F. 2d at 917.

[85] Id

[86] Id

[87] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Western States Paving, 407 F. 3d at 998; AGC of Ca, 950 F. 2d at 1417.

[88] H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Peightal, 26 F. 3d at 1559.

[89] Coral Constr, 941 F. 2d at 925.

[90] See generally, H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010); Western States Paving, 407 F. 3d at 990 n. 6; Coral Constr. Co., 941 F. 2d at 931-932(9thCir. 1991); Equal. Found. v. City of Cincinnati, 128 F. 3d 289 (6th Cir. 1997); Eng'g Contractors Ass'n, 122 F. 3d at 905, 908, 910; Ensley Branch N. A. A. C. P. v. Seibels, 31 F. 3d 1548 (11th Cir. 1994); see also U. S. v. Virginia, 518 U. S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.")

[91] Id.

[92] Id. The Seventh Circuit Court of Appeals, however, in Builders Ass'n of Greater Chicago v. County of Cook, Chicago, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F. 3d 642, 644-45 (7th Cir. 2001). The Court in Builders Ass'n rejected the distinction applied by the Eleventh Circuit in Engineering Contractors.

[93] See Eng'g Contractors Ass'n, 122 F. 3d at 910.

Circuit has held that "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort… . Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[94]

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

[94] Id. at 929 (internal citations omitted.)

D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs In The Eleventh Circuit.

Federal DBE Program

1. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp. 2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by Plaintiff in the Motion, namely whether or not the decision in Western States Paving Company v. Washington State Department of Transportation, 407 F. 3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of Plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." Id. at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing* Northern Contracting v. Illinois, 473 F. 3d 715 (7th Cir. 2007). The Plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing* Western States Paving, 407 F. 3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. Id. at 1338.

Ninth Circuit Approach: Western States

The district court analyzed the Ninth Circuit Court of Appeals approach in Western States Paving and the Seventh Circuit approach in Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) and Northern Contracting, 473 F. 3d 715. The district court in Broward County concluded that the Ninth Circuit in Western States Paving held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in Western States Paving to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp. 2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in Western States Paving concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp. 2d at 1339, *citing* Western States Paving, 407 F. 3d at 997.

In a footnote, the district court in Broward County noted that the United States Department of Transportation "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the Western States Paving decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in Western States." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the Western States Paving case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting* Western States Paving.

The Court also pointed out that the Eighth Circuit Court of Appeals in Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F. 3d 964 (8th Cir. 2003) reached a similar conclusion as in Western States Paving. 544 F.Supp.2d at 1339. The Eighth Circuit in Sherbrooke, like the court in Western States Paving, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting

The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. Id. In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in Northern Contracting, 473 F. 3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp. 2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting* Milwaukee County Pavers, 922 F.2d at 423.

The Ninth Circuit addressed the Milwaukee County Pavers case in Western States Paving, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in Milwaukee County Pavers. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in Western States Paving in the Northern Contracting decision. Id. The Seventh Circuit in Northern Contracting concluded that the majority in Western States Paving misread its decision in Milwaukee County Pavers as did the Eighth Circuit Court of Appeals in Sherbrooke. 544 F.Supp.2d at 1340, *citing* Northern Contracting, 473 F. 3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in Northern Contracting emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state's DOT's program. 544 F.Supp.2d at 1340, *citing* Northern Contracting, 473 F. 3d at 722.

The district court in Broward County stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in Tennessee Asphalt Company v. Farris, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in Broward County held that the Tenth Circuit Court of Appeals took a similar approach in Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in Broward County held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in Broward County held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in Milwaukee County Pavers and Northern Contracting and concluded that "the

appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the Plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in Broward County held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." Id.

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

MBE/WBE Programs

2. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

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

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

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

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

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

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

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

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

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

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

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

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. Id. "[R]ace conscious … policies must be limited in time." Id., *citing* Grutter, 539 U. S. at 342, and

Walker v. City of Mesquite, TX, 169 F. 3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. Id. at 268.

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

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. Id. at 270.

3. Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F. 3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In Engineering Contractors Association, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F. 3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). Id. The plaintiffs challenged the application of the program to County construction contracts. Id.

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. Id. at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. Id. The County Commission would make the final determination and its decision was appealable to the County Manager. Id. The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. Id.

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. Id. at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." Id. Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. Id. The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the

interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. Id. The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. Id. at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;

3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U. S. Supreme Court in City of Richmond v. J. A. Croson Co., 488 U. S. 469 (1989). Id. at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." Id. The Eleventh Circuit further noted:

> In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." Id., *citing* Croson, 488 U. S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy. '" Id. at 907, *citing* Ensley Branch, NAACP v. Seibels, 31 F. 3d 1548, 1565 (11th Cir. 1994) (*citing* and applying Croson)). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." Id. (internal citations omitted).

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

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

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

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

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

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

> [A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.

Id. at 914. "The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts."Id.

The Eleventh Circuit found that "[i]n general … disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." Id. The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." Id., *citing* 29 C.F.R. § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." Id., *citing* Concrete Works v. City & County of Denver, 36 F. 3d 1513, 1524 (10th Cir.

1994) (crediting disparity indices ranging from 0% to 3.8%); Contractors Ass'n v. City of Philadelphia, 6 F. 3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

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

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

The Eleventh Circuit then explained the burden of proof:

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

Id. (internal citations omitted).

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

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

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

> The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the

> contracts while others simply by virtue of their small size simply would not be able to do it. Id.

The Eleventh Circuit then summarized:

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

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

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

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

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

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

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

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

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

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

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

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

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

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." Id. The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. Id. The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. Id. The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and

receipts of that firm. Id. The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. Id.

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. Id. Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. Id. at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Id., *quoting* Croson, 488 U. S. at 501, *quoting* Hazelwood Sch. Dist. v. United States, 433 U. S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. Id. Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed supra. Id.

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). Id. The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." Id. "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males."Id.

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). Id. The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. Id. The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. Id. at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. Id.

The Eleventh Circuit held, in light of Croson, the district court need not have accepted this theory. Id. The Eleventh Circuit quoted Croson, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction." Id., *quoting* Croson, 488 U. S. at 503. Following the Supreme Court in Croson, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." Id., *quoting* Croson, 488 U. S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. Id. at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. Id. at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. Id.

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. Id. The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Women-Owned Businesses, produced every five years. Id. The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. Id.

The study indicated substantial disparities in 1977 and 1987 but not 1982. Id. The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. Id. However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. Id. Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. Id. at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. Id. The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms."Id.

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. Id. They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. Id. They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. Id.

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

> Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. Id. at 925. The interviewees reported similar instances of perceived discrimination, including: "difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms."Id.

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. Id. However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." Id. In her plurality opinion in Croson, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." Id., *quoting* Croson, 488 U. S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." Id. at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. Id. at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation."Id.

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, i. e., "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market."Id.

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences … must only be a 'last resort' option." Id., *quoting* Hayes v. North Side Law Enforcement Officers Ass'n, 10 F. 3d 207, 217 (4th Cir. 1993) and *citing* Croson, 488 U. S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard … forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." Id. at 927, *citing* Ensley Branch, 31 F. 3d at 1569. The four factors provide "a useful analytical structure." Id. at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." Id.

The Eleventh Circuit

> flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary. ' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." Id., *citing* Croson, 488 U. S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") … Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." Id. Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an "equally conclusory analysis" in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. Id.

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. Id. at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. Id. The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." Id. The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and

were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. Id. "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part."Id.

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in Croson:

> [T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect … The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., *quoting* Croson, 488 U. S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. Id. at 928. "Most notably … the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process."Id.

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. Id. at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. Id. "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. Id.

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. Id. However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. Id.

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

4. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07 CV019, 2007 WL 926153 (S. D. Ga. Mar. 14, 2007)

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

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined

"Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. Id. at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

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

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

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

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

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

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

5. Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305 (S. D. Fla. 2004)

The decision in Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, is significant to the disparity study because it applied and followed the Engineering Contractors Association decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus Hershell Gill is instructive as to the analysis relating to architect and engineering services. The decision in Hershell Gill also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in Concrete Works of Colorado, Inc. v. City and County of Denver, 321, 3d 950 (10th Cir. 2003). See discussion, infra.

Six years after the decision in Engineering Contractors Association, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S. D. Fla. 2004). After the Eleventh Circuit's decision in Engineering Contractors Association striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (CSBE) program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." Id. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). Id. The MBE/WBE programs applied to A&E contracts in excess of $25,000. Id. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Id. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. Id. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. Id. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." Id.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. Id. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." Id. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." Id. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. Id.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in Gratz v. Bollinger, 539 U. S. 244 (2003) and Grutter v. Bollinger, 539 U. S. 306 (2003). Id. at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in Gratz and Grutter did not alter the constitutional analysis as set forth in Adarand and Croson. Id. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. Id. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." Id. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. Id. (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." Id.

The County presented both statistical and anecdotal evidence. Id. at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. Id. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. Id. The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. Id. Dr. Carvajal used the

phone book, a list compiled by info USA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. Id. For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. Id.

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. Id. Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." Id. Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. Id. at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." Id. Dr. Carvajal's results remained substantially unchanged. Id.

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks."Id.

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. Id. The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. Id. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace."Id.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. Id. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace data survey was unreliable. Id. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F. 3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." Id. at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. Id. The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. Id. at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. Id.

The court quoted the Eleventh Circuit in Engineering Contractors Association for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." Id. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was

"unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in Engineering Contractors Association where the County employees themselves testified. Id.

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. Id. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. Id. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone."Id.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after Engineering Contractors Association. Id. Instead, the Commissioners voted to continue the HBE program. Id. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. Id. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. Id. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. Id. Under either scenario, the HBE program could not be narrowly tailored. Id.

The court found the waiver provisions in the HBE program inflexible in practice. Id. Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. Id. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." Id. at 1332, *citing* Grutter, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. Id. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." Id. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE unable to satisfy the substantial relationship test. Id.

The court held that the County was liable for any compensatory damages. Id. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at

the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional. " Id. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs … were unconstitutional: Croson, Adarand and [Engineering Contractors Association]." Id. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both Croson and Adarand. Id. Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. Id. Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. Id.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. Id. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. Id. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

6. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp. 2d 1307 (N.D. Fla. 2004)

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

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

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

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is

"encouraged" to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

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

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

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

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

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

7. Webster v. Fulton County, 51 F. Supp. 2d 1354 (N. D. Ga. 1999), a'ffd per curiam 218 F. 3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the

Engineering Contractors Association case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp. 2d 1354, 1357 (N. D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp. 2d at 1356-62].

The court, *citing* Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association, 122 F. 3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort. '" Id. at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in Engineering Contractors Association, and the intermediate scrutiny standard for evaluating gender preferences. Id. at 1363. The court found that under Engineering Contractors Association, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. Id.

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. Id. at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." Id., *citing* Eng'g Contractors Ass'n, 122 F. 3d at 916.

[The district court then set forth the Engineering Contractors Association opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. Id. at 1368, *citing* Eng'g Contractors Assoc., 122 F. 3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. Id. at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. Id. at 1369. The court cited City of Richmond v. J. A. Croson Co., 488 U. S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. Id. Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. Id. The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." Id. However, the court found that the Brimmer-Marshall Study contained no such data. Id.

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. Id. at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study; however, the court found the study had the same flaw in that it did not contain a regression analysis. Id. The

court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. Id.

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

> Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. Id. at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. Id. at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 to 1997. Id. at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. Id. Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). Id. (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted Engineering Contractors Association for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." Id., *quoting* Eng'g Contractors Ass'n, 122 F. 3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. Id. at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. Id. The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. Id. The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. Id.

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort. '" Id. at 1380, *citing* Eng'g Contractors Assoc., 122 F. 3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." Id., *quoting* Eng'g Contractors Ass'n, 122 F. 3d at 927. The court found that there was no evidence of discrimination by the County. Id. at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. Id. The court held that the County had not seriously considered race-neutral measures:

> There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. Id.

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. Id. The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. Id. at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. Id.

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. Id. The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in Engineering Contractors Association also utilized "goals" and was struck down. Id.

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. Id. at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. Id.

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. Id. On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. Webster v. Fulton County, Georgia, 218 F. 3d 1267 (11th Cir. 2000).

8. Phillips & Jordan, Inc. v. Watts, 13 F. Supp. 2d 1308 (N. D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In Phillips & Jordan, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

E. Recent Decisions Involving the Federal DBE Program in Other Jurisdictions

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

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

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

IDOT typically adopted a new DBE plan each year. Id. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. Id. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). Id. The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. Id. This initial list was corrected for errors in the data by surveying the D&B list. Id. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. Id. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. Id. IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). Id. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. Id.

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. Id. at 720. The court noted that, post-Adarand, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. Id. at 720-21, *citing* Western States Paving Co., Inc. v. Washington State DOT, 407 F. 3d 983, 987 (9th Cir. 2005), cert. denied, 126 S. Ct. 1332 (Feb. 21, 2006) and Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F. 3d 964, 970 (8th Cir. 2003), cert. denied, 541 U. S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be

constitutional, we do not see how the state can be thought to have violated the Constitution." Id. at 721, *quoting* Milwaukee County Pavers Association v. Fielder, 922 F. 2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. Id. The court concluded its holding in Milwaukee that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. Id. at 721-22. The court noted that the Supreme Court in Adarand Constructors v. Pena, 515 U. S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. Id. at 722.

The court further clarified the Milwaukee opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in Western States and Eighth Circuit in Sherbrooke. Id. The court stated that the Ninth Circuit in Western States misread the Milwaukee decision in concluding that Milwaukee did not address the situation of an as-applied challenge to a DBE program. Id. at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in Sherbrooke (that the Milwaukee decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. Id. at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. Id. at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. Id. at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. Id. First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. Id. NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. Id. The court stated that while the federal regulations list several examples of methods for determining the local base figure, Id. at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." Id. (*citing* 49 C.F.R. § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. Id. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalifed DBEs. Id. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. Id.

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

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

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

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

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

The district court conducted a trial after denying the parties' Motions for Summary Judgment in Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N. D. Ill. March 3, 2004), discussed infra. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N. D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. Id. at *4 (*citing* regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. Id. (*citing* regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. Id. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to IDOT's previous method of reviewing a bidder's list. Id.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for IDOT's contracting activity and its prime contractors as the State of Illinois; (2) the study identified the relevant product markets in which IDOT and

its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's Marketplace; (4) the study collected lists of DBEs from IDOT and twenty other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. Id. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. Id. at *7. The study thus calculated a weighted average base figure of 22.7 percent. Id.

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. Id. at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. Id. Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. Id.

IDOT considered three reports prepared by expert witnesses. Id. at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. Id. The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." Id. The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. Id.

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." Id. Additionally, witnesses identified twenty prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. Id. The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. Id.

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. Id. at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent, however, IDOT decided to maintain its figure at 22.77 percent. Id.

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." Id. She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (e. g., where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). Id. at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. Id.

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;

2. An extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;

4. "Unbundling" large contracts; and

5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. Id.

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. Id. at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. Id.

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. Id. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." Id. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. Id. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. Id. at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." Id. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. Id.

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. Id. Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." Id. A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects, testified and denied the allegations. Id. at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). Id. at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program … If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." Id. The court held that

challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." Id. at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." Id. at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. Id. at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." Id. The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. Id. Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. Id.

The court found that other jurisdictions had utilized the custom census approach without successful challenge. Id. at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." Id. at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." Id. at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. Id. The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This … is [also] supported by the statistical data … which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." Id. at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding, however, the court found that such verification was unnecessary. Id. at *21, n. 32.

The court further found:

> That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables … [DBE] construction firms are generally smaller and less experienced because of industry discrimination. '

Id. at *21, *citing* Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F. 3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. Id. at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. Id. The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." Id. The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. Id.

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. Id. The court found first that IDOT's indirect evidence of discrimination in the bonding,

financing, and insurance markets was sufficient to establish a compelling purpose. Id. Second, the court found:

> [M]ore importantly, Plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of private discrimination on federally-funded highway contracts. This is a fundamental distinction … [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished Builders Ass'n of Greater Chicago v. County of Cook, 123 F. Supp. 2d 1087 (N. D. Ill. 2000), aff'd 256 F. 3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. Id. at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. Id. at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. Id. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). Id.

The court found "[s]ignificantly, Plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." Id. at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. Id. The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. Id., *citing* Adarand Constructors, Inc. v. Slater "Adarand VII", 228 F. 3d 1147, 1177 (10th Cir. 2000) (*citing* for the proposition that flexibility and waiver are critically important).

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

3. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N. D. Ill. March 3, 2004)

This is the earlier decision in Northern Contracting, Inc., 2005 WL 2230195 (N. D. Ill. Sept. 8, 2005), see above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the Illinois DOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the Illinois Department of Transportation and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 C.F.R. Part 26) as well as the implementation of the Federal

Program by the Illinois Department of Transportation (i. e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether Illinois DOT's ("IDOT") DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. Id. The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. Id. at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. Id. Plaintiff appealed to the Ninth Circuit Court of Appeals. Id.

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

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

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

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

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F. 3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004). Id. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. Id. However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. Id. The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed." Id. (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. Id. at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. Id. However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. Id. Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. Id. at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." Id. at 998. The court held that a Sixth Circuit decision to the contrary, Tennessee Asphalt Co. v. Farris, 942 F. 2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. Id. at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. Id. at 998, *citing* Croson, 488 U. S. at 478. The court also found that in Monterey Mechanical Co. v. Wilson, 125 F. 3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." Id. In Monterey Mechanical, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored. '" Id., *citing* Monterey Mechanical, 125 F. 3d at 714. The court found that other courts are in accord. Id. at 998-99, *citing* Builders Ass'n of Greater Chi. v. County of Cook, 256 F. 3d 642, 647 (7th Cir. 2001); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F. 3d 730, 737 (6th Cir. 2000); O'Donnell Constr. Co. v. District of Columbia, 963 F. 2d 420, 427 (D. C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by Washington's DBE program must have suffered discrimination within the State. Id. at 999.

The court found that Washington's program closely tracked the sample USDOT DBE program. Id. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). Id. WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." Id. Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. Id. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. Id.

WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination."Id.

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (i. e., 9% participation could be achieved through race-neutral means). Id. at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. Id.

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. Id. It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. Id. The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed supra, which included contracts with affirmative action components. Id. The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. Id. The court also found the State conceded as much to the district court. Id.

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

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

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

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

5. Western States Paving Co. v. Washington DOT, US DOT & FHWA, 2006 WL 1734163 (W. D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in Western States Paving Co. Washington DOT, US DOT, and FHWA, 407 F. 3d 983 (9th Cir. 2005), cert. denied, 546 U. S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U. S. C. §§1981, 1983, and §2000d.

Because the Washington Department of Transportation ("WSDOT") voluntarily discontinued its DBE program after the Ninth Circuit decision, supra, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in Western States," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

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

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

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

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

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case, the Eighth Circuit

emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

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

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

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

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

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

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of

the numerical goals to the relevant labor market, and the impact of the remedy on third parties. Id. Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to DOT an overall goal for DBE participation in its federally-funded highway contracts. See, 49 C.F.R. § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. See, 49 C.F.R. § 26.15(b).

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

Second, the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. See, 49 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contacting markets. Id. at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-base nature of the DBE Program. Its benefits are directed at all small business owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a rebuttable 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 presumptably disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F. 3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

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

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11. 4 percent of the prime contractors and subcontractors in a highway construction market. Of this number 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11. 4 percent to 11. 6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11. 6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact 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 prescribe 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.).

7. Sherbrooke Turf, Inc. v. Minnesota DOT, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F. 3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota Department of Transportation claiming the Federal DBE provisions of the Transportation Equity Act for the 21st Century ("TEA-21") are unconstitutional. Sherbrooke challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The United States Department of Transportation and the Federal Highway Administration intervened as Federal defendants in the case. Sherbrooke, 2001 WL 1502841 at *1.

The United States District Court in Sherbrooke relied substantially on the Tenth Circuit Court of Appeals decision in Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with Croson's strict scrutiny standard. The court held that the "Constitution calls out far 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 C.F.R. 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.

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

The United States District Court for the District of Nebraska held in Gross Seed Co. v. Nebraska (with the United States DOT and Federal Highway Administration as Interveners), that the Federal DBE Program

(codified at 49 C.F.R. Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("NDOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 C.F.R. 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 NDOR Program or its implementation of the Federal DBE Program. The court points out that the NDOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of NDOR'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 NDOR 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 strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

9. Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U. S. 941, 534 U. S. 103 (2001)

This is the Adarand decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See Adarand Constructors, Inc. v. Pena, 515 U. S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the United States DOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

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

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

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

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

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

10. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., U.S.D.C., E.D.Cal, Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011)

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

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to

achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. Id. at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. Id.

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

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

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in Western States Paving Company v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting* Western States Paving, 407 F.3d at 991, *citing* City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in Western States Paving and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on Western States Paving, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination…", and whether Caltrans has complied with the Ninth Circuit's guidance in Western States Paving. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the Western States Paving case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. Id. at 52-53 The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the Western States Paving Company case. Id. at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under Western States Paving Company and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the Western States Paving case. Id. at 54-55. In Western States Paving, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. Id. at 55.

The district court stated that the Ninth Circuit in Western States Paving found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." Id. at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." Id. at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court has been appealed to the Ninth Circuit Court of Appeals.

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

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The Plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the Complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. Id.

New Jersey Transit Program and Disparity Study

NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. Id. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. Id.

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. Id. at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. Id. All groups other than Asian DBEs were found to be underutilized. Id.

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. Id. at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. Id.

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." Id. at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." Id. In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." Id. at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. Id. at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. Id. The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. Id.

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. Id. at 649-650. The availability rates were then "calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. Id. The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. Id.

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. Id. at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. Id. at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. Id. at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. Id. The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. Id. The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. Id.

The consultant also considered evidence of discrimination in the local market in accordance with 49 C.F.R. § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. Id. at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. Id. The base goal was then adjusted from 19.74 percent to 23.79 percent. Id.

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. Id. at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. Id. at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. Id. The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. Id. at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. Id. at 652, *citing* Geod v. N.J. Transit Corp., 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." Id. at 652 *citing* Northern Contracting, Inc. v. Illinois Department of Transportation, 473 F. 3d 715, 722 (7th Cir. 2007).

Applying Northern Contracting v. Illinois

The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in Northern Contracting, Inc. v. Illinois, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." Id. at 652 *quoting* Northern Contracting, 473 F. 3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. Id. at 652, *citing* Northern Contracting, 473 F. 3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." Id. at 652-653, *quoting* Northern Contracting, 473 F. 3d at 722 and *citing* also Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in Northern Contracting does not contradict the Eighth Circuit's analysis in Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F. 3d 964, 970-71 (8th Cir. 2003). Id. at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. Id. at 653 *citing* Sherbrooke Turf, 345 F. 3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." Id. at 653 *quoting* Western States Paving Co., Inc. v. Washington State Department of Transportation, 407 F. 3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing* South Florida Chapter of the Associated General Contractors v. Broward County, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. Id. at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. Id. at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 C.F.R. § 26.45. Id. The court held that NJT followed the goal setting process required by the federal regulations. Id. The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. Id. at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. Id.

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. Id. at 654. The court stated that NJT only utilized one of the examples listed in 49 C.F.R. § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. Id.

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. Id. at 654, *citing* 46 C.F.R. § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. Id. at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. Id. at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the Illinois Department of Transportation's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. Id. at 654, *citing* Northern Contracting, 473 F. 3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data was faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. Id. at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. Id. at 655, *citing* 49 C.F.R. § 26.45(d). This data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. Id. at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. Id. at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. Id. at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. Id. at 655. The court agreed with Western States Paving that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." Id. at 655, *quoting* Western States Paving, 407 F. 3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. Id. at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 C.F.R. § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. Id. at 655. The court held that based on these reasons and following the Northern Contracting, Inc. v. Illinois line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. Id. at 655.

However, the district court also found that even under the Western States Paving Co., Inc. v. Washington State DOT standard, the NJT program still was constitutional. Id. at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in Northern Contracting, Inc. v. Illinois, the court also examined the NJT DBE program under Western States Paving Co. v. Washington State DOT. Id. at 655-656. The court stated that under Western States Paving, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." Id. at 656, *quoting* Western States Paving, 407 F. 3d at 997.

Applying Western States Paving

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

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

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

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

The court pointed out the Ninth Circuit in Western States Paving found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. Id. at 657, *citing* Western States Paving, 407 F. 3d at 955. The court held that the Plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. Id.

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in Western States Paving, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. Id. at 657.

12. Geod Corporation v. New Jersey Transit Corporation, et. seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod Corporation and its officers, who are white males, sued the New Jersey Transit Corporation ("NJT") and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and the Transportation Equity Act for the 21st century ("TEA-21") and 49 C.F.R. Part 26.

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

DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

Compelling interest. The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 678 F.Supp.2d 276, at 282. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." Id.

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." Id. The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. Id. The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. Id.

NJT's DBE program as applied. The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on Western States Paving Company v. Washington State DOT, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. 678 F.Supp.2d at 282. In contrast, the NJT relied primarily on Northern Contracting, Inc. v. State of Illinois, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. Id.

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have lead to the parties distinguishing cases without any substantive difference in the application of law. Id.

The court reviewed the decisions by the Ninth Circuit in Western States Paving and the Seventh Circuit of Northern Contracting. In Western States Paving, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. 678 F.Supp.2d at 283. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." Id.

The court stated that the Seventh Circuit in Northern Contracting held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. 678 F.Supp. 2d at 283, *citing* Northern Contracting, 473 F.3d at 721. The district court held that implicit in Northern Contracting is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. Id.

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in

order to determine whether the program, as implemented by NJT, is narrowly tailored, 678 F.Supp.2d. at 283.

The court pointed out that the Eighth Circuit Court of Appeals in Sherbrook Turf, Inc. v. Minnesota DOT, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in Sherbrook, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. 678 F.Supp.2d at 283.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. 678 F.Supp2d. at 283, *citing* Western States Paving Company, 407 F.3d at 983, 988.

Determination of DBE goal. First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. 678 F.Supp.2d at 283-284, *citing* 49 C.F.R. § 26.45(b). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. Id. The court pointed out that NJT conducted a disparity study; and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale, was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. Id. at 284.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. Id. at 284. Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." Id. at 284. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 C.F.R. § 26.45(c). Id. at 284. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. Id.

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. 678 F.Supp.2d at 284.

NJT's adjustment of its DBE goal. The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE

vendors. 678 F.Supp.2d at 285. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. Id. A decomposition analysis was also performed. Id.

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out these were two methods specifically approved by 49 C.F.R. § 26.45(d). 678 F.Supp.2d at 285.

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. Id. at 285. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. Id.

Effects of past discrimination. NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. 678 F.Supp.2d at 285. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. Id. at 285.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. 678 F.Supp.2d at 285-286. Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program. Id.

Qualified immunity and Title VI. The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. 678 F.Supp.2d at 286. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Id. at 287. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim. Id. at 287-288.

13. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp. 2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 C.F.R. Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

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

Recent Decisions in Federal Circuit Courts of Appeal

1. H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al, 615 F. 3d 233 (4th Cir. 2010)

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with NCDOT. Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F. 3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. Id.

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F. 3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." Id., at footnote 1, *citing*, Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F. 3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. Id.

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F. 3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses … [that] shall not be applied rigidly on specific contracts or projects." Id. at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set "contract-specific goals or project-specific goals … for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. Id.

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. Id. at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] … that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." Id. at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the Department to reevaluate the Program over time and respond to changing conditions. 615 F. 3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. Id. § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. Id. Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F. 3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact." 615 F. 3d 233 at 241. The Court pointed out that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Id. at 241 *quoting* Alexander v. Estepp, 95 F. 3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." Id., *quoting* Shaw v. Hunt, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F. 3d 233 at 241 *quoting*, Croson, 488 U.S. at 504 and Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F. 3d 233 at 241, *quoting* Rothe Dev. Corp. v. Department of Defense, 545 F. 3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." Id. at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F. 3d 233 at 241, *citing* Concrete Works, 321 F. 3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. Id. at 241, *citing* Croson, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'" Id. at 241, *quoting* Maryland Troopers Association, Inc. v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. Id. at 241-242, *citing* Concrete Works, 321 F. 3d at 959. Challengers may offer a neutral explanation

for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. Id. at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. Id. at 242, *citing* Concrete Works, 321 F. 3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F. 3d 233 at 242, *citing* Alexander, 95 F. 3d at 315 (*citing* Adarand, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. Id. at 242. The Court found that a defender of a statute that classifies on the basis of gender, meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Id., *quoting* Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. Id. at 242.The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." Id. at 242, *quoting* Engineering Contractors, 122 F. 3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, … also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e.,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F. 3d 233 at 242 *quoting* Engineering Contractors, 122 F. 3d at 910 and Concrete Works, 321 F. 3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." Id. at 242 *quoting* Hogan, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." Id. at 243, *quoting* West Virginia v. U.S. Department of Health & Human Services, 289 F. 3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F. 3d 233 at 243. The Court found that the study grounded its analysis in the "disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. Id. In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. Id. The closer the resulting index is to 100, the greater that group's participation. Id.

The Court held that after Croson, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. Id. at

243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." Id. at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. Id.

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F. 3d 233 at 244, *quoting* Eng'g Contractors, 122 F. 3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." Id., *citing* Eng'g Contractors, 122 F. 3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central Department office in Raleigh, North Carolina. 615 F. 3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). Id. at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the department divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F. 3d 233 at 244, n.6. This data was not relied upon in forming the opinions relating to the study. Id. at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F. 3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. Id. at 245. The Court also noted that the consultant submitted its master list to the Department for verification. Id. at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F. 3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F. 3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. Id. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. Id. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. Id. The

Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. Id.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F. 3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. Id.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F. 3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the Department. The survey pool consisted of a random sample of such firms. Id.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F. 3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. Id. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. Id.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F. 3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. Id. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. Id. at 246. The Court cited Concrete Works, 321 F. 3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. Id. at 246-247, *citing* Concrete Works, 321 F. 3d 991 and Sherbrooke Turf, Inc. v. Minn. Department of Transportation, 345 F. 3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F. 3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. Id. The Court concluded plaintiff did not offer any contrary evidence. Id.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F. 3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. Id. at 247. Further, the State showed that over 90 percent of the Department's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. Id. at 247. The Court pointed out that the Court in Rothe II, 545 F. 3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. Id. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F. 3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." Id. at 248, *citing* Adarand v. Slater, 228 F. 3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. Id. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F. 3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. Id. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. Id.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F. 3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. Id. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. Id.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid

price. 615 F. 3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. Id. at 249.

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

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. Id. at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. Id. at 249. It was noted that the samples of the minority groups were randomly selected. Id. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. Id. at 249.

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

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

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

State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F. 3d 233 at 255, n. 11. But, the Court held where, as

here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. Id. at 255, n. 11.

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

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

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

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

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

2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F. 3d 195 (2d Cir. 2006)

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

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F. 3d 195, 199-200 (2d Cir. 2006). Under the U. S. Department of Transportation regulations, 49 C.F.R. § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South

American, or other Spanish or Portuguese culture or origin, regardless of race." Id. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. Id.

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

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

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

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

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

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

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

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

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

4. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F. 3d 950 (10th Cir. 2003), cert. denied, 540 U. S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

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

In Concrete Works the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In Concrete Works, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F. 3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. Id.

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. Id. at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." Id. In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for W/MBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. Id. at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. Id. at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. Id. The district court conducted a bench trial on the constitutionality of the three ordinances. Id. The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. Id. The City then appealed to the Tenth Circuit Court of Appeals. Id. The Court of Appeals reversed and remanded. Id. at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. Id. at 957-58, 959. The Court of Appeals also cited Richmond v. J. A. Croson Co., for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U. S. 469, 492 (1989) (plurality opinion). Because "an effort to alleviate the effects of societal discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. Id. at 958, *quoting* Shaw v. Hunt, 517 U. S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. Id. Rather, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors. '" Id., *quoting* Croson, 488 U. S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. Id.

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Id. The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." Id. (internal citations and quotations omitted). The Court

of Appeals held that CWC could also rebut Denver's statistical evidence "by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." Id. (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. Id. at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." Id., *quoting* Miss. Univ. for Women v. Hogan, 458 U. S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. Id. at 962. The consulting firm hired by Denver utilized disparity indices in part. Id. at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. Id. at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. Id. Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in DPW projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. Id. After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. Id.

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). Id. at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. Id. The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. Id. at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. Id.

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. Id. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of

MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 0.64 for MBEs and 0.70 for WBEs in the construction industry. In the professional design industry, disparity indices were 0.67 for MBEs and 0.69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. Id.

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, inter alia, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). Id. at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as "the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City's contracts." Id.

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. Id. The statewide market was used because necessary information was unavailable for the Denver MSA. Id. at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 0.41 for African American firms, 0.40 for Hispanic firms, 0.14 for Asian and other minorities, and 0.74 for women-owned firms. Id.

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. Id. Using data from the Public Use Microdata Samples ("PUMS") of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. Id. Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. Id. at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. Id.

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements … also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?" Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. Id.

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. Id. at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. Id. at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. Id. He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. Id.

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. Id.

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. Id. There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. Id.

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. Id. at 969-70.

The legal framework applied by the court. The court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. Id. at 970. The court, *quoting* Concrete Works II, stated that "the Fourteenth Amendment does not require a court to

make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." Id. at 970, *quoting* Concrete Works II, 36 F. 3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. Id. at 97, *quoting* Croson, 488 U. S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." Id., *quoting* Adarand VII, 228 F. 3d at 1176.

Denver, the court held, did introduce evidence of discrimination against each group included in the ordinances. Id. at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in Croson. The court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The Croson majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." Id. at 971, *quoting* Croson, 488 U. S. 503. Thus, the court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. Id.

The court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. Id., *citing* Croson, 488 U. S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. Id. at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. Id.

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. Id. at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in Concrete Works II and the plurality opinion in Croson. Id. The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area." Id., *quoting* Concrete Works II, 36 F. 3d at 1529 (emphasis added). In Concrete Works II, the court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." Id., *quoting* Concrete Works II, 36 F. 3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. Id. at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. Id.

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. Id. at 974, *quoting* Concrete Works II, 36 F. 3d at 1529. Thus, the court held Denver's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. Id.

The Court's rejection of CWC's arguments and the district court findings

Use of marketplace data. The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. Id. at 974. The court found that the district court's conclusion was directly contrary to the holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant. Id., *citing* Adarand VII, 228 F. 3d at 1166-67).

The court held the conclusion reached by the majority in Croson that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in Shaw v. Hunt. Id. at 975. In Shaw, a majority of the court relied on the majority opinion in Croson for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." Id., *quoting* Shaw, 517 U. S. at 909. The Shaw court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." Id. at 976, *quoting* Shaw, 517 U. S. at 910. The City can satisfy this condition by identifying the discrimination, "'public or private, with some specificity. ' " Id. at 976, *citing* Shaw, 517 U. S. at 910, *quoting* Croson, 488 U. S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." Id. Thus, the court concluded Shaw specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. Id. at 976.

In Adarand VII, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. Id., *citing* Adarand VII, 228 F. 3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus any findings Congress has made as to the entire construction industry are relevant." (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." Id., *quoting* Concrete Works II, 36 F. 3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA" was relevant to Denver's burden of producing strong evidence. Id., *quoting* Concrete Works II, 36 F. 3d at 1530 (emphasis added).

Consistent with the court's mandate in Concrete Works II, the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." Id. The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of

the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. Id., *quoting* Croson, 488 U. S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In Adarand VII, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." Id. at 977, *quoting* Adarand VII, 228 F. 3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded at the outset from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that existing MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. Id. at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." Id. at 977-78. In Adarand VII, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." Id. at 978, *quoting*, Adarand VII, 228 F. 3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination … supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded, that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that, in Adarand VII it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." Id. at 978, *quoting* Adarand VII, 228 F. 3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, supra, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the

construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. Id. at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in Adarand VII. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." Id. at 979, *quoting* Adarand VII,228 F. 3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. Id. at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. Id. at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced because of industry discrimination. Id. at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. Id.

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." Id. at 982. Similarly, the 1995 Study controlled for size, calculating, inter alia, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in

Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. Id. at 982.

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

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

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

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

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

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

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

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

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

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

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

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. Id. at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." Id. at 991, *quoting* Concrete Works II, 36 F. 3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." Id., *quoting* Adarand VII, 228 F. 3d at 1175. The court held that CWC did not meet its burden. CWC hypothesized that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. Id. at 991-92.

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

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in

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

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

5. In re City of Memphis, 293 F. 3d 345 (6th Cir. 2002)

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statue in advance of its passage. The district court had ruled that the City could not introduce the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

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

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

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

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F. 3d at 644. The court noted that the United States Supreme Court in United States v. Virginia ("VMI"), 518 U. S. 515, 532 and n. 6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in Cook County stated the difference between the applicable standards has become "vanishingly small." Id. The court pointed out that the Supreme Court said in the VMI case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F. 3d at 644, *quoting* in part VMI, 518 U. S. at 533. The court indicated that the Eleventh Circuit Court of

Appeals in the Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County, 122 F. 3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F. 3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F. 3d at 644-645.

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

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

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

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

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts.

256 F. 3d at 647. The court also rejected the proposition advanced by the County in this case—"that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project." 256 F. 3d at 647-648.

7. Associated Gen. Contractors v. Drabik, 214 F. 3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S. D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts. The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

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

8. W. H. Scott Constr. Co. v. City of Jackson, 199 F. 3d 206 (5th Cir. 1999)

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

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

9. Monterey Mechanical v. Wilson, 125 F. 3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F. 3d 702, 704 (9th Cir. 1994). The University rejected

the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. Id. The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. Id.

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. Id. at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. Id. The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. Id.

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. Id. at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. Id. at 709. The court held that contrary to the district court's finding, such a difference was not de minimis. Id.

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. Id. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." Id. The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." Id. at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited Concrete Works of Colorado v. Denver, 36 F. 3d 1512 (10th Cir. 1994), as analogous support for the proposition. Id. at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." Id. The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (e. g., advertising) to MBE/WBE firms. Id. at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. Id. at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. Id. at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (e. g., inclusion of Aleuts). Id. at 714, *citing* Wygant v. Jackson Board of Education, 476 U. S. 267, 284, n. 13 (1986) and City of Richmond v. J. A. Croson, Co., 488 U. S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." Id. at 714, *citing* Hopwood v. State of Texas, 78 F. 3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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

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

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

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

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U. S. Supreme Court in City of Richmond v. Croson. The court stated that according to the U. S. Supreme Court in Croson, a municipality has a compelling interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. Id. at 1412-13, *citing* Croson at 488 U. S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." Id. at 1413, *quoting* Coral Construction Company v. King County, 941 F. 2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." Id. at 1413 *quoting* Coral Construction, 941 F. 2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. Id. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. Id. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F. 2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." Id. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. Id. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE

prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. Id. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. Id. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. Id. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. Id. The Ninth Circuit stated than in its decision in Coral Construction, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. Id. at 1414, *citing* to Coral Construction, 941 F. 2d at 918 and Croson, 488 U. S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. Id. at 1414, *quoting* Coral Construction, 941 F. 2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. Id at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. Id. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." Id. at 1415 *quoting* Coral Construction, 941 F. 2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. Id. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. Id.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. Id. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in Croson as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. Id. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." Id. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. Id. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. Id. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. Id. at 1416 *quoting* Coral Construction, 941 F. 2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court

stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." Id. at 1417 *quoting* Coral Construction, 941 F2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. Id. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. Id. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. Id. at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. Id. at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. Id. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in Croson that race-conscious remedies may be permitted in some circumstances. Id. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." Id. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. Id. at 1418, *quoting* Coral Construction, 941 F. 2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. Id. 1418.

11. Coral Construction Co. v. King County, 941 F. 2d 910 (9th Cir. 1991)

In Coral Construction Co. v. King County, 941 F. 2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in City of Richmond v. J. A. Croson Co. The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (i. e., included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U. S. C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence

of discrimination is a disputed issue. 941 F. 2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima fascia case of discrimination. Id. The court pointed out that the U. S. Supreme Court in Croson held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Id. at 918, *quoting* Hazelwood School Dist. v. United States, 433 U. S. 299, 307-08, and Croson, 488 U. S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. Id. at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Id. at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. Id.

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. Id. at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." Id. at 919, *quoting* International Brotherhood of Teamsters v. United States, 431 U. S 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. Id. at 919, *citing* Cone Corp. v. Hillsborough County, 908 F. 2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. Id. at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program. Id. at 920. However, the court said this requirement of some evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Id. Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. Id. Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. Id.

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. Id. at 922.

The court also found that Croson does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. Id. at 922, *citing* Croson, 488 U. S. at 492. The court pointed out that the Supreme Court in Croson concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Id. at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed

obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. Id.

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. Id. at 922, *citing* Croson, 488 U. S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. Id. Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. Id.

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. Id. at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. Id. at 923. The court noted that it does not intend a government entity exhaust every alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. Id. Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. Id. The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. Id. The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. Id.

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. Id. at 923. In addition, the County provided information on assessing Small Business Assistance Programs. Id. The court found that King County fulfilled its burden of considering race-neutral alternative programs. Id.

A second indicator of program's narrowly tailoring is program flexibility. Id. at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. Id. at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. Id. at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. Id.

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. Id. The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. Id.

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. Id. at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business

has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. Id. at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. Id. This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. Id. Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. Id.

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. Id. at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. Id. Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. Id. Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. Id. at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. Id. at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. Id. at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. Id. The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. Id. at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

12. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al; 589 F. Supp. 2d 587 (E. D. N. C. 2008), affirmed in part, reversed in part, and remanded, 615 F. 3d 233 (4th Cir. 2010).

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

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected

because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

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

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

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

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

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

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

qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F. Supp. 2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N. C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program

violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F. Supp. 2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N. C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N. C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-Federal funds. N. C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F. Supp. 2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N. C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." Id. NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly."Id.

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D. 1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F. Supp. 2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N. C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F. Supp. 2d 587.

Compelling Interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F. Supp. 2d 587, *citing* Croson, 488 U. S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F. Supp. 2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F. Supp. 2d 587, *quoting* Belk v. Charlotte-Mecklenburg Board of Education, 269 F. 3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N. C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N. C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless

renewed by an act of the legislature. Id. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

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

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

District Court Order Affirmed in Part, Reversed in Part and Remanded on Appeal

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in part, reversed in part and remanded, 615 F. 3d 233 (4th Cir 2010) (see above).

13. Thomas v. City of Saint Paul, 526 F. Supp. 2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, ___S. Ct. ___, 2009 WL 2496325 (U. S. October 13, 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 (the "VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp. 2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor, on 22 different projects to various independent developers were accepted. 526 F. Supp. 2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. Id. Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. Id. The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. Id. at 963. Plaintiff Newell claimed he submitted numerous

bids on the City's projects all of which were rejected. Id. The court found, however, that he provided no specifics about why he did not receive the work. Id.

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. Id. at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. Id. at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. Id. The VOP further imposes obligations on the City with respect to vendor contracts. Id. The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. Id. The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. Id. The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. Id.

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. Id. at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. Id. The court found they failed to show any instance in which their race was a determinant in the denial of any contract. Id. at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. Id. at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. Id. at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. Id. at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. Id.

The court stated that the plaintiffs must identify a discriminatory policy in effect. Id. at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. Id. The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. Id.

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. Id. Therefore, the court held plaintiffs had no standing to challenge the VOP. Id. at 966.

Plaintiffs' 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 Eight Circuit Court of Appeals recently affirmed the ruling of the district court. Thomas v. City of Saint Paul, 2009 WL 777932 (8th Cir. March 26, 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

14. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp. 2d 725 (N. D. Ill. 2003)

This case is instructive because of the court's focus and analysis on whether the City of Chicago's MBE/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Women-Owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, $27,500,000 and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a "rigid numerical quota," a quota related not to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor's selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, "but it could." 298 F. 2d 725. "To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice …" Id.

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral

programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under $100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnical classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N. D. Ill 2004).

15. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp. 2d 749 (D. Md. 2002)

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

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

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

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no

sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or controversy" in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

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

16. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F. Supp. 2d 1232 (W. D. OK. 2001)

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

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

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

Compelling state interest. The district court, following Adarand VII, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. Id. at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. Id. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. Id. at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. Id.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." Id. Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." Id. The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by

proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. Id. at 1240, *citing* to Associated General Contractors of Ohio, Inc. v. Drabik, 214 F. 3d 730, 735 (6th Cir. 2000) and City of Richmond v. J. A. Croson Company, 488 U. S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." Id. at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." Id. In light of Adarand VII, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. Id.

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

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

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

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

part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. Id.

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. Id. at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in Adarand VII identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. Id. at 1242-1243.

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

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

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

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." Id. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing

letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. Id. at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. Id. at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. Id. Unlike the federal programs at issue in Adarand VII, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. Id. The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. Id.

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. Id. Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." Id. at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. Id. at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. Id. at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. Id. at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. Id.

The court stated that in Adarand VII, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. Id. at 1246. The court noted that the government submitted evidence in Adarand VII, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. Id. In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. Id. at 1246, *citing* Adarand VII, 228 F. 3d at 1181.

Unlike Adarand VII, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F. Supp. 2d at 1246. The court concluded that the

Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. Id. at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in Adarand VII stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. Id. at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. Id. The court pointed out that the 5 percent preference is applicable to all contracts awarded under the state's Central Purchasing Act with no time limitation. Id.

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. Id. at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. Id.

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. Id.

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. Id. The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. Id.

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

17. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, 83 F. Supp. 2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

18. Associated Gen. Contractors v. Drabik, 50 F. Supp. 2d 741 (S. D. Ohio 1999)

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to F. Buddie Contracting v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N. D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in Ritchey Produce, 707 N. E. 2d 871 (Ohio 1999), which held that the State's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to

justify the MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

This opinion underscored that governments must show four factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

Recent State Court Decisions

19. City of Atlanta v. Corey Entertainment, Inc., 278 Ga. 474, 604 S.E.2d 140 (2004)

Although this opinion does not deal directly with a challenge to the validity of a MBE/WBE/DBE type program, it involves the City of Atlanta and concerns DBE certification and the application of the Open Records Act relating to information about DBEs. In City of Atlanta v. Corey Entertainment, Inc, the trial court had granted summary judgment to Corey Entertainment, Inc. in connection with its request for documents as part of its challenge to the City's decision to award an airport advertising contract to Creative Media Displays and Clear Channel, Inc. The City of Atlanta and a disadvantaged business enterprise (DBE), Creative Media Displays, appealed the ruling arguing that the tax returns of the owner of the DBE, Ms. Fouch, are exempted from disclosure under the Georgia Open Records Act. O.C.G.A. § 50-18-70 *et seq.* Corey Entertainment filed a protest after the City announced the decision to award an advertising concession contract for the Atlanta airport to Clear Channel, Inc. Clear Channel committed to subcontract 30percent of the work to Creative Media Displays, which was a certified DBE. Corey challenged the City's decision on the basis that Creative Media Displays did not qualify as a DBE, and that but for its DBE status, Corey would have won the contract. Corey submitted an Open Records Act request to the City of Atlanta, but the City offered to produce only some of the relevant documents, and refused to produce tax returns of the owner of the DBE, Ms. Fouch.

Creative Media Displays was certified by the City as a DBE pursuant to a program administered by the United States Department of Transportation. The US DOT Regulations establish the standards and procedures for the City to use to determine whether an enterprise qualifies as a DBE. After the City refused to produce the documents in accordance with the Open Records Act request, Corey sued in Fulton County Superior Court seeking to compel the City to produce Fouch's tax returns. The City argued that Federal Regulations prohibited disclosure of the tax returns, and that they were therefore exempted from disclosure under O.C.G.A. § 50-18-72(a)(1). The trial court disagreed, and granted Corey's Motion for Summary Judgment and ordered the City to produce the tax returns. The court also ordered Corey to refrain from disclosing the documents to uninvolved parties.

The court first held that the tax returns, which were submitted to the City in the attempt to receive certification as a DBE, qualified as public record because they were "received in the course of the operation of a public office or agency." The court held that unless federal or state law specifically prohibited disclosure of the tax returns, they are subject to disclosure under the Open Records Act.

The City and the DBE cited several federal regulations to support their argument under 49 C.F.R. Part 26. The court held that these regulations do not specifically prohibit the disclosure of the tax returns. 49 C.F.R. § 26.67(a)(2)(iv) prohibits the release of an individual's personal net worth statement and any documentation supporting it. The court held that Fouch did not submit a "personal net worth statement" as defined in 49

C.F.R. § 26.67(a)(2)(ii), and thus 49 C.F.R. §26.67(a)(2)(iv) does not specifically prohibit the disclosure of the tax returns.

In addition, the City and Fouch argued that 49 C.F.R. § 26.109(a)(2) prohibit the release of the tax documents because that regulation requires the City to "safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law." The court held that to be consistent with State law, the City should maintain the confidentiality of these documents until properly ordered by a court to release them for a legitimate purpose. Although noting that Georgia law does generally treat tax returns as confidential information, it also provides that they may be disclosed in accordance with a proper judicial order. Moreover, the court stated that to the extent that the Atlanta City Code prohibits disclosure, that regulation is trumped by the Open Records Act, a state statute of general application.

Of significance, the court in a footnote provided that it expressed no opinion as to the effect of the amended version of 49 C.F.R. § 26.109(a)(2), referencing DBE applications, as that version did not come into effect until more than eight (8) months after the documents were requested in this case, and two (2) months after the trial court's order at issue. Therefore, the court left open the question as to whether the amended version of 49 C.F.R. § 26.109(a)(2), as it currently exists, would make any difference to its ruling regarding the Open Records Act.

The court pointed out that it had previously held the confidentiality of tax returns or return information is not absolute. The court held that if it is shown the desire for tax returns documents relates to a "legitimate public inquiry" it may be subject to disclosure. It would not be subject to disclosure if the purpose was merely to invade privacy. The court found that the request related to a legitimate public inquiry. Because of the importance of DBE certification in the procurement of government contacts, the court held that there is a strong need for open government to prevent the appearance of impropriety and corruption in the certification process. The court stated the goals of the DBE Program could easily be compromised without the anesthetic effect of at least limited sunlight into the certification process.

The court found that Corey had a right to challenge the City's contract decision, and that right overrides the DBE owner's interest in maintaining the confidentiality of the documents. The need for open government tips the scales in favor of disclosure, especially ywhen the court ordered Corey not to disclose the returns to any uninvolved persons. Further, the expectations of privacy are diminished, the court found when the documents are submitted in an attempt to receive favorable public contracts.

Finally, the court rejected the argument that Corey may not challenge the DBE certification because 49 C.F.R. § 26.87 provides the exclusive means in which to do so. The court held that this regulation does not preempt Corey's challenge, based on state law, to the City's decision to award the contract to Clear Channel. The court noted that Corey did not seek to have the DBE de-certified, but instead merely sought to challenge the certification to the extent that it formed the basis for the City's decision to award the Contract to Clear Channel and the DBE instead of Corey.

20. Cleveland Constr., Inc. v. City of Cincinnati, 169 Ohio App. 3d 627, 864 N. E. 2d 116 (2006), cert. denied 128 S. Ct. 379 (U. S. 2007)

On appeal from Cleveland Construction, Inc. v. City of Cincinnati, WL 4880918, Case No. A042683 (Ohio Court of Common Pleas, July 13, 2005 and August 29, 2005) (at Section V(c)(2a.), infra), the Ohio Court of Appeals reversed the trial court's entry of a directed verdict against Cleveland Construction on the issue of

lost profits, remanded the case for a new trial on the issue of liability and damages under 42 U. S. C. § 1983, and affirmed the trial court in all other respects. 864 N. E. 2d 116, 133 (Ohio App. 2006).

On appeal, both parties below raised multiple enumerations of error with the trial court's decision. In the decision below, the trial court ruled that the City's SBE Program created constitutionally impermissible race- and gender-based classifications. (See 2005 Decision, at Section V(c)(2a.), infra). In its fourth enumeration of error, the city argued that its SBE Program should not be subject to strict scrutiny (for race-based classification) or intermediate scrutiny (for gender-based classification). The City argued that its SBE Program did not create race- or gender-based classifications because the City merely gathered availability estimates "for information purposes only" and bidders were required only to document their good faith efforts at obtaining minority- and women-owned business participation. The Court of Appeals rejected that argument holding that rigid quotas or set-asides are not a prerequisite to a finding of a racial classification: "[w]here regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny." 864 N. E. 2d at 126. The court noted that in Adarand I, although the challenged regulations did not require contractors to hire minority subcontractors, they offered a financial incentive to do so, and the regulations were thus subject to strict scrutiny. Id. at 127, *citing* Adarand Constructors v. Pena, 515 U. S. 200, 224 (1995).

The Court of Appeals determined that it had to look beyond the SBE Program's "ostensibly neutral labels such as 'outreach program' and 'participation goals'" to determine whether the SBE Program imposed racial classifications. Id. at 127. The court found that under the SBE Program, bidders were required to use good faith efforts to promote opportunities for minority- and women-owned businesses to the extent of their availability as determined by the City, and to submit detailed descriptions of those good faith efforts. The court held that "[w]here the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences. Therefore, the program's rules must be subject to strict scrutiny." Id. at 127. The court held that to the extent the SBE Program pressured contractors to utilize female-owned subcontractors, that portion was subject to intermediate scrutiny. Because the City conceded that its SBE Program could not survive either standard of heightened scrutiny, the court affirmed the trial court's finding holding unconstitutional those portions of the SBE Program causing bidders to use racial- or gender-based preferences. The court also overruled the City's enumeration of error over the trial court's award of prevailing party attorneys' fees to the plaintiff.

The Court of Appeals reversed the trial court's entry of a directed verdict for the city on the plaintiff's claim for lost profit damages. The court confirmed that under Ohio law, a disappointed bidder cannot recover lost profit damages when a municipality violates competitive-bidding laws. But, under 42 U. S. C. § 1983, a disappointed bidder may recover their lost profits as damages; the court cited to Adarand, W. H. Scott Construction Co. v. Jackson, and Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, Fla. in support of that proposition. The court reversed the entry of a directed verdict and remanded to the trial court for a new trial on the issue of Section 1983 liability and damages.

Finally, the Court of Appeals affirmed the trial court's ruling that the named city officials sued in their individual capacities were entitled to qualified immunity. The court determined that due to complex nature of the issues, the city officials could not have reasonably known that their conduct was unconstitutional (required on order to overcome a qualified immunity defense).

The city subsequently applied for certiorari to the United States Supreme Court. The Supreme Court denied certiorari on October 9, 2007. 128 S. Ct. 379 (Oct. 9, 2007).

21. Cleveland Constr., Inc. v. City of Cincinnati, Case No. A042683, WL 4880918 (Ohio Court of Common Pleas, July 13, 2005 and August 29, 2005)

This case is instructive as it addresses the validity of the City of Cincinnati's program involving contracting with MBE/WBEs, information that a city may gather as to MBE/WBE participation, information that a city may track as to MBE/WBE participation, and the type of legislation the local or state governments may consider adopting. Cleveland Construction, Inc. (the "plaintiff") challenged the City of Cincinnati's (the "City") Small Business Enterprise Program (the "Program"), and a related SBE Subcontracting Outreach Program which applied to City-funded construction projects valued in excess of $100,000. Case No. A0402638 (Ohio Common Pleas Court, July 13, 2005) at 5. The Program required prime contractors to subcontract a minimum percentage of their bid (20% or greater on some construction contracts) to qualified available minority subcontractors. Id.

The City stipulated that it lacked the necessary factual basis to withstand a strict scrutiny analysis, or even an intermediate scrutiny analysis, of its Program. Id. at 10-11. The court then considered whether the Program imposed classifications subject to such analyses. Id. The court found that "the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender." Id. at 12. Accordingly, the court found that the City could use MBE/WBE annual participation goals in conjunction with such a tracking program, and other outreach efforts, as long as such efforts included no "further mechanism to promote or effectuate or encourage others to meet such goals in any particular context." Id. (internal citations omitted).

However, the court found that where outreach efforts operate as "a sub rosa preference — that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors — courts must apply strict scrutiny." Id. at 12-13. The court found that the Program contained a number of race- and gender-classification provisions and "indisputably pressures" contractors to recruit minority subcontractors, including requisite documentation of good faith outreach efforts and potential investigation of recruitment efforts by the Office of Contract Compliance; accordingly, the Program was subject to strict scrutiny. Id. at 13-14. Because the City conceded that the Program could not survive a strict scrutiny analysis, the court found the Program facially unconstitutional and ordered the City to take prompt action to remove all such unconstitutional provisions. Id. at 15. However, the court found the plaintiff was unable to demonstrate that the unconstitutional aspects of the Program caused him to lose the contract award at issue. Id. at 18.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact MBE/WBE and DBE Programs

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

Although this case does not involve the Federal DBE Program (49 C.F.R. Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In Rothe, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U. S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U. S. C. § 2323. Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F. 3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp. 2d 840 (W. D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in Rothe Development Corp. v. U. S. Dept. of Defense, 499 F. Supp. 2d 775 (W. D. Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in Rothe, 413 F. 3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U. S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in Concrete Works, Adarand Constructors, Sherbrooke Turf and Western States Paving (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F. Supp. 2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent (the "Price Evaluation Adjustment Program" or "PEA") 10 U. S. C. § 2323(e)(3). Rothe, 499 F. Supp. 2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. Id. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. Id. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

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

The district court discussed and cited the decisions in Adarand VII (2000), Sherbrooke Turf (2003), and Western States Paving (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in The Compelling Interest (a. k. a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. Rothe at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in Adarand VII, Sherbrooke Turf, and Western States Paving, also relied on it in support of their compelling interest holding. Id. at 827.

The district court also found that the Tenth Circuit decision in Concrete Works, IV, 321 F. 3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. Id. at 829-32.

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

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

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

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

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

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

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

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

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

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

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

3. Over- and under-inclusiveness.

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

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. Id. at 881. The court concluded that the 5 percent goal was

aspirational, not mandatory. Id. at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

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

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

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F. 3d at 1036. The court cited the decision in Croson, 488 U. S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F. 3d. at 1036, *quoting* Croson, 488 U. S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F. 3d at 1036, *quoting* Croson, 488 U. S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F. 3d at 1036.

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

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

Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. Id.

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

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity-between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F. 3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old is stale per se, which rejected the argument put forth by Rothe. 545 F. 3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing* to Western States Paving v. Washington State Department of Transportation, 407 F. 3d 983, 992 (9th Cir. 2005) and Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F. 3d 964, 970 (8th Cir. 2003) (relying on the Appendix, published in 1996).

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

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

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the Department of Defense "which Congress was emphatically not required to make." Id. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the Dean v. City of Shreveport case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-

conscious remedy." 545 F. 3d at 1040, footnote 11 *quoting* Dean v. City of Shreveport, 438 F. 3d 448, 445 (5th Cir. 2006).

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

The court stated that in general, "[a] disparity ratio less than 0.80" — i. e., a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F. 3d at 1041, *quoting* the district court opinion in Rothe VI, 499 F. Supp. 2d at 842; and *citing* Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F. 3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F. 3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F. 3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F. 3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of Croson and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F. 3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. Id.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. Id. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F. 3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F. 3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F. 3d at 1043 *quoting* Engineering Contractors Association, 122 F. 3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. Id. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. Id. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F. 3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. Id. at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F. 3d at 1044 *citing* to Engineering Contractors Association, 122 F. 3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. Id. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. Id. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. Id. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. Id. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. Id.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. Id. The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F. 3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. Id.

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was no evidence presented of a single instance of alleged discrimination by the Department of Defense in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F. 3d at 1049. The court noted this lack of evidence in the context of the opinion in Croson that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F. 3d at 1048, *citing* Croson, 488 U. S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F. 3d at 1049, *quoting* Concrete Works, 321 F. 3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the Department of Defense, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula to assess the quantum of evidence that rises to the Croson 'strong basis in evidence' benchmark. '" 545 F. 3d at 1049, *quoting* W. H. Scott Constr. Co., 199 F. 3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F. 3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i. e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F. 3d at 1049-1050.

2. Dynalantic Corp. v. United States Dept. of Defense, 503 F. Supp. 2d 262 (D. D. C. 2007)

Dynalantic Corp. involves a recent challenge to the Department of Defense's ("DOD") utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program (the "8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp. 2d 262, 263 (D. D. C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. Id. Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. Id. at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D. C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D. C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the

8(a) program as administered by the SBA and utilized by the DOD. The D. C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. Id. at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. Id. at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U. S. C. § 2323] as opposed to a challenge to the program as a whole. Id. at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to Western States Paving in support of this proposition. Id. The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent Rothe decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. Id. at 267.

3. "Federal Procurement After Adarand" (USCCR Report September, 2005)

In September of 2005, the United States Commission on Civil Rights (the "Commission") issued its report entitled "Federal Procurement After Adarand" setting forth its findings pertaining to federal agencies' compliance with the constitutional standard enunciated in Adarand. United States Commission on Civil Rights: Federal Procurement After Adarand (Sept. 2005), available at http://www. usccr. gov, *citing* Adarand, 515 U. S. at 237-38. The following is a brief summary of the report.

In 1995, the United States Supreme Court decided Adarand Constructors, Inc. v. Pena, 515 U. S. 200 (1995), which set forth the constitutional standard for evaluating race-conscious programs in federal contracting. The Commission states in its report that the Court in Adarand held that racial classifications imposed by federal, state and local governments are subject to strict scrutiny and the burden is upon the government entity to show that the racial classification is the least restrictive way to serve a "compelling public interest;" the government program must be narrowly tailored to meet that interest. The Court held that narrow tailoring requires, among other things, that "agencies must first consider race-neutral alternatives before using race conscious measures." [p. ix]

Scope and methodology of the Commission's report. The purpose of the Commission's study was to examine the race-neutral programs and strategies implemented by agencies to meet the requirements set forth in Adarand. Accordingly, the study considered the following questions:

- Do agencies seriously consider workable race-neutral alternatives, as required by Adarand?
- Do agencies sufficiently promote and participate in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance?
- Do agencies employ and disclose to each other specific best practices for consideration of race-neutral alternatives?
- How do agencies measure the effects of race-neutral programs on federal contracting?
- What race-neutral mechanisms exist to ensure government contracting is not discriminatory?

The Commission's staff conducted background research, reviewing government documents, federal procurement and economic data, federal contracting literature, and pertinent statutes, regulations and court decisions. The Commission selected seven agencies to study in depth and submitted interrogatories to assess the agencies' procurement methods. The agencies selected for evaluation procure relatively large amounts of goods and services, have high numbers of contracts with small businesses, SDBs, or HUB Zone firms, or play a significant support or enforcement role: the Small Business Administration (SBA), and the Departments of Defense (DOD), Transportation (DOT), Education (DOEd), Energy (DOEn), Housing and Urban Development (HUD), and State (DOS).

The report did not evaluate existing disparity studies or assess the validity of data suggesting the persistence of discrimination. It also did not seek to identify whether, or which, aspects of the contracting process disparately affect minority-owned firms.

Findings and recommendations. The Commission concluded that "among other requirements, agencies must consider race-neutral strategies before adopting any that allow eligibility based, even in part, on race." [p. ix] The Commission further found "that federal agencies have not complied with their constitutional obligation, according to the Supreme Court, to narrowly tailor programs that use racial classifications by considering race-neutral alternatives to redress discrimination." [p. ix]

The Commission found that "agencies have largely failed to apply the Supreme Court's requirements, or [the U. S. Department of Justice's ("DOJ")] guidelines, to their contracting programs." [p. 70] The Commission found that agencies "have not seriously considered race-neutral alternatives, relying instead on SBA-run programs, without developing new initiatives or properly assessing the results of existing programs." [p. 70]

The Commission identified four elements that underlie "serious consideration" of race-neutral efforts, ensure an inclusive and fair race-neutral system, and tailor race-conscious programs to meet a documented need: "Element 1: Standards — Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives; Element 2: Implementation — Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic government-wide programs; Element 3: Evaluation — Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks; Element 4: Communication — Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency government-wide." [p. xi]

The Commission found that "despite the requirements that Adarand Imposed, federal agencies fail to consider race-neutral alternatives in the manner required by the Supreme Court's decision." [p. xiii] The Commission also concluded that "[a]gencies engage in few race-neutral strategies designed to make federal

contracting more inclusive, but do not exert the effort associated with serious consideration that the Equal Protection Clause requires. Moreover, they do not integrate race-neutral strategies into a comprehensive procurement approach for small and disadvantaged businesses." [p. xiii]

Serious consideration [P. 71]

Finding: Most agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs. Due to the lack of specific guidance from the DOJ, "agencies appear to give little thought to their legal obligations and disagree both about what the law requires and about the legal ramifications of their actions."

Recommendation: Agencies must adopt and follow guidelines to ensure consideration of race-neutral alternatives, which system could include: (1) identifying and evaluating a wide range of alternatives; (2) articulating the underlying facts that demonstrate whether race-neutral plans work; (3) collecting empirical research to evaluate success; (4) ensuring such assessments are based on current, competent and comprehensive data; (5) periodically reviewing race conscious plans to determine their continuing need; and (6) establishing causal relationships before concluding that a race-neutral plan is ineffective. Best practices could include: (1) statistical standards by which agencies would determine when to abandon race race-conscious efforts; (2) ongoing data collection, including racial and ethnic information, by which agencies would assess effectiveness; and (3) policies for reviewing what constitutes disadvantaged status and the continued necessity for strategies to increase inclusiveness.

Antidiscrimination policy and enforcement [P. 72]

Finding: The federal government lacks an appropriate framework for enforcing nondiscrimination in procurement. Limited causes of action are available to contractors and subcontractors, but the most accessible mechanisms are restricted to procedural complaints about bidding processes.

Recommendation: The enactment of legislation expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability, in federal contracting and procurement. Such legislation should include protections for both contractors and subcontractors and establish clear sanctions, remedies and compliance standards. Enforcement authority should be delegated to each agency with contracting capabilities.

Finding: Most agencies do not have policies or procedures to prevent discrimination in contracting. Generally, agencies are either unaware of or confused about whether federal law protects government contractors from discrimination.

Recommendation: The facilitation of agency development and implementation of civil rights enforcement policies for contracting. Agencies must establish strong enforcement systems to provide individuals a means to file and resolve complaints of discriminatory conduct. Agencies must also adopt clear compliance review standards and delegate authority for these functions to a specific, high-level component. Once agencies adopt nondiscrimination policies, they should conduct regular compliance reviews of prime and other large contract recipients, such as state and local agencies. Agencies should widely publicize complaint procedures, include them with bid solicitations, and codify them in acquisition regulations. Civil rights personnel in each agency should work with procurement officers to ensure that contractors understand their rights and responsibilities and implement additional policies upon legislative action.

Finding: Agencies generally employ systems for reviewing compliance with subcontracting goals made at the bidding stage, but do not establish norms for the number of reviews they will conduct, nor the frequency with which they will do so.

Recommendation: Good faith effort policies should be rooted in race-neutral outreach. Agencies should set standards for and carry out regular on-site audits and formal compliance reviews of SDB subcontracting plans to make determinations of contractors' good faith efforts to achieve established goals. Agencies should develop and disseminate clear regulations for what constitutes a good faith effort, specific to individual procurement goals and procedures. Agencies should also require that all prime contractors be subject to audits, and require prime contractors to demonstrate all measures taken to ensure equal opportunity for SDBs to compete, paying particular attention to contractors that have not achieved goals expressed in their offers.

Ongoing review [P. 73]

Finding: Narrow tailoring requires regular review of race-conscious programs to determine their continued necessity and to ensure that they are focused enough to serve their intended purpose. However, no agency reported policies, procedures, or statistical standards for when to use race-conscious instead of race-neutral strategies, nor had agencies established procedures to reassess presumptions of disadvantage.

Recommendation: Agencies must engage in regular, systematic reviews (perhaps biennial) of race-conscious programs, including those that presume race-based disadvantage. They should develop and document clear policies, standards and justifications for when race-conscious programs are in effect. Agencies should develop and implement standards for the quality of data they collect and use to analyze race-conscious and race-neutral programs and apply these criteria when deciding effectiveness. Agencies should also evaluate whether race-neutral alternatives could reasonably generate the same or similar outcomes, and should implement such alternatives whenever possible.

Data and measurement [P. 73-75]

Finding: Agencies have neither conducted race disparity studies nor collected empirical data to assess the effects of procurement programs on minority-owned firms.

Recommendation: Agencies should conduct regular benchmark studies which should be tailored to each agency's specific contracting needs; and the results of the studies should be used in setting procurement goals.

Finding: The current procurement data does not evaluate the effectiveness or continuing need for race-neutral and/or race-conscious programs.

Recommendation: A task force should determine what data is necessary to implement narrow tailoring and assess whether (1) race-conscious programs are still necessary, and (2) the extent to which race-neutral strategies are effective as an alternative to race-conscious programs.

Finding: Agencies do not assess the effectiveness of individual race-neutral strategies (e. g., whether contract unbundling is a successful race-neutral strategy).

Recommendation: Agencies should measure the success of race-neutral strategies independently so they can determine viability as alternatives to race-conscious measures (e. g., agencies could track the number and dollar value of contracts broken apart, firms to which smaller contracts are awarded, and the effect of such efforts on traditionally excluded firms).

Communication and collaboration [P. 75]

Finding: Agencies do not communicate effectively with each other about efforts to strengthen procurement practices (e. g., there is no exchange of race-neutral best practices).

Recommendation: Agencies should engage in regular meetings with each other to share information and best practices, coordinate outreach, and develop measurement strategies.

Outreach [P. 76]

Finding: Even though agencies engage in outreach efforts, there is little evidence that their efforts to reach small and disadvantaged businesses are successful. They do not produce planning or reporting documents on outreach activities, nor do they apply methods for tracking activities, expenditures, or the number and types of beneficiaries.

Recommendation: Widely broadcast information on the Internet and in popular media is only one of several steps necessary for a comprehensive and effective outreach program. Agencies can use a variety of formats — conferences, meetings, forums, targeted media, Internet, printed materials, ad campaigns, and public service announcements — to reach appropriate audiences. In addition, agencies should capitalize on technological capabilities, such as listservs, text messaging, audio subscription services, and new technologies associated with portable listening devices, to circulate information about contracting opportunities. Agencies should include outreach in budget and planning documents, establish goals for conducting outreach activities, track the events and diversity of the audience, and train staff in outreach strategies and skills.

Conclusion. The Commission found that 10 years after the Supreme Court's Adarand decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral decisions that would effectively redress discrimination. Although some agencies employ some race-neutral strategies, the agencies fail "to engage in the basic activities that are the hallmarks of serious consideration," including program evaluation, outcomes measurement, reliable empirical research and data collection, and periodic review.

The Commission found that most federal agencies have not implemented "even the most basic race-neutral strategy to ensure equal access, i. e., the development, dissemination, and enforcement of clear, effective antidiscrimination policies. Significantly, most agencies do not provide clear recourse for contractors who are victims of discrimination or guidelines for enforcement."

One Commission member, Michael Yaki, filed an extensive Dissenting Statement to the Report. [pp. 79-170]. This Dissenting Statement by Commissioner Yaki was referred to and discussed by the district court in Rothe Development Corp. v. US DOD, 499 F. Supp. 2d 775, 864-65 (W. D. Tex. August 10, 2007), reversed on appeal, Rothe, 545 F. 3d 1023 (Fed. Cir 2008), (see discussion of Rothe above at Section VII, 1.). In his dissent, Commissioner Yaki criticized the Majority Opinion, including noting that his statistical data was "deleted" from the original version of the draft Majority Opinion that was received by all Commissioners. The district court in Rothe considered the data discussed by Yaki.

CHAPTER 12.
Future Implementation of the Federal DBE Program

Chapter 12 explores further improvements to GDOT's implementation of the Federal DBE Program. Part A of this section presents this analysis.

In Part B of Chapter 12, BBC discusses potential program measures for GDOT's state-funded contracts, as well as tracking of DBE and MBE/WBE participation in these contracts. Part C reviews the need for appropriate GDOT investment in staff, training and information systems when implementing the Federal DBE Program.

A. Federal Requirements in Implementing the Federal DBE Program

Regulations at 49 CFR Part 26 and associated USDOT guidance, including a sample plan provided by USDOT, provide direction on implementation of the Federal DBE Program. Plan elements are discussed in the order identified in 49 CFR Part 26. Because only certain portions of the Federal DBE Program are discussed below, GDOT should refer to the complete federal regulations when considering its implementation of the Program.

Reporting to USDOT — 49 CFR 26.11 (b). GDOT must periodically report DBE participation to FHWA. BBC's review indicates that GDOT may need to compile additional information on local agency contracts using FHWA funds administered through GDOT. GDOT might improve other aspects of its DBE reporting as well. Recommendations are provided later in Chapter 12 (see BBC discussion under 49 CFR 26.55).

Bidders list — 49 CFR Section 26.11 (c). As part of its implementation of the Federal DBE Program, GDOT must develop a bidders list of firms that are available for its contracts. The bidders list must include the following information about each available firm:

- Name;
- Address;
- DBE status;
- Age; and
- Annual gross receipts.

GDOT might consider developing a new bidders list that includes information from BBC's availability interviews and BBC's analysis of GDOT's prequalification and registration databases.

In the future, GDOT should add businesses to the bidders list as they are newly prequalified and registered. To do so, it should consider expanding the information collected as part of its prequalification and registration processes. GDOT must also collect information concerning annual gross receipts to be in compliance with 49 CFR Section 26.11 (c).

The bidders list can also provide vendor data that will help GDOT track utilization of DBEs and minority- and women-owned firms in its FHWA- and state-funded contracts. GDOT should request firms seeking to do business with the Department to provide race/ethnicity/gender ownership status for the company (on a self-reported basis).

Prompt payment mechanisms — 49 CFR Section 26.29. GDOT requires prime contractors to pay subcontractors within 15 days of receiving payment from GDOT. This prompt payment requirement appears to be in compliance with 49 CFR Section 26.29.

DBE Directory — 49 CFR Section 26.31. GDOT maintains a current DBE Directory for DBEs certified in Georgia on its website.

Overconcentration — 49 CFR Section 26.33. An agency implementing the Federal DBE Program is required to devise appropriate measures if it finds that DBEs are so overconcentrated in certain types of work as to unduly burden the opportunity of non-DBEs in that type of work. GDOT's current DBE Program Plan indicates that GDOT will annually review information to determine whether there is overconcentration.

GDOT's DBE Program Plan also lists measures it might use to address any overconcentration. Its potential measures currently include "the use of incentives, technical assistance, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field."

GDOT might add the following to these measures:

> GDOT may also consider varying use of contract goals, to the extent consistent with Section 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Such a measure is indicated in 49 CFR Section 26.33(b). As discussed in previous chapters of this report, GDOT should monitor future utilization of DBEs and non-DBEs in areas such as trucking and hauling, and consider appropriate actions, such as varying its use of contract, as necessary.

In accordance with 49 CFR Section 26.33(c), GDOT would need to obtain the approval of FHWA for any determination of overconcentration and the measures it would employ to address it. Once approved, the measures would become part of GDOT's DBE Program Plan.

Business development programs — 49 CFR Section 26.35. Business development programs (BDPs) are efforts to assist DBE-certified firms to develop the capabilities to compete outside of the DBE Program. GDOT might develop a BDP for DBE-certified firms per the federal regulations. Specialized assistance would be tailored to developing firms and firms in transitional stages of development.

Guidance in the Federal DBE Program concerning administration of business development programs is provided in 49 CFR Section 26.35 and Appendix A to 49 CFR Part 26.

Mentor-protégé program – 49 CFR Section 26.35 and Appendix D to 49 CFR Part 26. For many years, GDOT participated in the State of Georgia's mentor-protégé program. The State is no longer implementing this program. GDOT might consider partnerships with other agencies to create a mentor-protégé program for small contractors and consultants, including DBEs. Success would require participation from mentors, which has been a challenge for GDOT in the past.

Responsibilities for monitoring the performance of other program participants — 49 CFR Section 26.37. The Final Rule effective February 28, 2011 revised requirements for monitoring and enforcement mechanisms to ensure that work committed to a DBE at contract award or through modifications to the contract is actually performed by the DBE to which the work was committed. These requirements are outlined in 49 CFR Section 26.37.

Fostering small business participation — 49 CFR Section 26.39. The Final Rule effective February 28, 2011 added a requirement for transportation agencies to foster small business participation in their contracting. GDOT has submitted an SBE Program for FHWA review, as discussed in Chapter 11.

Setting overall annual DBE goals — 49 CFR Section 26.45. Chapter 10 of the report presents information for GDOT to use as it sets an overall DBE goal. GDOT should update the portion of its DBE Program Plan pertaining to its overall DBE goal.

On February 3, 2010, USDOT published a Final Rule concerning how often agencies that implement the Federal DBE Program are required to submit overall annual DBE goals. Agencies such as GDOT need to develop and submit overall annual DBE goals every three years. That change was effective as of March 5, 2010. GDOT's current overall DBE goal is effective through FY 2012.

The Federal DBE Program provides that agencies may adjust their overall DBE goals within these three-year periods in order to reflect any changed circumstances, per 49 CFR Section 26.45(f)(1)(ii). Agencies must submit such an adjustment to FHWA for review and approval.

Maximum feasible portion of goal met through neutral programs. GDOT must meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. Taking this requirement into consideration, GDOT should maintain its current neutral efforts and evaluate and consider using additional neutral measures discussed in Chapter 11.

GDOT must project the portion of its overall DBE goal that could be achieved through neutral means. It should consider the information and analytical approaches presented in Chapter 11 when making future projections.

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

- Based on this report and other information and evidence, GDOT should consider whether it should continue to utilize contract goals to meet any portion of its overall annual DBE goal that it does not project being able to meet using race-neutral means.

- If GDOT determines that it needs to continue to establish DBE contract goals, it should also evaluate which, if any, DBE groups should be considered eligible to participate in any contract goals it determines are appropriate per the federal regulations to use for its FHWA-funded contracts (or other USDOT-funded contracts). GDOT should consider this report and other information to make this determination.

- Should GDOT, in the future, determine that some DBE groups should not be eligible to participate in any DBE contract goals, GDOT must request a program waiver per 49 CFR Section 26.15.

USDOT guidelines on the use of DBE contract goals include the following:

- Contract goals may only be used on contracts that have subcontracting possibilities.

- Agencies are not required to set a contract goal on every FHWA-funded contract.

- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that agency projects being unable to meet through neutral means.

- An agency's contract goals must provide for participation by all DBE groups eligible for race-conscious measures. If GDOT were to determine, in the future, that it should include specific DBE groups but not others for contract goals, GDOT must submit a waiver request to FHWA (see 49 CFR Section 26.15).

- Subdivision of the DBE contract goal is not permitted under the Federal DBE Program unless approved by a waiver. Based on the data presented in Chapter 6 concerning the utilization of DBEs on GDOT FHWA-funded contracts, white women-owned DBEs accounted for more than 60 percent of the total DBE participation and minority-owned DBEs were less than 40 percent of DBE participation. One state, the Illinois Department of Transportation, has requested a waiver to implement separate contract goals for women-owned DBEs and minority-owned DBEs. Given the utilization results for white women-owned DBEs and minority-owned DBEs, GDOT might further explore with FHWA what actions might be appropriate and whether any waiver request is warranted.

- GDOT must maintain and report data on DBE utilization separately for contracts that include and do not include DBE goals.

Termination of DBE contractor. The Final Rule effective February 28, 2011 strengthens requirements around termination of DBE subcontractors that a prime contractor used to meet a DBE contract goal. With the new rule, prime contractors cannot terminate a DBE firm without the written consent of GDOT, and the DBE firm can be terminated only for good cause. The Final Rule lists what constitutes good cause for this purpose. GDOT may need to expand the section of its DBE Program Plan to reflect the new rule.

Analysis of the reasons for not meeting an overall DBE goal — 49 CFR Section 26.47(c). One addition to the Federal DBE Program made under the Final Rule effective February 28, 2011 requires agencies to do the following if its DBE participation reports for a fiscal year are less than the overall goal for that fiscal year:

1. Analyze in detailed the reasons for the difference; and

2. Establish specific steps and milestones to correct the problems identified and to enable the agency to fully meet the goal for the new fiscal year.

The Federal DBE Program requires agencies to prepare DBE utilization reports based on firms actually certified as DBEs. However, BBC's analysis of the overall DBE goal in this study is based upon current *and* potential DBEs.

- One of the reasons that GDOT might fall short of its overall DBE goal is that some minority- and women-owned firms participating in GDOT's FHWA-funded contracts might not be certified as DBEs and will not be counted in its DBE participation reports (and still be counted in the overall DBE goal).

- In order to have the information that allows it to explore this factor, GDOT should collect information on the race/ethnicity/gender ownership of all firms participating in its contracts as prime contractors and subcontractors, not just DBEs.

BBC recommends that GDOT keep a record of DBE participation on FHWA-funded contracts and a separate accounting of MBE/WBE participation during a fiscal year.

Flexible use of any race-conscious measures — 49 CFR Section 26.51(f). GDOT must exercise flexibility in any use of race-conscious measures such as DBE contract goals, as explained in 49 CFR Section 26.51(f)(2). For example, if GDOT determines that it is exceeding its overall DBE goal in a fiscal year, it must reduce or eliminate any use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal, then it must make appropriate modifications in the use of neutral and/or race-conscious measures to allow it to meet the overall goal.

If, after implementation of any additional neutral remedies, GDOT observes improvements in utilization for certain racial/ethnic/gender groups on state-funded contracts (in comparison to the availability of these groups for such contracts), it might then change its projection of how much of the overall annual DBE goal can be achieved through neutral means in future years.

Good faith effort procedures — 49 CFR Section 26.53. Under the Federal DBE Program, bidders do not have to meet the DBE goal to be awarded a contract. The Program requires agencies to also consider bidders that make good faith efforts to meet the contract goal. USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. GDOT's current DBE Program outlines the good faith efforts process that it would use if it continues to use DBE contract goals.

The Final Rule effective February 28, 2011 amends the requirements for good faith efforts procurements when using DBE contract goals (see 49 CFR Section 26.53(f)).

Counting DBE and MBE/WBE participation — 49 CFR Section 26.55. Section 26.55 of the Federal DBE Program identifies how agencies should count DBE participation. Section 26.11 provides for the Uniform Report of DBE Awards or Commitments and Payments.

Comprehensive reporting of DBE participation. GDOT should consider the following improvements to its overall tracking systems and procedures.

- In the disparity study, GDOT and BBC were able to collect prime contract and subcontractor data for local agency contracts through contacts with agencies and prime contractors. For future studies and evaluation, GDOT should consider improving its data collection and tracking for both FHWA- and state-funded contracts awarded by local agencies.

- GDOT should also institute efforts to track actual participation of DBEs and minority- and women-owned firms in its consultant contracts. For purposes of the disparity study, BBC compiled this information from hard-copy monthly invoices.

- GDOT should train prime contractors and staff to enter dollar amounts for all subcontractors for FHWA- and state-funded construction contracts in its TRANPORT data system. This improvement should start with dollar amounts at the time a subcontract is awarded and include any change orders. It should also track actual payments. GDOT should implement similar requirements for suppliers on its construction contracts.

Reporting of MBE/WBE participation in addition to DBE participation. In addition to tracking DBE participation, BBC recommends that GDOT develop procedures and databases to track MBE/WBE participation in FHWA- and state-funded contracts. This will help GDOT track effectiveness of neutral programs for both FHWA- and state-funded contracts and, if necessary, provide important information behind any shortfalls in annual DBE participation, including preparing utilization reports for all minority- and women-owned firms.[1]

- GDOT should use the BBC database developed as part of this study as a starting point for tracking MBE/WBE utilization.
- Firms doing business with GDOT as a prime contractor or subcontractor should be required to identify race/ethnicity/gender ownership information as part of the contractor/consultant prequalification and registration process, or through a similar effort.
- GDOT should collect similar information for prime contractors and subcontractors participating in local agency contracts that use funds administered through the Department.
- GDOT should collect and report information for prime contractor and subcontractor utilization on both FHWA- and state-funded contracts.
- GDOT should also continue to prepare reports on the participation of certified DBEs in FHWA-funded contracts, as required under the Federal DBE Program.

DBE certification — 49 CFR Part 26 Subpart D. GDOT is a certifying member of the Georgia Uniform Certification Program. Firms interested in doing business with GDOT that are seeking DBE certification can be certified from a certifying member of the Georgia UCP.

There are two revenue ceilings that affect agency certification of DBEs:

- A maximum annual revenue for any firm seeking DBE certification that is established as part of the Federal DBE Program ($22,410,000, as indicated in 49 CFR Section 26.69(b)); and
- Size standards that define small businesses set by the U.S. Small Business Administration.

Because both sets of size limits can change on an annual basis, GDOT should monitor these changes and reflect them in its DBE Program Plan. For example, the SBE issued new size standards for certain transportation and professional services subindustries effective March 12, 2012. Prior to this change, engineering firms could only be certified as DBEs if their revenue was below a $4.5 million limit. The change increased the limit to $14 million.[2]

[1] Including MBE/WBEs that are self-identified.

[2] See 77 Fed. Reg. 7490 (February 10, 2012); http://www.gpo.gov/fdsys/pkg/FR-2012-02-10/pdf/2012-2659.pdf#page=1.

The Final Rule effective February 28, 2011 changed the ceiling for personal net worth used for DBE certification to $1,310,000. GDOT will need to update this portion of its DBE Program Plan to reflect the new rule. It should monitor any future changes to the personal net worth limits.

The Final Rule effective February 28, 2011 also facilitates DBE certification across multiple states. GDOT should ensure that its DBE Program Plan accommodates these changes.

Monitoring other changes to the Federal DBE Program. The Federal DBE Program regulations periodically change, and USDOT also issues new guidance concerning implementation of the Program. In 2012, USDOT anticipates issuing proposed rules that change certain reports and certification documents. GDOT should monitor these developments.

In three states, implementation of the Federal DBE Program by the state departments of transportation is currently under review in federal court (see Chapter 2 and Appendix A of this report). GDOT should continue to monitor relevant court decisions in these and other cases.

B. Implementation of Programs for GDOT State-funded Contracts

The Federal DBE Program does not pertain to state-funded contracts. GDOT should consider implementing race- and gender-neutral measures for its state-funded contracts.

GDOT should also initiate internal reporting of MBE/WBE and DBE utilization on state-funded contracts using the same methods that it would use for FHWA-funded contracts. That practice will allow GDOT to track how well it is addressing the disparities that BBC found for certain MBE/WBE groups in its state-funded contracts. Monitoring utilization and assessing progress in addressing any disparities for state-funded contracts will also help GDOT understand how its neutral programs may be affecting participation in its FHWA-funded contracts.

C. Appropriate Staffing and Funding of Programs

The effectiveness of GDOT's future implementation of the Federal DBE Program will depend in part on the resources committed for staffing, training and information systems, as well as GDOT's funding of technical assistance and other programs to assist small businesses and DBEs.

Chapter 11.
Percentage of Overall DBE Goal to be Met Through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goal using race-neutral means.[1] Each agency must determine whether the overall DBE goal can be met solely through race-neutral measures, or whether race-conscious program elements such as DBE contract goals are also needed. If the agency determines race-conscious measures are needed, it must project the portion of the overall DBE goal to be met through neutral and through race-conscious measures (such as DBE contract goals). Race-neutral program elements are initiatives that help all businesses or small businesses in general, including DBEs.

To summarize:

- If an agency determines that it can achieve its overall DBE goal by race-neutral means and that no race-conscious elements are appropriate or required, the agency would submit its program using only race-neutral means for USDOT approval. The agency would project that 100 percent of its overall DBE goal could be met through neutral means and that 0 percent would need to be met through race-conscious means.

- If a combination of neutral and race-conscious measures is determined by the agency to be needed to meet its overall DBE goal, the agency would project the relative portion of the overall DBE goal to be met through neutral and race-conscious means.

In recent years, GDOT has projected that one-half of its overall DBE goal would be met through neutral means (6 percentage points of its 12 percent overall DBE goal).

USDOT guidance concerning how transportation agencies should project the race-neutral/race-conscious division of their overall DBE goals includes the following:

- USDOT Questions and Answers about 49 CFR Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall goal they will meet through race- and gender-neutral means.[2]

- USDOT "Tips for Goal-Setting" also suggests factors to consider when making such projections.[3]

- An FHWA template for how it considers approving state DOTs' DBE goal and methodology submissions includes a section on projecting the percentage of the overall

[1] 49 CFR Section 26.51.

[2] See http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc.

[3] http://www.osdbu.dot.gov/DBEProgram/tips.cfm.

DBE goal to be met through neutral and race-conscious means. An excerpt from this template is provided in Figure 11-1.

Based on 49 CFR Part 26 and the above sources, general areas of questions that transportation agencies might ask in performing this analysis include:

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic/gender group presumed to be socially and economically disadvantaged under the Federal DBE Program? If not, then the agency should only implement neutral remedies and no race-conscious remedies.

B. What has been the past experience of the agency in meeting its overall DBE goal? Does the agency have a history of not meeting or exceeding its overall DBE goal?

C. What has DBE participation been when the agency did not apply contract goals (or other race-conscious remedies)?[4]

D. What is the extent and effectiveness of race-neutral efforts that the agency could have in place for the next fiscal year? What new neutral efforts are ready for immediate implementation?

Chapter 11 is organized around each of the topics discussed above, followed by a discussion of other considerations (Part E) and a summary (Part F).

Figure 11-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State's race-neutral/race-conscious division and why it is the State's best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient's race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient's market, the race-neutral measures it employs and information on contracting in the recipient's contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient's contracts that do not have contract goals; past prime contractors achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state's programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women's businesses participate in programs without goals.

Source: FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year]. http://www.fhwa.dot.gov/civilrights/dbe_memo_a4.htm

[4] USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state, local or private contracting where contract goals are not used.

A. Is there evidence of discrimination within the local marketplace for any racial/ethnic/gender group presumed to be socially and economically disadvantaged under the Federal DBE Program?

In narrowly tailoring its implementation of the Federal DBE Program to reflect local marketplace conditions, an agency that determines race-conscious measures are necessary needs to consider whether any race-conscious remedies (such as DBE contract goals) should be restricted to certain DBE groups. If so, the portion of the goal pertaining to the DBE groups for which race-conscious measures would not apply might be counted toward the projection of what will be attained through neutral means.

Chapter 9 summarizes information the study team analyzed concerning the Georgia transportation contracting marketplace:

- There is some quantitative and qualitative evidence of disadvantages related to race, ethnicity and gender.
- There is some evidence of disadvantages for each racial, ethnic and gender group presumed to be socially disadvantaged under the Federal DBE Program. This evidence includes disparities in the utilization of each group in GDOT transportation contracts when DBE contract goals were not applied.

GDOT will need to review disparity study results and other information it has available in order to make a determination as to whether any DBE group would be eligible for any future race-conscious measures such as DBE contract goals (or whether no race-conscious measures apply).

If there is no need for race-conscious measures for any DBE group, the agency would project that 100 percent of its overall DBE goal would be met through neutral means.

B. What has been the past experience of the agency in meeting its overall DBE goal?

BBC examined GDOT's past experience in meeting its overall DBE goal, including whether GDOT had a history of not meeting or exceeding its overall DBE goal. Based on data starting in FY 2007, it does not appear that GDOT fell substantially short of its past overall annual DBE goals nor does it appear that the agency substantially exceeded them, as explained below.

GDOT has set an overall annual goal for DBE participation of 12 percent from FY 2007 through FY 2011. GDOT's measurements of DBE utilization indicated levels within about 2 percentage points of the annual goal for three of these five fiscal years. In FY 2009, utilization was 2.7 percentage points below the goal. Figure 11-2 presents DBE goals for each year and GDOT's reported DBE attainment for each year.

Figure 11-2.
GDOT-reported DBE attainment and overall DBE goal, by fiscal year

Fiscal year	DBE attainment	Annual DBE goal	Difference
2007	13.3 %	12.0 %	1.3 %
2008	11.8	12.0	(0.2)
2009	9.3	12.0	(2.7)
2010	10.4	12.0	(1.6)
2011	9.8	12.0	(2.2)

Note: Numbers rounded to nearest tenth of 1 percent.
Source: GDOT reports.

BBC independently measured DBE utilization for 2009 through June 2011. According to BBC's analyses, DBEs obtained 10.1 percent of the FHWA-funded contract dollars that GDOT awarded from 2009 through June 2011.

C. What has DBE participation been when GDOT has not applied contract goals (or other race-conscious remedies)?

DBE participation that is projected to result from neutral programs should be counted as such when projecting the portion of the overall DBE goal that could be met through neutral means. Further, any time a DBE wins a prime contract or subcontract through customary competitive purchasing procedures (i.e., the firm is not placed at an advantage because of a DBE contract goal), that DBE utilization can also be considered as race-neutral participation.

BBC examined results of the utilization and disparity analyses and other research in this study to review participation of minority- and women-owned firms when race-conscious programs did not apply during the study period.

1. DBE participation for GDOT contracts when the Federal DBE Program did not apply. BBC first examined participation of firms certified as DBEs on GDOT contracts when no race- or gender-conscious programs applied.

- GDOT did not set DBE contract goals on its state-funded contracts during the study period. BBC identified DBE participation of 3.6 percent on GDOT contracts on state-funded contracts (including prime contracts and subcontracts as shown in Figure 6-2 in Chapter 6).

- DBEs obtained 1.9 percent of prime contract dollars on GDOT FHWA- and state-funded contracts. Race- or gender-conscious programs did not affect utilization of DBEs as prime contractors or prime consultants.

Of the two measures, the 3.6 percent utilization results are more comprehensive as they include DBE participation as prime contractors and subcontractors.

2. Disparity analysis results for GDOT contracts when no race- or gender-conscious programs applied. The results discussed above only pertain to GDOT's utilization of firms certified as DBEs. The goal-setting analysis in Chapter 10, however, also includes minority- and women-owned firms that are not currently certified as DBEs and appear that they might be eligible for DBE certification. Therefore, it is also instructive to examine the results for minority- and women-owned firms (which includes DBEs and non-certified MBEs and WBEs) when examining past utilization.

- Including certified DBEs and non-certified firms, minority- and women-owned firms received 5.5 percent of GDOT state-funded contract dollars.

- Minority- and women-owned firms received 3.2 percent of GDOT prime contract dollars on FHWA- and state-funded contracts.

The results indicating 5.5 percent MBE/WBE participation are more comprehensive as they include utilization as prime contractors and subcontractors.

It is important to note that non-certified minority- and women-owned firms would need to become certified as DBEs for GDOT to be able to count them in DBE participation reports. Some of the MBE/WBEs utilized by GDOT might not meet the criteria for DBE certification. Even so, GDOT should consider the results for past MBE/WBE participation when projecting the portion of its overall DBE goal to be met through neutral measures.

3. Other information. Chapter 4 and supporting appendices present results that include some evidence of disparities for minority- and women-owned firms in the Georgia marketplace.

D. What is the extent of race-neutral efforts that the agency could have in place for the next fiscal year?

BBC reviewed GDOT's existing and planned neutral measures that are part of its implementation of the Federal DBE Program. BBC also identified measures that GDOT might consider for future implementation. There may be a number of reasons why certain of these additional measures are not practicable, and there could be neutral remedies in addition to those discussed here that GDOT might consider.

1. Current GDOT neutral programs. GDOT currently implements a broad range of neutral measures to increase participation of DBEs in its FHWA-funded contracts. GDOT plans to continue these neutral measures in the future. In addition to GDOT, many national and local organizations implement small business development programs in Georgia.

Figure 11-3 lists examples of neutral measures provided in 49 CFR Section 26.51(b).

Figure 11-3.
Examples of neutral measures listed in federal regulations

Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces).

Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing).

Providing technical assistance and other services.

Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate).

Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.

Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.

Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low.

Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Source: 49 CFR Section 26.51(b).

GDOT is already implementing the types of measures listed in Figure 11-3. Examples of these and other existing neutral measures are provided below.

- GDOT has a supportive services contract that provides training and other assistance regarding bonding, financing, business management, technology, business growth and development, and information on how to do business with GDOT. These services are available to established and start-up firms.

- Firms can access prime contractor, subcontractor and DBE directories on the GDOT website. GDOT also provides a searchable DBE database on its website that allows prime contractors to identify DBEs based on name, subindustry or location.

- GDOT currently posts on its website lists of potential bidders for its construction contracts that are available to DBEs and other small businesses seeking subcontracting opportunities. Firms interested in subcontracts on a project can identify themselves to potential bidders on the GDOT website.

- GDOT's prompt pay policy requires that prime contractors pay their subcontractors for satisfactory performance of their work no later than 10 days from receipt of each payment from GDOT.

- Prime contractors are not allowed to withhold retainage from subcontractors (GDOT no longer withholds retainage on payments for contracts).

2. Business assistance programs available in Georgia. In addition to GDOT neutral measures, a number of organizations throughout Georgia are implementing efforts to assist small businesses, including minority- and women-owned businesses. Figure 11-4 provides examples of technical assistance, financing, bonding, mentor-protégé and networking programs. GDOT interacts with many of these programs through its own supportive services effort.

Figure 11-4.
Examples of small business assistance and other neutral programs available in Georgia

Neutral remedies	
Technical assistance	Technical assistance such as small business training is widely available throughout Georgia. Programs provide general information and assistance for business start-ups and growing businesses. Examples include general support providers such as SCORE, the U.S Small Business Administration, the State of Georgia's First Stop Business Information Centers, The Georgia Department of Economic Development, Small Business Development Centers, the Georgia Micro Enterprise Network, The Resource Institute, The Edge Connection at Kennesaw State University, the Women's Economic Development Agency, and business groups including minority and women business chambers. There is also industry-specific training opportunities from organizations such as such as the Georgia Tech Enterprise Innovation Institute and the Georgia Manufacturing Extension Partnership. The Greater Atlanta Economic Alliance administers the Small Business Transportation Resource Center in partnership with the USDOT Office of Small and Disadvantaged Business Utilization. The SBTRC provides assistance, training and counseling to DBEs and small businesses interested in transportation-related projects. Other programs focus on market development assistance and use of electronic media and technology. These assistance programs are available through organizations such as Procurement Technical Assistance Centers throughout the state.
Small business finance	Small business financing is available through several local agencies in Georgia. A number of organizations support small businesses with training and loan package preparation related to different SBA loan programs. Some agencies will help firms evaluate whether they qualify for SBA and conventional loans. The USDOT Short Term Lending Program provides low-cost working capital loans for up to $750,000 for firms performing transportation-related contracts. Citizens Trust Bank is a local STLP participating lender.
Bonding programs	Programs such as the SBA Surety Bond Guarantee Program provide bid, performance and payment bond guarantees for individual contracts. The USDOT has operated a number of bonding assistance programs as well, including the Bonding Education Program and the Disadvantaged Business Enterprise American Recovery and Reinvestment Act Bonding Assistance Reimbursable Fee Program (DBE ARRA BAP). Training on how to obtain a bond is also provided by a number of different agencies including the Greater Atlanta Economic Alliance, the Greater Women's Business Council and Minority Business Development Centers.
Mentor-protégé programs	The SBA 8(a) Business Development Mentor-Protégé Program is an example of a mentor-protégé program that pairs subcontractors with prime contractors to assist in management, financial and technical assistance and the exploration of joint venture and subcontractor opportunities for federal contracts. The Georgia Minority Supplier Development Council (GMSDC) administers the Georgia Mentor Protégé Connection in partnership with the Georgia Department of Economic Development (GDEcD) and Georgia Tech's Enterprise Innovation Institute. The Greater Women's Business Council's mentor-protégé program is one example of a not-for-profit organization's program.
Business networking	Many organizations in Georgia offer networking opportunities for small businesses including minority- and women-owned businesses. Examples include the Georgia Minority Supplier Development Council, local chambers of commerce, and minority and women business chambers.

Source: BBC Research & Consulting.

3. Additional neutral efforts planned as part of GDOT's Small Business Enterprise (SBE) Program. The Final Rule effective February 28, 2011 added a requirement for transportation agencies to foster small business participation in their contracting. USDOT set a deadline of February 28, 2012 for state and local agencies to submit a small business program element for review.

GDOT submitted a small business program element to FHWA that proposed a number of efforts to assist small business enterprises (SBEs).

Program measures assisting small prime contractors and subcontractors. GDOT's SBE Program includes the following elements.

- Encouraging prime contractors to waive bonding or assist SBE subcontractors in obtaining bonding.
- Encouraging staged bonding where feasible, when bonding is carried over from one project state to the next.
- Relaxing bonding requirements for projects less than $25,000.
- Unbundling large contracts to open more contracting opportunities for SBEs.
- Providing information on GDOT's contracting needs and offer instructions on bid specifications, procurement policy, procedures and general bidding requirements.
- Providing specifications and requests for proposals to the SBE community in a timely manner to allow SBEs adequate time to develop responsible and responsive bids. In instances where the cost of obtaining specifications or requests for proposals is prohibitive, GDOT will make copies of the materials available to SBE development agencies at no charge.
- Encouraging prime contractors to pro-rate payment and delivery schedules, where feasible, to minimize cash flow problems faced by small firms. GDOT will provide guidance to SBE contractors regarding maintenance of positive cash flow in order to meet financial obligations.
- Using debriefing sessions to explain why certain bids were unsuccessful.
- Maintaining records showing specific efforts to identify and award contracts to SBEs and establishing a monitoring system to ensure that all contractors, subcontractors, consultants and vendors comply with contract specifications related to SBE utilization.
- Informing SBEs of bid notices and specifications related to their capabilities by placing bid notices in major local newspapers and other periodicals. Bid notices may also be sent to local trade associations, technical assistance agencies, economic development groups and SBEs with capabilities relevant to the bid notice. Lists of potential firms bidding as primes may also be made available to SBEs.

Subcontracting elements of program. GDOT included a number of SBE program elements to encourage prime contractors to use small businesses as subcontractors in GDOT contracts:

- Any contractor receiving a federally-funded contract with GDOT shall agree that small businesses will have the maximum practicable opportunity to participate in the contract consistent with its efficient performance.
- Prime contracts shall show Good Faith Effort in soliciting and accepting bids from SBEs.
- Prime contractors are to maintain records on all subcontracting performed by SBEs.

Local agency participation in the SBE Program. GDOT's plan requires local agencies receiving federal funds administered by GDOT to comply with the SBE Program.

Summary. If fully implemented, and if a broad set of small businesses are eligible and actually participate in the program, GDOT's SBE Program might increase participation of DBEs. At this time, it is difficult to quantify the potential effect of the SBE Program. GDOT had not received feedback from FHWA concerning its SBE Program at the time of this report. GDOT may further refine the program based on FHWA comments.

4. Additional neutral programs for GDOT consideration. In addition to its existing and planned neutral measures, GDOT might consider the neutral program elements presented below.

Some of these program elements were identified by USDOT in its Final Rule effective February 28, 2011:

- Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., $1 million).
- In multi-year design-build contracts or other large contracts (e.g., for "megaprojects"), requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

The BBC study team suggests additional neutral measures for GDOT review. These include:

- Changes to GDOT's systems for prequalifying construction contractors, prequalifying consultants and evaluating consultants' qualifications statements; and

- Construction contractor assistance program.

Small business set-aside program for prime contractors and consultants. GDOT might consider employing a small business set-aside program for small construction and engineering-related contracts that are not legally required to be publicly bid. Program participants certified as small businesses would be able to compete with one another for contracts. GDOT would establish a dollar limit for these contracts, and then consider application of the program for contracts under that ceiling on a case-by-case basis.

A small business set-aside program may help encourage small businesses, including DBEs, to compete for smaller GDOT contracts by limiting the competition to similarly-sized firms. GDOT would need to restrict the program to firms that were certified as small business enterprises in accordance with federal guidance.

Requiring bidders on very large contracts to specify elements of the contract that are of a size that small businesses, including DBEs, can reasonably perform. On any large construction project, GDOT might require bidders to document that they have broken out subcontract opportunities of sizes suitable for small subcontractors, including DBEs.

Subcontracting minimum. GDOT might consider a measure that would encourage a larger amount of subcontracting on GDOT contracts. Even without DBE contract goals, DBEs' share of GDOT subcontract dollars is much greater than DBEs' share of GDOT prime contract dollars (see Chapter 8).

GDOT might consider an initiative similar to the City of Los Angeles' Mandatory Subcontracting Minimum (MSM) program.

- For each contract above a certain dollar amount, GDOT would set a percentage to be subcontracted based on an analysis of the work to be performed and past experience with similar contracts (different types of projects would involve greater or smaller amounts of subcontracting). For some contracts, GDOT could set no MSM.

- Prime contractors bidding on the contract would need to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be deemed responsive.

- The program would need to be flexible, including the opportunity for the prime contractor to request a waiver (preferably before time of bid so that the waiver would apply to each prime).

An MSM program corresponds to a neutral remedy listed in the Federal DBE Program, which suggests that agencies could promote participation of all small businesses, including MBE/WBEs, by "requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces."[5]

GDOT would need to consider whether the program described here is permitted under state law.

Alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts. Alternative bid evaluation would allow GDOT to consider factors other than price when awarding contracts. GDOT could explore a pilot program that would encourage large prime contractors to joint venture with smaller contractors including DBEs, or for small contractors to join in a joint venture. Either approach might foster opportunities for smaller firms to gain experience as prime contractors. GDOT would need to consider whether the program described here is permitted under state law.

Prequalification for construction prime contractors. GDOT should review its prequalification procedures to ensure that they do not act as barriers to smaller and newer firms as well as firms with less past success competing for GDOT contracts. There may be aspects of the prequalification process that work to perpetuate disparities for minority-owned firms, which have been relatively unsuccessful in obtaining GDOT construction prime contracts compared with other groups.

GDOT should review its practice of prequalifying for dollars of GDOT work that can be performed. Because bonding is already required under state law for larger contracts, GDOT's practice of prequalifying for dollars of work performed may represent an additional barrier for smaller contractors. Chapter 8 of the report explains how this aspect of GDOT prequalification may affect certain groups of firms.

As explained in Chapter 8, GDOT's current prequalification process for construction prime contractors appears to advantage contractors that:

- Have worked for GDOT in the past and have received high scores for that work.
- Have more equity in the firm, especially cash and accounts receivable compared with their current liabilities.
- Have more plant and equipment used for road construction.

This process may disadvantage smaller, younger firms in general. It may have an added negative impact on minority- and women-owned firms (see Chapter 8).

[5] 49 CFR Section 26.51(b)(1).

State law requires GDOT to prequalify construction contractors. Even so, GDOT might be able to modify the factors and scoring system or add flexibility in how prequalification is applied. Such steps might lessen potential negative effects on small businesses.

- For example, GDOT might consider raising the $2 million contract size threshold that requires prequalification.
- GDOT might review whether it could limit prequalification of construction prime contractors to consideration of past work, using a system similar to its registration process for construction subcontractors.
- Alternatively, GDOT might consider a prequalification system for construction contractors based on qualifications for specific types of work, similar to its system for consultants.

Prequalification of consultants. Consultants seeking GDOT engineering-related contracts must be prequalified by "area classes," which pertain to specific types of work. Firms submit applications to be prequalified for each area class. GDOT can approve a firm for one area class and deny an application for another area class.

GDOT approved about two-thirds of the area class applications submitted by majority-owned firms and 47 percent of area class applications submitted by minority-owned firms. (The approval rate for WBEs exceeded majority-owned firms, as discussed in Chapter 8.)

GDOT might review its prequalification process for area classes to identify whether there are factors in the process that disadvantage minority-owned firms. Any such changes might benefit all small businesses seeking area classes.

Evaluation of consultants' qualifications statements. Once firms are prequalified for GDOT consulting contracts, they compete for specific contracts by submitting qualifications statements. GDOT evaluates the qualifications statements to determine a "short-list" of firms to be asked for interviews. GDOT typically makes a consultant selection after conducting interviews with short-listed firms.

GDOT employs a scoring system when evaluating qualifications statements and interviews. BBC compared evaluation scores received by majority-owned firms with those for MBEs and WBEs submitting qualifications statements. On average, more than one-half of firms submitting qualifications statements are short-listed for an interview. One of the six submissions by minority-owned firms resulted in short-listing. GDOT's scores for MBE submissions were lower than scores assigned to majority-owned firms in three of the four evaluation categories:

- **Stability and resources.** One of the evaluation factors is the financial stability, litigation history and general history of the firm.
- **Experience and qualifications.** Evaluators consider the experience and qualifications of the proposed consultant team in light of the scope of the project, work classes involved, and GDOT policies.

- **Suitability.** GDOT reviews the ability of the firm to do the work, including specialized qualifications and the capacity of the consultant team to accomplish the work given current staff workloads.

GDOT might review the factors considered to ensure that they do not negatively affect minority-owned firms. GDOT may also need to train evaluators to make sure they do not implement the scoring system in a way that negatively impacts minority-owned firms. Any such changes may benefit all small businesses.

GDOT might consider small business preferences in its scoring of consultants (to the extent that state law permits). For example, when evaluating proposals for engineering contracts, GDOT might include five evaluation points out of 100 to be awarded based on certified small business status of the prime consultant.

GDOT might also consider a new evaluation category that considers the contract dollars a consultant currently has with GDOT, with points awarded to consultants with less or no current work (and zero points to the proposer with the most current work). As with other neutral measures, GDOT should consider whether this change would be permitted under state law.

Construction contractor assistance program. The BBC study team's review of business assistance resources in Georgia identified a wide range of general assistance for start-up and emerging businesses but less assistance to established construction firms seeking to grow into larger prime contractor roles. Focusing on established construction companies interested in further developing their capabilities, GDOT might consider ways to further expand one-on-one counseling, mentor-protégé programs, and referrals to experts in finance and bonding. This assistance would be open to all small firms regardless of race or gender.

Other neutral measures for GDOT consideration. The neutral measures discussed here provide a broad spectrum of programs or actions for GDOT to consider, but is by no means exhaustive. GDOT should review programs that other agencies have implemented and seek additional input from the local small business and DBE business communities.

Implications for projecting the neutral portion of overall DBE goal. An agency implementing the Federal DBE Program is required to meet the maximum feasible portion of its overall DBE goal by using workable neutral means to facilitate DBE participation in its contracts. An agency is not required to implement every conceivable race-neutral alternative, but must engage in serious, good-faith consideration of workable race-neutral alternatives. Its consideration of those neutral measures should be reflected in its projection of the portion of the overall DBE goal to be achieved through neutral means.

A number of issues arise when an agency considers the impact of possible neutral measures:

- When projecting the portion of the overall DBE goal to be achieved through neutral means, USDOT requires agencies to evaluate the time frame necessary for implementation. Programs that may require years to develop should not be reflected in projections of the impact of neutral remedies for the next fiscal year. GDOT should account for this factor in making its projection.

- In addition, it will be difficult for GDOT to assess the potential impact of additional neutral measures on DBE participation until it has reviewed them, chosen those for implementation, successfully implemented them, and then evaluated their effectiveness.

Implications for state-funded contracts. GDOT discontinued its race- and gender-conscious program for state-funded contracts in the 1990s. To the extent permitted under state law, neutral efforts GDOT adopts related to its FHWA-funded contracts should be applied, where feasible, to state-funded contracts. GDOT should also collect data on MBE/WBE and DBE participation on state-funded contracts to help it assess the impact of its neutral programs.

E. Other Considerations

The following considerations are also important in GDOT's implementation of the Federal DBE Program.

Adjustments as GDOT implements the Federal DBE Program. GDOT will need to monitor the effectiveness of any race-conscious measures and its race-neutral measures during the course of an entire fiscal year.[6]

- Before the fiscal year is complete, GDOT might find that DBE utilization on FHWA-funded contracts will substantially exceed its overall DBE goal within the fiscal year. It would need to adjust the extent to which it uses any race-conscious measures if this outcome occurs.

- Similarly, GDOT might reach a mid-year decision to increase the extent to which it uses race-conscious remedies if it finds that the measures in place are not effective in reaching its overall DBE goal.

Firms potentially eligible for DBE certification. The Federal DBE Program requires GDOT to prepare DBE utilization reports based on firms actually certified as DBEs.[7] However, many of the minority- and women-owned firms examined in this disparity study are not currently certified even though they might be eligible for certification (based on their annual revenue). GDOT should encourage and facilitate certification for such firms.

[6] 49 CFR Section 26.51(f)(2).

[7] See 49 CFR Section 26.55(f) and 26.87(i).

As discussed in Chapters 5 and 10, BBC's analysis of the base figure for GDOT's overall DBE goal includes minority- and women-owned firms that might be eligible for DBE certification but have not chosen to pursue certification.

- One reason that future DBE utilization on GDOT contracts could fall below GDOT's overall DBE goal is that many of the minority- and women-owned firms doing business with GDOT are not currently DBE-certified.

- GDOT should examine factors in addition to its utilization of certified DBEs to evaluate the effectiveness of its programs, as discussed below.

Tracking minority- and women-owned firms that are not currently certified as DBEs. GDOT will need to track the effectiveness of neutral programs for both FHWA- and state-funded contracts, including preparing additional utilization reports that include all minority- and women-owned firms.[8] GDOT should:

- Use the BBC database developed as part of this study as a starting point for tracking MBE/WBE utilization;

- Request that firms doing business with GDOT as a prime contractor or subcontractor identify race/ethnicity/gender ownership to facilitate tracking purposes;

- Collect and analyze MBE/WBE utilization in addition to DBE utilization for prime- and subcontractor utilization on both FHWA- and state-funded contracts, and for GDOT and local agency contracts; and

- Continue to prepare reports on the participation of certified DBEs in FHWA-funded contracts, as required under the Federal DBE Program.

Monitoring changes in the Federal DBE Program. The Federal DBE Program regulations periodically change, and USDOT also issues new guidance concerning implementation of the Program. GDOT should monitor these developments.

Other transportation agencies' implementation of the Federal DBE Program is under review in federal court. GDOT should continue to monitor relevant court decisions in these and other cases.

F. Summary

GDOT should review all of the analyses in Chapter 11 and the balance of the disparity study, and any additional information it has available, when determining whether it will meet its overall DBE goal solely through neutral measures, or when projecting the portion of the overall DBE goal to be achieved through neutral efforts. Its specific neutral projection will depend on the level of overall DBE goal it adopts.

[8] Including MBE/WBEs that are self-identified.

CHAPTER 10.
Overall Annual DBE Goal

As part of implementing the Federal DBE Program, GDOT must set an overall goal for DBE participation in FHWA-funded contracts. The Final Rule, which made certain changes to the Federal DBE Program effective February 28, 2011, requires the overall goal to pertain to a three-year period. GDOT set an overall DBE goal of 12 percent for the three year period through FY 2012.

Federal regulations (49 CFR Part 26.45) outline a two-step process for setting the overall goal:

- Step 1: Establishing a base figure; and
- Step 2: Making any needed adjustment to the base figure.

GDOT will explain each step and its choice of an overall DBE goal for FY 2013-FY 2015 in a Goal and Methodology document it will prepare and submit to FHWA prior to this three-year period. The information below can assist GDOT when making these decisions.

Step 1: Establishing a Base Figure

As presented in the Chapter 5 availability analysis, minority- and women-owned firms currently or potentially certified as DBEs would be expected to receive 19.8 percent of prime contract and subcontract dollars for GDOT's FHWA-funded contracts based on their relative availability for that work.

GDOT should consider 19.8 percent as the base figure for its overall goal for DBE participation if the types of FHWA-funded contracts for the time periods covered by future goals will be similar to FHWA-funded contracts from 2009 through June 2011.

If, for example, the mix of work between construction- and engineering-related contracts will differ in the future, GDOT can apply new weights to develop a new base figure. (As shown in Figure 10-1 on the following page, the current weight is 90 percent for construction contracts and 10 percent for engineering-related contracts.) Similarly, GDOT could consider adjusting the base figure if the future geographic mix of contracts were to differ substantially from the 2009 through June 2011 time period. MBE/WBE availability was several percentage points higher for contracts in North Georgia and the Atlanta Metropolitan Area than in Middle Georgia and South Georgia. In addition, these results are based on a time period that includes a number of projects funded through the American Recovery and Reinvestment Act. When considering an overall DBE goal, GDOT should review how its future mix of FHWA-funded projects may differ from the 2009 through June 2011 time period.

GDOT must develop its goal for DBE participation by including all DBE groups, and should not subdivide the goal by DBE group.[1] (The data BBC presents by DBE group is to document how the overall DBE goal might be calculated.)

[1] See 49 CFR Section 26.45 (h).

The 19.8 percent base figure shown in Figure 10-1 is higher than GDOT's current 12 percent overall DBE goal. However, GDOT only included certified DBEs in the base figure calculations for its current overall DBE goal. BBC also counted minority- and women-owned firms that possibly could be certified as DBEs but are not currently certified.[2] BBC also had more detailed information concerning available firms and performed a more sophisticated contract-by-contract analysis of availability than analyses performed in the past.

Figure 10-1. Construction and engineering components of base figure for GDOT FHWA-funded transportation contracts

Potential DBEs	Availability percentage		
	Construction	Engineering	Total
African American-owned	14.2 %	9.2 %	13.7 %
Asian-Pacific American-owned	1.3	1.3	1.3
Subcontinent Asian American-owned	0.1	3.5	0.4
Hispanic American-owned	0.1	1.6	0.2
Native American-owned	0.1	0.0	0.1
WBE (white women-owned)	4.1	3.1	4.0
Total potential DBEs	19.9 %	18.7 %	19.8 %
Sector weight	90 %	10 %	

Note:

Weights are based dollars of FHWA-funded contracts for 2009–June 2011.

Source:

BBC Research & Consulting.

Step 2: Making Any Needed Adjustment to the Base Figure

GDOT can make upward or downward adjustments to the base figure as it determines its overall DBE goal. It does not have to make a step 2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and Methodology document prepared for FHWA.

The Federal DBE Program outlines factors that recipients of USDOT funds must consider when assessing whether to make a "step 2" adjustment to the base figure:[3]

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

BBC completed an analysis of each of the step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information BBC examined was not as easily quantifiable, but is still relevant as GDOT assesses whether or not to make a step 2 adjustment.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT Tips for Goal Setting suggests that agencies examine data on past participation of DBEs on USDOT-funded contracts, and choose the median level of annual participation for the years examined as the measure of past participation. "Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past

[2] Consistent with USDOT guidance, as discussed in Chapter 5.

[3] 49 CFR Section 26.45.

participation to make your adjustment because the process of determining the median excludes all outliers (abnormally high or abnormally low) past participation percentages."[4]

Median annual DBE participation based on GDOT reports for FY 2007 through FY 2011 was 10.4 percent.[5] BBC's independent analysis of 2009 through June 2011 FHWA-funded contracts indicates 10.1 percent DBE utilization (based on aggregate utilization over this period). The two approaches yield similar estimates of past DBE participation in FHWA-funded contracts. Figure 10-2 presents these estimates.

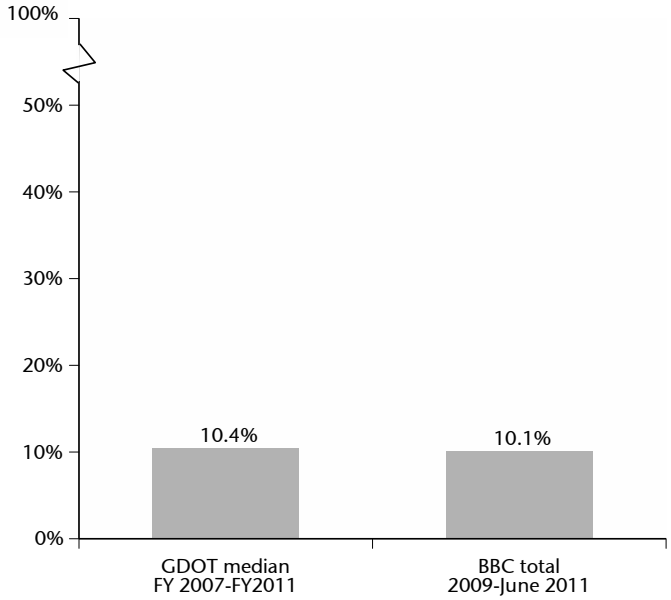
Figure 10-2.
Estimates of DBE participation on FHWA-funded contracts

Note:

Number of FHWA-funded contracts/subcontracts analyzed by BBC is 5,390. For more detail, see Figure K-3 in Appendix K.

Source:

BBC Research & Consulting from GDOT's Goal and Methodology, DBE participation reports to FHWA and GDOT contract data.



2. Information related to employment, self-employment, education, training and unions. Chapter 4 of the report summarizes information concerning local marketplace conditions for minorities and women. Detailed quantitative analyses of the Georgia marketplace are presented in Appendices D through G. BBC's analysis suggests that there are certain barriers affecting entry, advancement and business ownership for minorities and women in the Georgia construction and engineering industries:

- Taken together, this information suggests that barriers to employment, self-employment and education exist for certain minority groups and women in Georgia.
- It follows that such barriers may have affected the relative availability of minority- and women-owned firms to perform Georgia work.

[4] Section III (A)(5)(c) in USDOT. Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program. http://www.osdbu.dot.gov/DBEProgram/tips.cfm.

[5] Beginning with FY 2007 and ending in FY 2011, GDOT reported DBE dollars awarded as a percentage of total dollars awarded for FHWA-funded contracts of 13.3%, 11.8%, 9.3%, 10.4% and 9.8% based upon its Goal and Methodology (for earlier years) and DBE Participation Reports submitted to FHWA for FY 2009 through FY 2011.

It may not be possible to properly quantify the extent to which barriers to employment, education and training may have depressed the relative number of minority- and women-owned firms in the local industry. However, the effect of disparities in self-employment on availability can be quantified, as discussed below.

Quantitative information on self-employment. Through regression models, BBC investigated whether race, ethnicity or gender influenced rates of business ownership among Georgia workers after accounting for the effects of several neutral factors.[6] Chapter 4 of the report summarizes BBC's analyses and Appendix F provides detailed results of the regression models.

BBC identified statistically significant disparities in business ownership rates for African Americans, Hispanic Americans and women working in the Georgia construction industry in 2007-2009. BBC calculated the impact on the base figure if African Americans, Hispanic Americans and white women owned businesses at the same rates as similarly situated non-minorities (and white men). These "but for" calculations are presented in Figure 10-3. BBC's calculations include the same categories of contracts used when determining the base figure (i.e., construction and engineering). BBC made a "but for" calculation for construction, and then weighted the results with the component of the base figure for engineering based on GDOT's dollars of FHWA-funded contracts for those types of contracts. The results indicate an overall DBE goal of 26.3 percent if GDOT were to make an upward step 2 adjustment based on this information.

Calculations are explained below and in Figure 10-3. The columns of Figure 10-3 represent the following:

a. **Current availability.** Column (a) shows the current availability of potential DBEs as presented in Chapter 5. Each row shows the percentage of firms that are minority- or women-owned and are either currently DBE-certified or appear to be "small" (within the revenue size standards currently eligible for DBE certification). Combined, the information for construction and for engineering equals the 19.8 percent base figure for the overall DBE goal discussed in Chapter 5.

   The row "majority and small MBE/WBEs" refers to firms that do not appear to be eligible for DBE certification.

b. **Disparity indices for business ownership.** Column (b) presents disparity indices related to business ownership for the different racial/ethnic/gender groups. See Chapter 4 and Appendix E for an explanation of the regression models from which BBC formulated these disparity indices.

c. **Availability after initial adjustment.** Column (c) presents initial availability estimates after adjusting for statistically significant disparities in business ownership. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100.

d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that were re-scaled so that the sum of the estimates equals 100 percent. BBC re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and

[6] BBC examined U.S. Census data on business ownership rates using methods similar to analyses examined in the court cases involving state departments of transportation in California, Illinois and Minnesota.

dividing it by the sum of availability estimates shown under "Total firms" in column (c) and multiplying by 100. For example, for African American-owned construction firms, the calculation is (18.7% ÷ 107.8%) x 100 = 17.3%.

e. **Components of goal.** Column (e) shows the component of the total goal attributed to the adjusted MBE/WBE availability in each procurement area. BBC calculated each component by taking the total DBE availability estimate shown under "Total small minority and female" in column (d) and multiplying it by the proportion of total FHWA-funded contract dollars for construction and engineering (90% for construction and 10% for engineering-related contracts). The study team used the 25.7 percent shown under "Total small minority and female" in column (d) for construction and multiplied it by 90 percent for a result of 24.4 percent. The column (d) figure for engineering (18.7%) was multiplied by its weight of 10 percent for a result of 1.9 percent. The values in column (e) were then summed to equal the total adjusted DBE availability (last row of Figure 10-3). The sum is 26.3 percent.

From the calculations in Figure 10-3, as described above, the potential step 2 adjustment indicates an overall DBE goal of 26.3 percent.

Figure 10-3.
Potential adjustment to base figure for overall DBE goal

Business ownership	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of goal**
Construction					
African American	14.2 %	76	18.7 %	17.3 %	
Asian-Pacific American	1.3	no adjustment	1.3	1.2	
Subcontinent Asian American	0.1	no adjustment	0.1	0.1	
Hispanic American	0.1	50	0.2	0.2	
Native American	0.1	no adjustment	0.1	0.1	
White women	4.1	56	7.3	6.8	
Total small minority and female	19.9 %		27.7 %	25.7 %	24.4 %
Majority and large MBE/WBE	80.1		80.1	74.3	
Total firms	100.0 %		107.8 %	100.0 %	
Engineering					
Total small minority and female	18.7 %	no adjustment	18.7 %	18.7 %	1.9 %
Majority and large MBE/WBE	81.3		81.3	81.3	
Total firms	100.0 %		100.0 %	100.0 %	
Total small minority and female after adjustments and weighting					26.3 %

Note: * Initial adjustment is calculated as current availability divided by the disparity index.
** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FWHA-funded contract dollars in that category (construction is 90%, engineering is 10%).
*** Small minority and female firms includes those firms that BBC surveyed and who reported annual revenues below the Federal DBE revenue caps. MBE/WBE firms reporting annual revenues over DBE limits are not included in this total. Totals also do not include firms that have applied for DBE certification and been denied and firms that have graduated from the Federal DBE Program.

Source: BBC Research & Consulting.

3. Statistical disparities in the ability of DBEs to get financing, bonding and insurance. BBC analyzed access to financing, bonding and insurance. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms. Any barriers in access to capital, bonding and insurance would affect the opportunities for minorities and women to form and successfully operate construction and engineering-related firms.

- As discussed in Chapter 4, because firms typically must have working capital, bonding and insurance to be awarded and perform GDOT construction prime contracts, any greater barriers to obtaining these business inputs for minorities and women would place these firms at a disadvantage in obtaining Department construction contracts.

- Similarly, if minority- and women-owned engineering and related firms face disadvantages obtaining financing and insurance, they may have disadvantages obtaining GDOT engineering-related contracts. Insurance is a requirement for obtaining Department work and sufficient working capital is a practical necessity to perform GDOT contracts.

Unequal access to financing, bonding and insurance may adversely affect the current availability of minority- and women-owned firms to perform GDOT work, which adds to the evidence for an upward Step 2 adjustment. However, the impact on the base figure could not be explicitly quantified. Chapter 4 summarizes this information; Appendix G presents detailed quantitative analyses.

4. Other relevant data. The Federal DBE Program suggests that federal aid recipients also examine "other factors" when determining whether to make a step 2 adjustment to the base figure.[7] One factor BBC examined was the relative success of minority- and women-owned firms in the local transportation contracting industry. There is evidence of disparities for certain groups of minority- and women-owned firms. Chapter 4 summarizes this information and Appendix F presents detailed quantitative analyses. As with access to financing, bonding and insurance, quantification of how these factors affect the base figure was not possible.

Summary of information for step 2 analysis. BBC's in-depth analysis of each factor outlined in the Federal DBE Program suggests that GDOT consider one of the following options concerning a step 2 adjustment.

Option 1 – making an upward adjustment. Over the long-term, there are reasons that GDOT might consider a higher overall goal than the 19.8 percent base figure.

- If GDOT were to make an upward adjustment, it might consider the 26.3 percent figure for DBE participation after adjusting current availability for business ownership rates to reflect "your determination of the level of DBE participation you would expect absent the effects of discrimination."[8] Figure 10-3, earlier in this chapter, presents these calculations.

- Analyses of access to capital and other factors summarized above also support an overall goal higher than 19.8 percent.

[7] 49 CFR Section 26.45.

[8] 49 CFR Section 26.45 (b).

- As emphasized in the USDOT Tips for Goal Setting, "If the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made."[9] The calculations that reflect disparities in business ownership rates appear to provide such a rational relationship.

Option 2 – making a downward step 2 adjustment. As explained above, one factor GDOT must consider is the volume of work DBEs have performed in recent years. GDOT DBE participation reports for FY 2007 through FY 2011 indicated median annual DBE participation of 10.4 percent for these years. This level of participation may represent a minimum demonstration of "current capacity of DBEs to perform work," which is lower than the 19.8 percent base figure. (BBC measured total DBE participation of 10.1 percent for FHWA-funded contracts for 2009 through June 2011, a figure close to the 10.4 percent median value.)

- USDOT "Tips for Goal-Setting" suggest that the base figure can be averaged with the median past DBE participation to make the step 2 adjustment.

- If GDOT chose this approach, the 19.8 percent base figure would be averaged with the 10.4 percent median level of past attainment for an adjusted DBE goal of 15.1 percent. (For simplicity, GDOT could round this figure to 15 percent, consistent with what it has done when setting an annual DBE goal in the past.)

Option 3 – making no step 2 adjustment. USDOT regulations clearly state that an agency such as GDOT is required to review a broad range of information when considering whether a step 2 adjustment is necessary. GDOT, however, is not required to make such an adjustment as long as it can explain what factors were considered and why no adjustment is warranted.

[9] USDOT. Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program. http://www.osdbu.dot.gov/DBEProgram/tips.cfm.

CHAPTER 9.
Summary of Evidence from Marketplace and Disparity Analyses

The balance of the report presents information that will assist GDOT when setting an overall DBE goal (Chapter 10), projecting the maximum feasible portion of the overall DBE goal to be met through neutral means (Chapter 11) and designing components of its implementation of the program following the federal regulations (Chapter 12). Before proceeding to these analyses, it is useful to summarize the information from the marketplace and disparity analyses in earlier chapters.

A. Marketplace Analyses

There is evidence of disparities in the Georgia marketplace for minorities and women pertaining to:

- Entry and advancement;
- Business ownership;
- Access to business capital, bonding and insurance; and
- Success of businesses.

The evidence of barriers to doing business in the transportation contracting marketplace includes information collected in telephone interviews with Georgia minority-, women- and majority-owned businesses. Chapter 4 and Appendices D, E, F and G present results of BBC's marketplace analyses.

There is also qualitative evidence of discrimination against minority- and women-owned businesses in the Georgia marketplace from a number of disparity studies local agencies have completed in the past three years. The qualitative information from these disparity studies is consistent with BBC's quantitative analyses of marketplace conditions in Georgia, as discussed in Chapter 4.

B. Disparity Analyses for GDOT Contracts

BBC examined GDOT construction and engineering-related contracts from 2009 through June 2011. BBC separately analyzed GDOT's FHWA-funded contracts, for which DBE contract goals often applied, and GDOT's state-funded contracts (on which no goals applied).

- The utilization of minority- and women-owned firms in GDOT contracts when the Federal DBE Program did not apply (state-funded contracts) was substantially below what might be expected from the availability analysis. There were substantial disparities for white women-owned firms and African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned businesses.

- Even when the Federal DBE Program did apply (GDOT's FHWA-funded contracts), there were substantial disparities between the utilization and availability of MBE/WBEs overall. When examined by group, there were substantial disparities for African American-, Asian-Pacific American- and Subcontinent Asian American-owned firms on GDOT's FHWA-funded contracts.

There were also disparities in the overall utilization of MBE/WBEs on local agency construction contracts that received funds administered through GDOT.

C. Exploration of Causes of the Disparities

BBC conducted a number of analyses to further explore the disparities identified for minority- and women-owned firms discussed above.

- **Regions and time periods.** As discussed in Chapter 8, BBC identified disparities in GDOT's utilization of MBE/WBEs across regions of the state. There were disparities for 2009 as well as the 2010 through June 2011 time period.

- **GDOT construction and engineering contracts.** There were disparities for MBE/WBEs overall for state-funded construction contracts, and for FHWA-funded contracts with application of DBE contract goals. BBC also found disparities for MBE/WBEs on GDOT engineering-related contracts.

- **Prime contracts.** There were disparities in the utilization of MBEs and WBEs as prime contractors on GDOT construction contracts (except for Subcontinent Asian American-owned firms). For small construction contracts, BBC identified disparities in the utilization of MBE/WBEs as prime contractors. There were disparities for MBE/WBEs on engineering-related prime contracts as well.

  Certain aspects of GDOT's contracting process appear to negatively affect prime contract opportunities for all small firms. Such components may have more of a negative effect on minority- and women-owned firms. Many of these components are required under state law.

- **Analysis of potential overconcentration.** Based on analyses of DBE participation by type of work, GDOT may need to consider steps to ensure that future DBE participation is not overconcentrated in trucking (in accordance with 49 CFR Section 26.33).

D. Analysis of Complaints from DBEs and Other Firms

The BBC study team reviewed written complaints GDOT received between January 2009 and June 2011 related to operation of the Federal DBE Program. Complaints made by DBEs and other firms related to:

- Improper delay or withholding of payment by the prime contractor;
- Non-use of a listed DBE subcontractor and fraudulent reporting of DBE use; and
- Other fraudulent actions.

The complaints made to GDOT indicate efforts by some prime contractors to avoid compliance with the Federal DBE Program. The complaints suggest that DBE subcontractors are unfairly treated by some prime contractors on GDOT contracts. Appendix I reviews these complaints in detail.

The types of complaints made to GDOT are consistent with qualitative information compiled in the local government disparity studies summarized in Chapter 4.

E. Summary

There appears to be a continued need for GDOT efforts to open transportation contracting opportunities to minority- and women-owned businesses.

- Quantitative and qualitative information indicate disadvantages for minorities and women and for minority- and women-owned firms in the Georgia marketplace.
- Even with implementation of the Federal DBE Program, there was underutilization of MBE/WBEs overall in GDOT's FHWA-funded contracts from 2009 through June 2011.
- There were also disparities in the use of MBE/WBEs on local agency contracts that use FHWA and/or state funds administered by GDOT.
- The Federal DBE Program does not apply to GDOT's state-funded contracts. Without application of DBE contract goals on GDOT contracts:
    - The utilization of MBE/WBEs was less than one-quarter (22%) of the level that might be expected based on the availability of minority- and women-owned firms for this work.
    - There were substantial disparities in the utilization of African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American- and white women-owned firms on GDOT's state-funded contracts.
- There is a need for GDOT to explore additional measures to open more prime contract opportunities to minority- and women-owned firms and to help build capabilities of minority- and women-owned firms to perform that work.

- GDOT may also need to consider steps to ensure that future DBE participation is not overconcentrated in trucking.

Past complaints to GDOT that were submitted by DBEs suggest that GDOT will need to continue close monitoring of prime contractor compliance with the Federal DBE Program.

The information concerning Georgia marketplace conditions and barriers that MBE/WBEs may face is important as GDOT considers:

- Setting its overall annual goal for DBE participation;
- Determining the extent to which it can achieve its DBE goal through neutral efforts and the specific groups that might be included in certain Program measures such as DBE contract goals; and
- Specific measures to be included in its implementation of the Federal DBE Program.

CHAPTER 8.
Exploration of Possible Causes of Any Disparities

Five areas of questions emerge from the disparities observed in MBE/WBE utilization on GDOT contracts:

A. Are disparities found in some regions of the state and not in others?

B. Is there any difference in disparities for 2009 compared with January 2010 through June 2011?

C. Are there disparities for GDOT construction contracts?

D. Are there disparities for GDOT engineering contracts?

E. Is there any evidence of "overconcentration" of DBEs in certain types of work?

Answers to these questions may be relevant as GDOT considers whether all or how much of its overall annual DBE goal can be met through race- and gender-neutral means and what measures may be needed in implementing the federal regulations. In accordance with the Federal DBE Program, results may also help the Department, if necessary, identify the specific racial/ethnic/gender groups that might be included in any future race- or gender-conscious programs.

A. Are disparities found in some regions of the state and not in others?

The study team examined disparity analysis results individually for four regions of Georgia:

- North;
- Atlanta Metropolitan Area;
- Middle; and
- South.

The disparity results for these regions mirrored those for the state as a whole.

MBE/WBE utilization and availability were very similar for the North, Middle and South regions when examining combined FHWA- and state-funded GDOT contracts. MBE/WBE availability was in the range of 20 to 25 percent in these regions and utilization of minority- and women-owned firms totaled between 12.7 to 14.3 percent. The disparity index was 50 in North region, 66 in South Georgia and 71 in Middle Georgia, each indicating a substantial disparity for MBE/WBEs overall, even with the DBE Program in place for many of these contracts.

MBE/WBE utilization for 2009 through June 2011 was somewhat lower for GDOT contracts in the Atlanta Metropolitan Area (8.2%), resulting a correspondingly more severe disparity— an index of 37.

In sum, it does not appear that disparities in the utilization of MBE/WBEs in GDOT contracts are found in some regions of the state and not in others. Appendix K provides detailed utilization and disparity results for each region, beginning with Figure K-35.

B. Is there any difference in disparities for 2009 compared with January 2010 through June 2011?

BBC examined whether there was any trend in MBE/WBE utilization and overall disparity results between the first year of the study period and the ending 18 months.

- GDOT utilization of minority- and women-owned firms was 13.5 percent for contracts GDOT awarded in 2009 and 11.4 percent for contracts awarded from January 2010 through June 2011.

- Disparities in overall utilization of MBE/WBEs were similar between these time periods (disparity index for MBE/WBEs of 59 for 2009 and 54 for 2010–June 2011).

K-29 and K-32 in Appendix K provide detailed results for these two time periods.

C. Are there disparities for GDOT construction contracts?

BBC examined several questions concerning disparity results for GDOT construction contracts:

1. Are there disparities for MBEs and WBEs on GDOT construction contracts?

2. Is it possible that MBE/WBE capacity is "used up" on FHWA-funded construction contracts, which would cause low MBE/WBE utilization on state-funded contracts?

3. Do results differ for construction prime contracts and subcontracts?

4. Are there disparities in the use of MBE/WBE prime contractors for small construction contracts?

5. Are there different results for subcontracts on FHWA-funded contracts and state-funded construction contracts?

6. Does analysis of MBE/WBE bids on construction prime contracts help to explain disparity results?

7. Do GDOT bid processes for construction contracts explain any of the disparities?

1. Are there disparities for MBEs and WBEs on GDOT construction contracts? As discussed in Chapter 6, 12.7 percent of GDOT construction contract dollars from 2009 through June 2011 went to minority- and women-owned firms. However, MBE/WBE utilization on state-funded contracts (where GDOT set no DBE contract goals) was just 4.8 percent compared with 13.2 percent MBE/WBE utilization on FHWA-funded contracts, for which GDOT typically set DBE contract goals.

BBC compared utilization of minority- and women-owned firms on GDOT construction contract with what might be expected based upon the availability analysis for those contracts. Combining FHWA- and state-funded construction contracts, the 12.7 percent MBE/WBE utilization was substantially below the 21.7 percent utilization that might be expected from the availability analysis. The disparity index was 58, as shown in Figure K-5 of Appendix K. There were substantial disparities for African American- and Asian-Pacific American-owned firms but not for other groups. Disparity results for just FHWA-funded contracts were very similar (see Figure 8-1 on the following page and Figure K-6 in Appendix K).

BBC examined whether the lower MBE/WBE utilization on state-funded contracts could be explained by different types, sizes and locations of these contracts.

- The availability analysis indicates higher MBE/WBE availability for state-funded contracts (25.5%) than for FHWA-funded contracts (21.5%). Therefore, differences in types, sizes and locations of contracts cannot explain the differences in MBE/WBE utilization between state- and FHWA-funded contracts. Figures K-6 and K-7 in Appendix K provide these results.

- The disparity index for MBE/WBEs for GDOT state-funded construction contracts was 19, a substantial disparity. In other words, MBE/WBEs received less than 20 cents of every dollar of utilization on state-funded construction contracts that might be expected from the availability analysis for those contracts.

- There were substantial disparities in the utilization of WBEs and African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned firms on state-funded contracts.

- The absence of DBE contract goals is the key difference in the level of MBE/WBE participation on GDOT's state- and FHWA-funded construction contracts, which appears to affect results for each MBE/WBE group.

Figure 8-1 compares disparity results for GDOT's FHWA- and state-funded construction contracts.

Figure 8-1. Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on GDOT FHWA- and state-funded construction contracts, 2009–June 2011

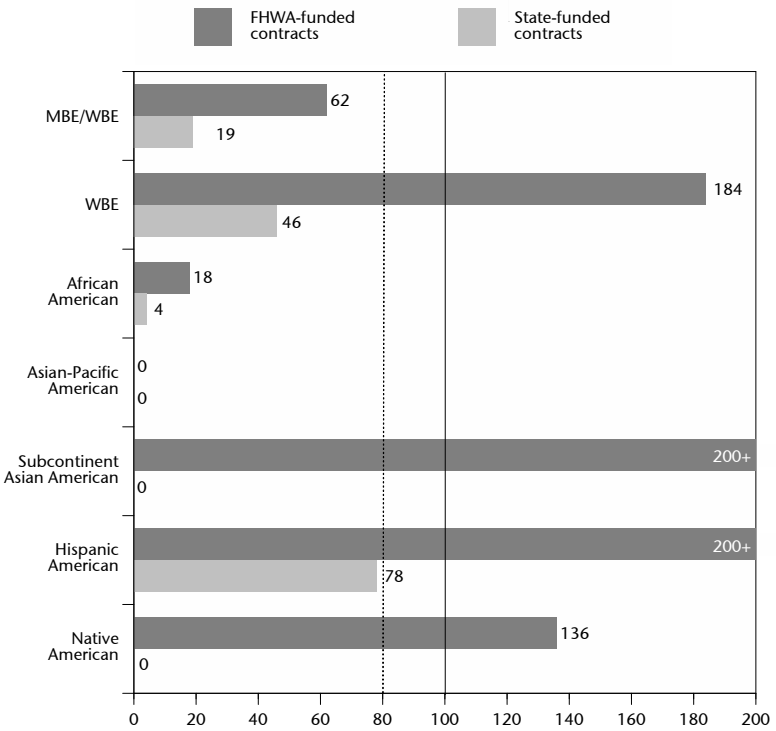
Note:

Number of contracts/subcontracts analyzed is 3,740 for FHWA-funded and 410 for state-funded contracts.

For more detail, see Figures K-6 and K-7 in Appendix K.

Source:

BBC Research & Consulting.



2. Is it possible that MBE/WBE capacity is "used up" on FHWA-funded construction contracts, which would cause low MBE/WBE utilization on state-funded contracts? BBC explored whether low MBE/WBE utilization on GDOT state-funded contracts could be caused by MBE/WBEs being drawn to participate in FHWA-funded contracts (for which DBE contract goals often apply), which exhausted their "capacity." This line of reasoning follows that MBE/WBEs would then have little remaining capacity to work on state-funded construction contracts. Although this possibility may occur for certain individual DBE contractors, this theory does not appear to accurately portray overall MBE/WBE utilization and availability on GDOT contracts.

- As explained in Chapter 5, BBC's availability analysis incorporates the "bid capacity" of minority-, women- and majority-owned firms as reported in the telephone interviews with those firms. (Firms are only counted for contracting opportunities that are of a size that they have bid on or performed in the past.) Firms are treated equally in the availability analysis based on the information collected from each business without regard to the race/ethnicity/gender ownership. Therefore, the availability analysis incorporated any differences in bid capacity between MBE/WBEs and majority-owned firms. Disparities were still evident for state-funded contracts.

- Most of the MBE/WBEs counted in the availability analysis are not DBE-certified. (As mentioned in Chapter 5, fewer than one-in-five MBE/WBEs in the availability analysis were certified as DBEs.) Even if some DBEs chose to concentrate on contracts with DBE goals, such firms would represent only a portion of the available MBE/WBE firms.

- In the 2009 through June 2011 study period, the "gap" between actual MBE/WBE utilization on FHWA-funded contracts and what might be expected from the availability analysis amounted to $162 million. This amount exceeds the total dollars of state-funded construction contracts examined from 2009 through June 2011 ($111 million). There is no evidence that, on aggregate, MBE/WBE "capacity" was used up on FHWA-funded contracts. If MBE/WBEs won all state-funded prime, $41 million in "gap" between overall utilization and availability would still remain.

- There was more utilization of DBEs (2.7%) than non-DBE-certified MBE/WBEs (2.1%) on state-funded construction contracts, a result that is inconsistent with the theory that FHWA-funded contracts with DBE contract goals use up the "capacity" of DBEs faster than non-DBEs.

3. Do results differ for construction prime contracts and subcontracts? BBC explored differences in MBE/WBE utilization for construction prime contracts and subcontracts.

Utilization. Minority- and women-owned firms received $37 million of the $1.3 billion in prime contract dollars for GDOT's FHWA- and state-funded construction contracts from 2009 through June 2011. The $37 million of utilization was about 3 percent of total prime contract dollars. DBEs accounted for 1.8 percentage points of the 3 percent MBE/WBE utilization as prime contractors, as shown in the left side of Figure 8-2.

Subcontract dollars on GDOT construction contracts totaled $545 million from 2009 through June 2011, and minority- and women-owned firms received $191 million of this total. As shown in the right side of Figure 8-2, MBE/WBEs accounted for 35 percent of subcontract dollars on GDOT construction contracts (DBEs represented 29 percentage points of this utilization). Because most GDOT construction projects (and contract dollars) during the study period were FHWA-funded, DBE contract goals affected the results for subcontract utilization examined in Figure 8-2.

Figure 8-2.
MBE/WBE and DBE share of FHWA- and state-funded prime contract and subcontract dollars on GDOT construction projects, 2009–June 2011

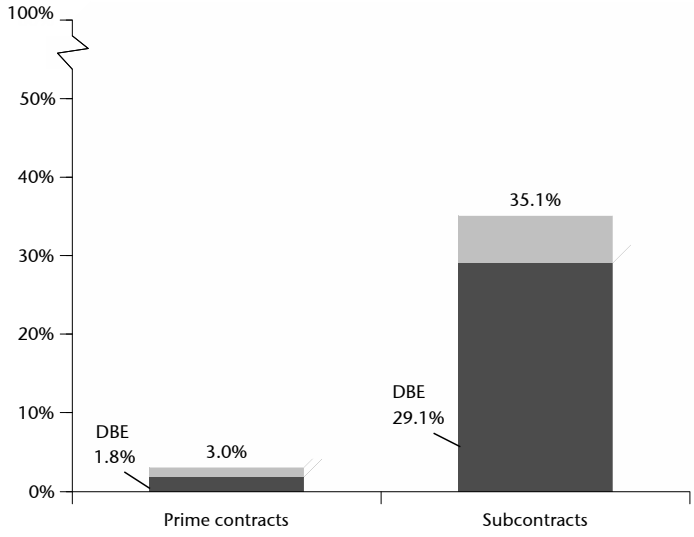
Note:

Number of contracts/subcontracts analyzed is 734 for prime contracts and 3,416 for subcontracts.

For more detail and results by group see Figures K-14 and K-23 in Appendix K.

Source:

BBC Research & Consulting from GDOT contract data.



Disparity analysis. Figure 8-3 shows disparity indices for construction prime contracts (darker bars) and subcontracts (lighter bars) for each racial/ethnic/gender group. Overall, there were large disparities for MBE/WBEs for construction prime contracts (disparity index of 14) but not for subcontracts (disparity index of 143) when examined combined FHWA- and state-funded construction contracts. Results differed somewhat by racial/ethnic/gender group, however.

- Out of the 734 construction contracts examined, BBC identified no prime contracts going to African American-, Asian-Pacific American-, or Native American-owned firms. Therefore, the disparity index for construction prime contracts for each of these groups was 0. Utilization of Hispanic American-owned firms as prime contractors was also low (0.1%) compared with the availability of those firms for GDOT construction prime contracts (0.5%). The disparity index for Hispanic American-owned firms was 18.

- BBC identified 36 construction prime contracts going to white women-owned firms. WBEs received 2.6 percent of prime contract dollars for these construction contracts, still less than the 4.1 percent that might be expected based upon WBE availability for that work. The disparity index for construction prime contracts for WBEs was 63, indicating a substantial disparity.

- Although just one construction prime contract went to a Subcontinent Asian American-owned firm, the prime contract dollars were large enough ($3.4 million) that utilization of Subcontinent Asian American-owned firms was more than twice what would be expected from the availability analysis (disparity index of more than 200 as indicated in Figure 8-2).

Figure 8-3 also presents disparity indices for construction subcontracts.

Even with application of DBE contract goals for most of these construction projects, there were still disparities in the utilization of African American- and Asian-Pacific American-owned firms as subcontractors. Utilization of African American-owned firms (8.2%) was substantially below what might be expected from the availability analysis for construction subcontracts (13.8%), resulting in a disparity index of 60. Just two subcontracts went to Asian-Pacific American-owned firms. The disparity index for Asian-Pacific American-owned firms rounded to 0.

Utilization of WBEs and Subcontinent Asian American-, Hispanic American- and Native American-owned firms as subcontractors on GDOT construction contracts exceeded what might be expected from the availability analysis. Application of DBE contract goals for many of these contracts is one potential reason for these results. (Page 8 of this chapter examines results for construction subcontracts in more detail.)

Figure 8-3.
Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on GDOT FHWA-and state-funded construction projects, 2009—June 2011

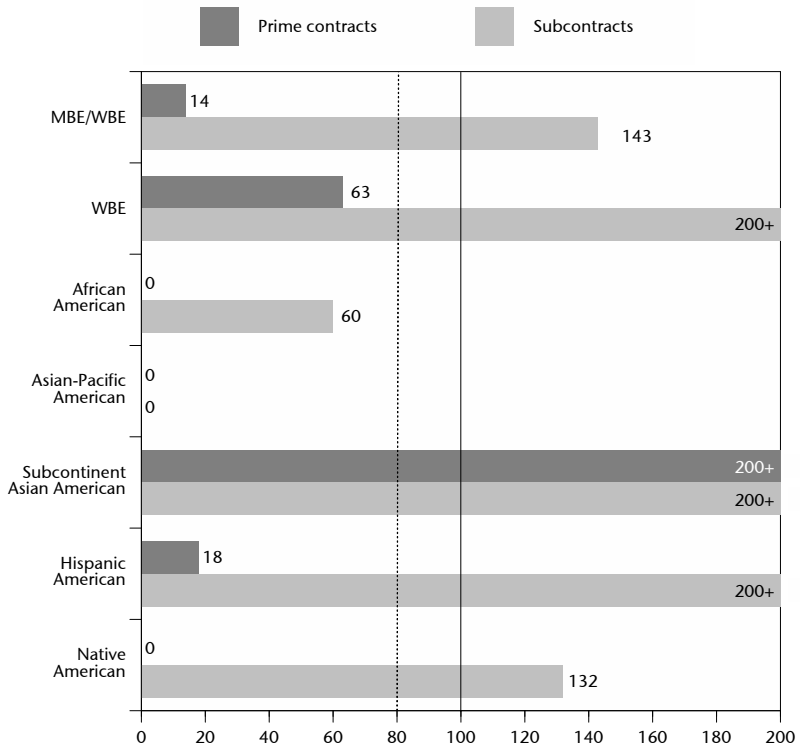
Note:

Number of contracts/subcontracts analyzed is 734 for prime contracts and 3,416 for subcontracts.

For more detail and results by group see Figures K-14 and K-23 in Appendix K.

Source:

BBC Research & Consulting.



4. Are there disparities in the use of MBE/WBE prime contractors for small construction contracts? The size of GDOT construction prime contracts may present a barrier for certain MBE/WBE groups. A number of contractors interviewed by the study team indicated that size of GDOT contracts was a barrier to bidding (see Appendix F). To explore this issue, BBC examined MBE/WBE utilization and availability as prime contractors for construction contracts of $2 million or less.

As shown in Figure 8-4, utilization of MBE/WBEs as prime contractors was only somewhat higher for small construction contracts (5%) than all contracts (4%).

Figure 8-4.
MBE/WBE and DBE share of FHWA- and state-funded construction prime contract dollars by contract size, 2009—June 2011

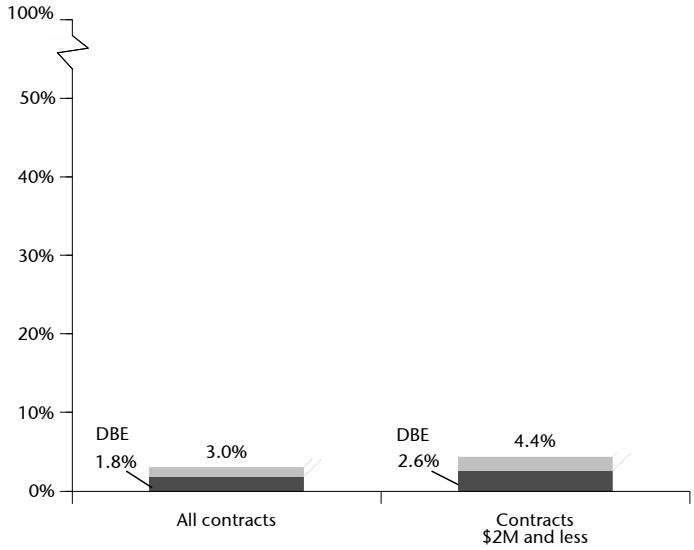
Note:

Number of all prime contracts analyzed is 734 for all contracts and 554 for contracts of $2 million and less.

For more detail and results by group see Figures K-14 and K-39 in Appendix K.

Source:

BBC Research & Consulting from GDOT contract data.



MBE/WBE utilization as prime contractors on construction contracts up to $2 million was substantially less than what might be expected from the availability analysis. The resulting disparity index for MBE/WBEs overall was 16, and there were substantial disparities for all racial/ethnic/gender groups. Figure K-39 in Appendix K presents these results.

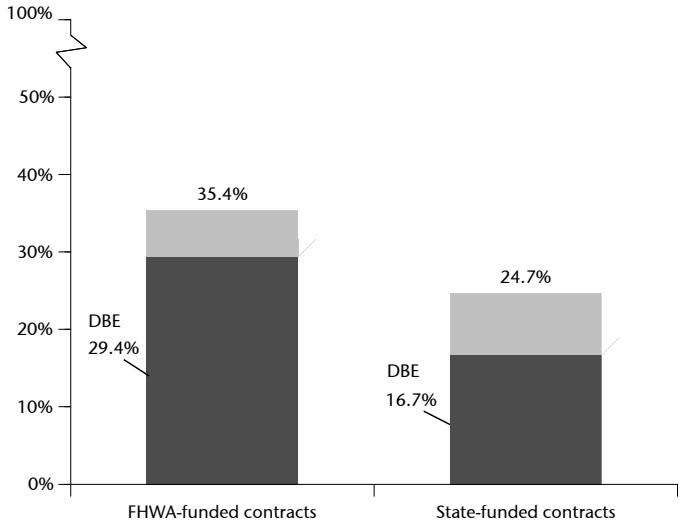
5. Are there different results for subcontracts on FHWA-funded contracts and state-funded contracts? Utilization of minority- and women-owned firms as subcontractors on GDOT construction contracts may be affected by whether the DBE contract goals program is applied. BBC explored differences in MBE/WBE utilization as subcontractors as well as disparity results for FHWA- and state-funded contracts. (DBE contract goals only applied for FHWA-funded contracts.)

Utilization. Figure 8-5 shows that MBE/WBE utilization as subcontractors was higher for FHWA-funded construction contracts (left side of Figure 8-5) compared with state-funded construction contracts (right side of Figure 8-5). MBE/WBEs received 35 percent of subcontract dollars on FHWA-funded projects compared to25 percent for state-funded contracts. DBE-certified firms accounted for a higher portion of subcontract dollars on FHWA-funded contracts (29%) compared with state-funded contracts (17%).

White women-owned firms accounted for about two-thirds of the MBE/WBE utilization as subcontractors.

Figures K-24 and K-25 in Appendix K provide detailed information on the utilization of subcontractors by racial/ethnic/gender group.

Figure 8-5.
MBE/WBE and DBE share of GDOT FHWA- and state-funded construction subcontract dollars, 2009—June 2011



Note:

Number of subcontracts analyzed is 3,179 for the FHWA-funded contracts and 237 for state-funded contracts.

For more detail and results by group see Figures K-24 and K-25 in Appendix K.

Source:

BBC Research & Consulting from GDOT contract data.

Disparity analysis. Figure 8-6 examines disparity results for subcontracts on FHWA- and state-funded construction contracts.

- There were disparities between utilization and availability for both state-funded subcontracts (lighter bars) and FHWA-funded subcontracts (darker bars) for African American- and Asian-Pacific American-owned firms.
- Utilization of Subcontinent Asian American- and Native American-owned firms as subcontractors exceeded availability for FHWA-funded construction contracts, but none of the subcontracts examined for state-funded construction contracts went to those firms. (Again, no DBE contract goals applied to state-funded contracts.)
- Utilization of white women-owned firms and Hispanic American-owned businesses as subcontractors exceeded availability for both FHWA- and state-funded contracts.

Figure 8-6. Disparity indices for MBE/WBE utilization as subcontractors on GDOT FHWA-and state-funded construction projects, 2009–June 2011

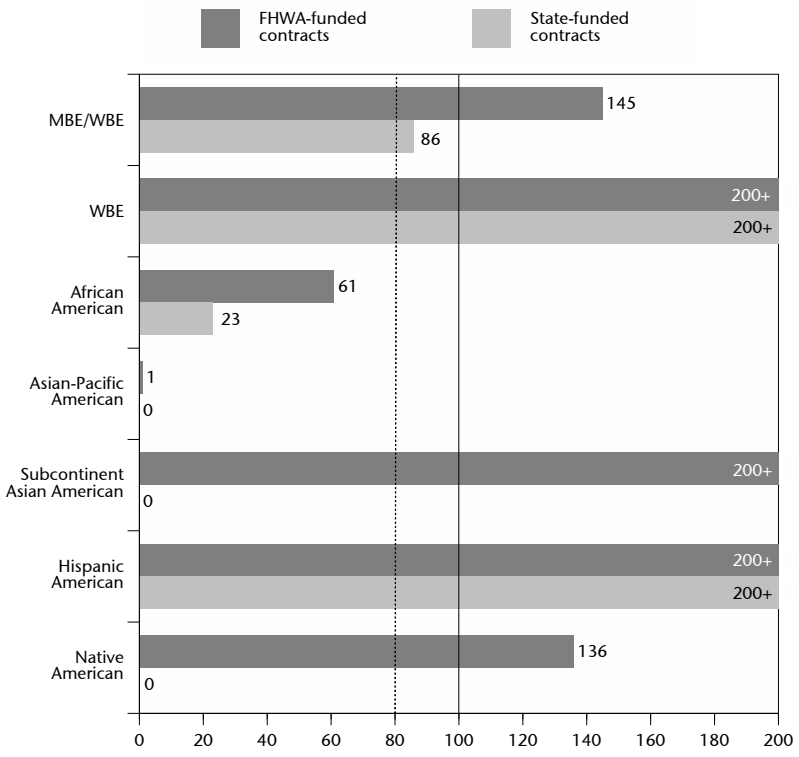
Note:

Number of subcontracts analyzed is 3,179 for the FHWA-funded contracts and 237 for state-funded contracts.

For more detail and results by group see Figures K24 and K-25 in Appendix K.

Source:

BBC Research & Consulting.

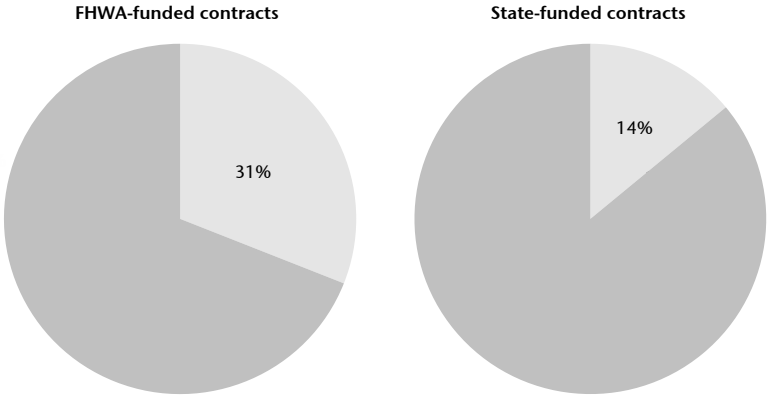


BBC also considered whether there was evidence that prime contractors self-performed more of the work (and subcontracted less of the project) when there were no DBE contract goals.

- As shown in Figure 8-7, 14 percent of state-funded construction contract dollars went to subcontractors (including MBE/WBE and non-MBE/WBEs).
- Subcontracts accounted for 31 percent of the dollars of FHWA-funded construction contracts.

In addition to DBE contract goals, factors such as types of projects may also affect the relative amount of subcontracting on FHWA- and state-funded construction contracts.

Figure 8-7.
Subcontracting as a percentage of total construction contract dollars on FHWA-and state-funded contracts, 2009–June 2011



Source: BBC Research & Consulting from GDOT contract data.

6. Does analysis of MBE/WBE bids on construction prime contracts help to explain disparity results? BBC analyzed bid information for GDOT construction contracts from 2009 through June 2011. In total, 3,246 bids were submitted for these 730 contracts.[1]

Relative number of bids from MBE/WBEs. MBE/WBEs submitted 192 (5.9%) of the 3,246 bids:

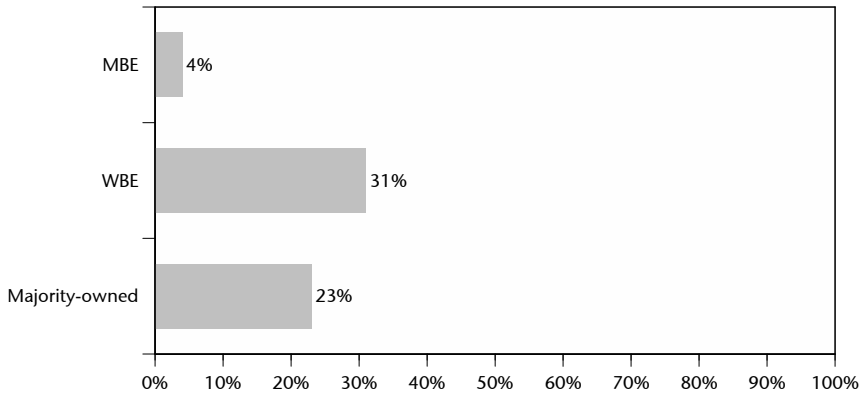
- A total of 75 bids on these prime contracts (2.3% of all bids) came from minority-owned firms (seven different firms); and
- 117 bids (3.6% of all bids) came from WBEs (eight different firms).

The proportion of bids from MBEs and from WBEs was low compared with the share of firms available for prime construction contracts that were MBEs (18%) and WBEs (14%).

BBC also examined the proportion of firms prequalified to bid on GDOT construction prime contracts. Based on BBC's analysis of GDOT's prequalification database as of 2011, 7 percent of prequalified firms were MBEs and 11 percent were WBEs.[2] MBEs' and WBEs' share of bids on GDOT construction prime contracts was also below what might be indicated from the representation of MBEs and WBEs in GDOT's prequalification database. (Prequalification for GDOT construction contracts is discussed in detail in the following pages.)

Success of bids. As shown in Figure 8-8, just 4 percent of the bids submitted by MBEs resulted in contract awards, far below the 23 percent win rate found for majority-owned firms and 31 percent win rate for WBEs.

Figure 8-8. Proportion of bids on GDOT construction contracts that were winning bids, 2009–June 2011



Note:
Based on analysis of 3,246 bids on 730 contracts.

Source:
BBC Research & Consulting from GDOT contract records.

7. Do GDOTs bid processes for construction contracts explain any of the disparities? BBC further explored the success rate of MBE bidders on construction contracts, and why the number of bids from MBEs and WBEs were less than what might be expected given representation of MBE/WBEs among transportation construction prime contractors.

[1] The 730 contracts account for nearly all GDOT construction contracts examined as part of this study. Bid data were not available for a small number of construction contracts.

[2] Subcontractors go through a similar "registration" process. MBEs accounted for 25 percent and WBEs were 28 percent of preregistered firms in 2011 based upon BBC's analysis.

GDOT awards construction contracts to low bidders (that are deemed responsive and responsible). Compared with other groups, BBC found that MBE bidders were much less likely to be the low bidder among the bids examined. There was no indication that MBE bids were not considered by GDOT.

BBC examined GDOT requirements for bidding on its construction contracts, processes for notifying potential bidders of construction contract opportunities, and methods for selecting a prime contractor to perform the work to further explore the relative number of MBE and WBE bids.

State code. Georgia Code Title 32 governs maintenance and construction of public roads and services ancillary to that mission, such as consulting. GDOT follows these requirements and other state law pertaining to public works contracts in its contracting practices.

Bonding. Payment and performance bonds are required under Georgia state law for public works contracts estimated to exceed $100,000. Bidders on GDOT construction contracts are also required to submit a bid bond.

As discussed in Chapter 4, BBC asked firms completing availability telephone interviews:

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

Among firms reporting that they had obtained or tried to obtain a bond, minority- and women-owned firms were more than twice as likely as majority-owned firms to report difficulties. This information suggests that the bonding requirements on public works contracts in Georgia may have a negative impact on minority- and women-owned firms.

Advertisement of invitations to bid. Public bidding of GDOT construction contracts is generally required for contracts exceeding $100,000. BBC researched how GDOT makes construction contract opportunities known to potential bidders.

- GDOT advertises construction contract bid opportunities on its website. Prime contractors, subcontractors and suppliers interested in a project can download needed bid documents from the GDOT website.
- Private bid services such as Dodge Reports also provide information on GDOT contracts that are available for bid.

It does not appear difficult to learn of GDOT contract opportunities if potential bidders are familiar with GDOT's process for communicating those opportunities. As discussed in Chapter 4, however, BBC's telephone interviews with transportation contracting firms in Georgia conducted as part of the availability analysis found that minority- and women-owned firms were more likely than majority-owned firms to identify learning of GDOT bid opportunities as a barrier to doing business. (Further GDOT research may be warranted to explore why minority- and women-owned firms were more likely to report difficulties learning of GDOT bid opportunities.)

Bid process. Firms seeking to bid on a GDOT construction prime contract follow the process below:

- The firm must be prequalified for the GDOT project.
- The business must submit a request for eligibility to bid (at no charge).[3]
- The firm submits a bid through GDOT's electronic bidding system.

Prequalification is discussed below.

Prequalification requirement for construction prime contractors (and certain subcontractors). GDOT applies the prequalification requirement for construction contracts over $2 million.[4] [5]

General requirements for GDOT prequalification are set forth in state law:

- GDOT must prequalify firms before they can be eligible to bid on certain construction contracts or perform work as a subcontractor on a GDOT contract.[6]
- Every contractor desiring to be qualified to bid or subcontract must file an application including, among other information:
  - A financial statement;
  - A complete questionnaire regarding the contractor's organization and the work performed by such contractor; and
  - A statement of equipment owned or leased by such contractor.
- GDOT must assign "maximum capacity" ratings to contractors and subcontractors.

[3] Prior to the bid letting date, GDOT posts the Eligible Bidders List for each contract, noting where the eligible bidder is a subcontractor, manufacturer or supplier.

[4] Prime contractors do not have to be prequalified to bid on GDOT construction contracts less than $2 million as long as they have no more than $4 million in remaining work on their current combined GDOT and non-GDOT contracts. If the additional contract would put a contractor over $4 million in current GDOT work, the firm must be prequalified in order to bid on that contract.

[5] According to GDOT staff, many firms seek prequalification with GDOT because it helps them win work with local governments, even if they have no intention of bidding on future GDOT work.

[6] There are certain waivers available for specialty trade contractors.

The prequalification process appears to have four effects on potential prime contractors:

- During the study period, the time required for submission and GDOT consideration of prequalification information may have delayed some firms from being able to bid on GDOT construction contracts of $2 million or more, although GDOT has recently shortened its approval timeframe.[7]

- Firms can be denied the opportunity to bid on GDOT contracts of $2 million or more if they do not pass the prequalification process.

- Once they are prequalified, GDOT's requirements limit the size of GDOT prime contracts firms can pursue.

- Businesses are limited in the total dollar amount of GDOT work they can have under contract that remains to be performed, as explained below.

GDOT tracks the current work of an apparent low bidder through a "certification of capacity" submitted by the contractor. Within one day of being the apparent low bidder, the prime must submit a list of its current contracts with remaining contract amounts. If a bidder is apparent low bidder on multiple GDOT contracts during one bid letting, the bid review committee can decide whether to still award it the new work. If a firm is not prequalified for the combined amount, GDOT could defer the award until the firm gets properly prequalified.

GDOT calculates a "maximum capacity" rating for contractor prequalification through a somewhat complicated formula:

- GDOT begins by scoring the contractor's past work performance on GDOT contracts (scale from 0 to 10, with 10 as the highest score), and then doubles that value to get an "ability factor."

- GDOT then makes a financial calculation that considers the firm's assets and liabilities. The financial calculation subtracts the firm's current liabilities from its current assets and then adds in the value of plant and equipment used for road construction (with some consideration of net deferred assets[8]).

- The "maximum capacity" factor is calculated by multiplying the "ability factor" by the result of the financial calculations.

Capacity is a snapshot at a certain time, and firms can request to be re-evaluated after projects are completed. GDOT's prequalification process for construction contractors does not consider work classes.

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[7] GDOT reported that there was a backlog of prequalification processing in the past few years because stimulus funding and the poor economy created more interest in public sector work in the transportation contracting industry. Sometimes it took six months to be approved, but the process could require 24 months depending on the firm. GDOT reports that, as of 2012, the GDOT approval process typically requires about two weeks.

[8] A value equal to 60 percent of net deferred assets (other assets not used for road & bridge) less deferred liabilities (longer than 1 year) is added to the value of current assets less current liabilities.

This process appears to generate higher "capacity" values for contractors that:

- Have worked for GDOT in the past and have received high scores for that work.[9]
- Have more equity in the firm, especially cash and accounts receivable compared with their current liabilities.
- Have more plant and equipment used for road construction.

The past experience factor may perpetuate disparities in the utilization of minority- and women-owned firms on GDOT construction contracts identified in this report.

- Firms that have not had experience on GDOT contracts have more difficulty obtaining high "capacity" values.
- Firms that have worked with GDOT are rated by GDOT staff. As with any subjective evaluation process, GDOT's system opens the possibility that firms may receive lower ratings for work based on factors that are not supported by actual performance. GDOT has some controls in place so that a negative perception of one staff person does not necessarily determine the capacity score a firm receives.[10]

Chapter 4 and related appendices in this report provide some evidence that there is not a level playing field for minority- and women-owned firms. Although the financial component of the "maximum capacity" rating may disadvantage any small firm attempting to work with GDOT as a prime contractor, it appears that it may have more negative impact on minority- and women-owned firms.

As explained below, businesses performing large subcontracts often need to go through a prequalification process as well, even if they do not bid as prime contractors.

Registration requirement for subcontractors. Subcontractors must be registered by GDOT to perform subcontracts on GDOT construction projects. The process for determining bid capacity for subcontractors is similar to prequalification for prime contractors, except that it is solely based on GDOT evaluation of "ability" with no consideration of financial information. (A number of years ago, GDOT only required registration for subcontractors with work over $500,000.)

Subcontractor bid capacity is calculated by multiplying a firm's "ability factor" by a standard financial rating set at $110,000. If the ability score is "5.5" for the firm, its ability is then 11 (after doubling the score). The firm's bid capacity would then be 11 multiplied by the standard $110,000 financial

[9] Because firms that have not worked with GDOT have no evaluation scores for past GDOT projects, GDOT applies a default evaluation score of 5.5 for new contractors, which leads to an ability factor of 11 (after doubling the score), as long as the contractor provides sufficient letters of recommendation from other clients to support that figure.

[10] GDOT rates work performance of each contractor and subcontractor for each GDOT construction contract, or every 12 months if the contract runs longer than a year. The project manager at the district level is responsible for the scoring. Construction staff at GDOT headquarters sign off on the rating. A three-person committee at GDOT reviews prequalification applications.

rating, or $1.21 million. The maximum bid capacity resulting from subcontractor registration is $2.2 million if it received an evaluation score of 10, which is then doubled and multiplied by $110,000.[11]

As with prime contractors that are new to GDOT, a new subcontractor has no rating of its past projects. The new subcontractor receives a score of 5.5 (if supported by references), which translates to an ability factor of 11. Multiplying by $110,000, this new subcontractor would have a bid capacity of $1.21 million.

If a firm has not done prior GDOT work (which means it has a bid capacity of $1.21 million), and it seeks to perform a $1.5 million subcontract, the firm would have to go through the prequalification process to attempt to be granted a higher bid capacity figure. This is also true for subcontractors that would exceed their bid capacity with the new GDOT subcontract added to their current work. GDOT evaluates subcontractors' certification of capacity prior to approving the subcontractor for a new GDOT contract.

D. Are there disparities for GDOT engineering contracts?

As with construction contracts, BBC further analyzed GDOT engineering-related contracts:

1. Are there disparities for GDOT engineering-related contracts?

2. Do results differ for engineering prime contracts and subcontracts?

3. Are there different results for small engineering prime contracts?

4. How does GDOT notify firms of engineering-related contract opportunities?

5. Does GDOT's consultant selection process explain any of the disparities?

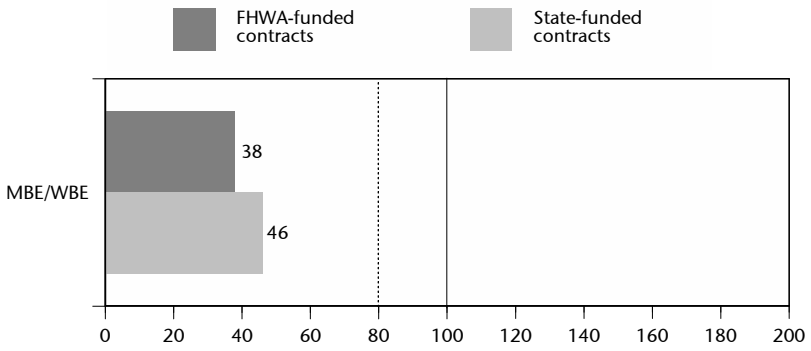
[11] A three-person committee at GDOT reviews registration applications.

1. Are there disparities for MBEs and WBEs on GDOT engineering-related contracts?
BBC also examined GDOT engineering-related contracts from 2009 through June 2011. Chapter 6 presents MBE/WBE utilization — 9.5 percent — for combined FHWA- and state-funded engineering-related contracts. As the availability analysis indicates that 24.5 percent of GDOT's engineering-related contract dollars might be expected to go to minority- and women-owned firms, the actual level of utilization was substantially below availability even with DBE goals applied on certain FHWA-funded contracts. (Figure K-8 in Appendix K provides these results.)

Similar to the analysis of GDOT construction contracts, BBC separately examined MBE/WBE utilization and availability for GDOT FHWA- and state-funded engineering contracts. No DBE contract goals applied to state-funded contracts. Because of the small number of state-funded contracts (28), Figure 8-9 focuses on combined results for MBE/WBEs.

As shown in Figure 8-9, there were disparities between the utilization and availability of MBE/WBEs on both FHWA- and state-funded engineering contracts. The disparity index for minority- and women-owned firms on state-funded engineering-related contracts was 46, similar to the index of 38 for FHWA-funded contracts. For state-funded contracts, utilization was below availability for each MBE/WBE group. There were disparities on FHWA-funded contracts for each group except for Hispanic American-owned firms. Figures K-9 and K-10 in Appendix K provide detailed results.

Figure 8-9.
Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on GDOT FHWA- and state-funded engineering contracts, 2009–June 2011



Note:

Number of contracts/subcontracts analyzed is 650 for FHWA-funded and 38 for state-funded contracts.

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

Source:

BBC Research & Consulting.

2. Do results differ for prime contracts and subcontracts? BBC examined MBE/WBE utilization and availability as prime consultants and subconsultants on GDOT engineering-related contracts.

Utilization. Minority- and women-owned firms received $8.6 million out of the $167 million of GDOT engineering-related prime contract dollars from 2009 through June 2011. This represents a 5.2 percent level of participation for MBE/WBEs as prime consultants in engineering contracts. As shown in Figure 8-10, DBEs accounted for about one-half of the utilization of MBE/WBE prime consultants.

About $9.6 million of the $25 million of engineering-related subcontract dollars went to minority- and women-owned firms, 38 percent of GDOT engineering-related subcontract dollars. DBEs accounted for most of the dollars going to MBE/WBE subconsultants.

Figure 8-10.
MBE/WBE and DBE share of FHWA-and state-funded prime contract and subcontract dollars on GDOT engineering-related contracts, 2009–June 2011

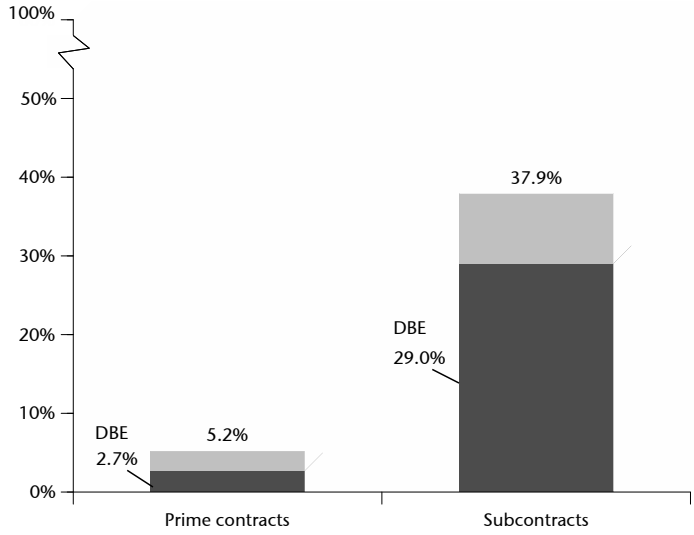
Note:

Number of contracts/subcontracts analyzed is 406 for prime contracts and 282 for subcontracts.

For more detail and results by group see Figures K-17 and K-26 in Appendix K.

Source:

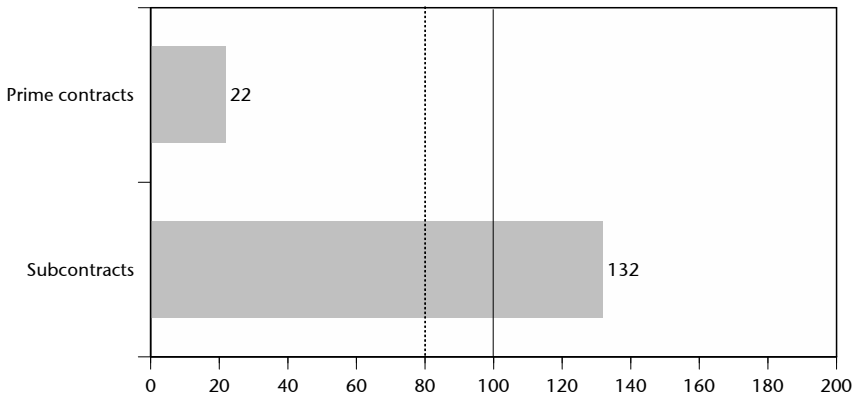
BBC Research & Consulting from GDOT contract data.



Disparity analysis. BBC identified disparities between MBE/WBE utilization and availability for engineering prime contracts. Utilization of MBE/WBEs on GDOT engineering subcontracts exceeded availability (disparity index of 132).

Figure 8-11 summarizes disparity results for MBE/WBEs overall. Figures K-17 and K-26 present disparity results for individual groups.

Figure 8-11. Disparity indices for MBE/WBE utilization as prime consultants and subconsultants on GDOT FHWA-and state-funded engineering-related contracts, 2009–June 2011



Note:

Number of contracts/subcontracts analyzed is 406 for prime contracts and 282 for subcontracts.

For more detail and results by group see Figures K-17 and K-26 in Appendix K.

Source:

BBC Research & Consulting.

Figure K-28 in Appendix K provides disparity results for subcontracts on state-funded engineering contracts, which did not have DBE contract goals. Because only 10 subcontracts were identified, it is difficult to draw any conclusions from these results.

Subcontracting as a percentage of engineering contract dollars. Subcontract data collected by BBC indicated that subcontract dollars accounted for 13 percent of engineering-related contract dollars (MBE/WBE and non-MBE/WBE subcontractors) during the study period.

3. Are there different results for small prime contracts? The study team examined whether the size of GDOT engineering-related contracts may be a barrier for MBE/WBEs. During the study period, about three-quarters of engineering-related contracts were $500,000 or less (accounting for one-sixth of total dollars going to prime consultants on engineering contracts.

As shown in Figure 8-12, utilization of MBE/WBEs as prime consultants on small contracts (3.6%) was less than for all engineering-related contracts (5.2%).

Figure 8-12.
MBE/WBE and DBE share of GDOT FHWA- and state-funded engineering prime contract dollars by contract size, 2009—June 2011

Note:

Number of all contracts analyzed is 406 for all contracts and 307 for contracts of $500,000 and less.

For more detail and results by group see Figures K-17 and K-40 in Appendix K.

Source:

BBC Research & Consulting from GDOT contract data.

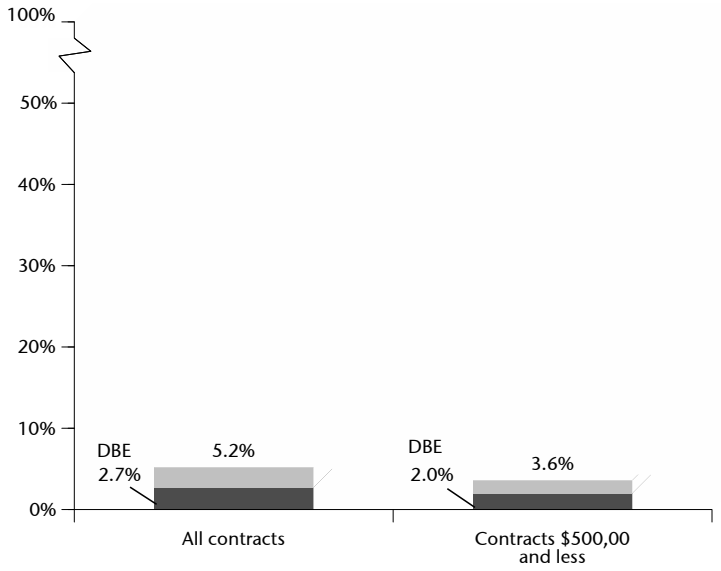


Figure 8-13 shows overall MBE/WBE disparity indices for MBE/WBEs as prime consultants for all engineering-related contracts and for contracts of $500,000 or less. The disparity index of 14 indicates a substantial disparity for MBE/WBEs as prime consultants on GDOT's small engineering-related contracts, similar to the index of 22 found for prime contracts of all sizes.

Figure K-40 in Appendix K presents detailed results for individual MBE/WBE groups.

Figure 8-13.
Disparity indices for MBE/WBE utilization as prime consultants on small and all GDOT FHWA-and state-funded engineering-related contracts, 2009—June 2011

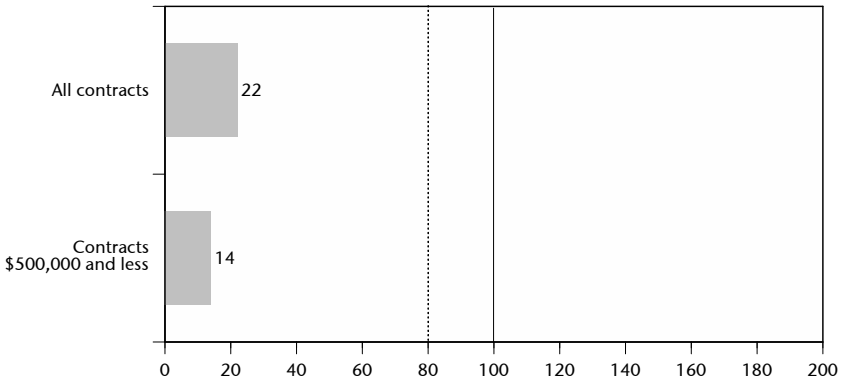
Note:

Number of all contracts analyzed is 406 for all contracts and 307 for contracts of $500,000 and less.

For more detail and results by group see Figures K-17 and K-40 in Appendix K.

Source:

BBC Research & Consulting.



4. How does GDOT notify firms of engineering-related contract opportunities? As with construction contracts, BBC reviewed GDOT's process for advertising engineering-related contract opportunities.

GDOT participates in the Georgia Procurement Registry, an online service operated by the Georgia Department of Administrative Services that notifies firms of public sector contract opportunities.

- Firms that wish to be notified of GDOT engineering-related contracts and other state and local agency contracts can subscribe to be notified of certain types of work.
- Subscribed firms are then notified when opportunities that match a firm's capabilities are posted to the registry.
- The service is free for participating firms.

This registry is the only method GDOT uses to notify firms for specific engineering-related contracts. However, GDOT does post a general schedule of projected consultant "acquisition needs" for each year on an annual basis.

As with GDOT's process for communicating construction contract opportunities, the Procurement Registry appears to be an effective means of notifying potential proposers of GDOT's engineering-related contracts as long as firms are aware of this process. (GDOT does not appear to explain the Registry or provide a link on the GDOT "Doing Business" or "Consultants" pages of its website.)

5. Does GDOT's consultant selection process explain any of the disparities? GDOT uses a qualifications-based selection process to award engineering-related contracts. Firms competing for GDOT engineering-related contracts must first be prequalified by GDOT.

Prequalification. Compared to GDOT's prequalification of construction contractors, which focuses on the *amount* of work GDOT will allow a contractor to perform at one time, GDOT's consultant prequalification process focuses on the *types* of work it will allow a firm to conduct.

GDOT specifies general classes of work (such as bridge design) that may then have many specific "area classes" for which consultants must seek GDOT prequalification. Each firm applies for GDOT prequalification by specific area class (often for multiple area classes). GDOT considers firm qualifications to perform an area class and may approve a firm for some area classes and not others. Prequalification for consultants typically takes one month, and involves a vote of a standing GDOT staff committee. Firms seeking prime contracts and firms seeking subcontracts go through the same prequalification process.

BBC examined the representation of minority- and women-owned firms among all GDOT prequalified consultants — 16 percent of prequalified firms were MBEs and 12 percent were WBEs. The proportion of GDOT prequalified firms that are MBEs and WBEs is similar to the proportion of firms in BBC's availability analysis for GDOT engineering-related prime contracts that were minority- and women-owned (15% and 8%, respectively).

Representation on the prequalification list for GDOT engineering-related contracts is only one factor in obtaining GDOT work; approval for work in specific area classes is also important. The study team

collected and analyzed prequalification evaluation results for 1,754 individual area class applications (made by 166 individual firms). Figure 8-14 presents the proportion of approvals of area class prequalification for minority-, women- and majority-owned businesses.

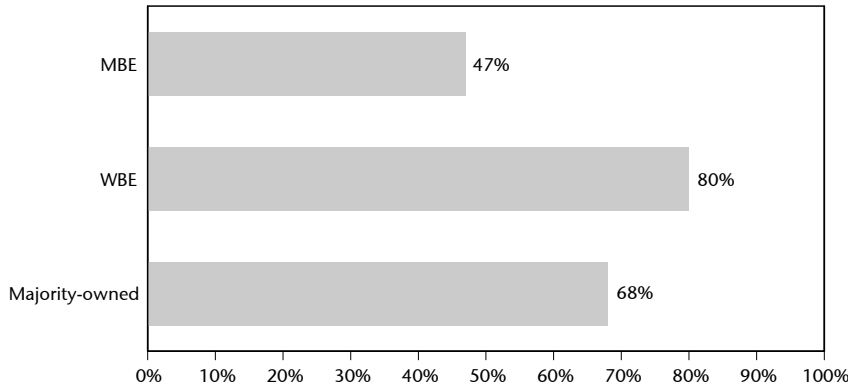
- MBEs submitted 215 area class applications and had 47 percent approved, less than the 68 percent rate at which majority-owned firms had area class applications approved.
- WBEs submitted 118 applications and were approved about 80 percent of the time.

It appears that MBEs are not as successful as WBEs and majority-owned firms when applying for area class prequalification. Figure 8-14 shows these results.

Figure 8-14. Proportion of area class applications approved by approval on GDOT, 2009—June 2011

Note:
Based on 1,754 area-applications (MBE=215, WBE=118, majority=1,421).

Source:
BBC Research & Consulting from GDOT records.



Selection process. Prequalification for engineering-related contracts does not necessarily mean that a firm will receive any GDOT work. Once they are prequalified for specific area classes, firms must learn of and submit qualifications statements for specific GDOT contracts. (Note that the prime consultant's qualifications can be supplemented by subconsultants participating in a team.)

GDOT typically begins the consultant selection process for a specific engineering-related contract by requesting that consultants respond to requests for qualifications, which are evaluated by a committee within GDOT. (Responses to RFQs are referred to as "proposals" in this report.) The GDOT committee typically evaluates consultants based on the following criteria:

- **Stability and resources.** One of the evaluation factors is the financial stability, litigation history and general history of the firm.
- **Experience and qualifications.** Evaluators consider the experience and qualifications of the proposed consultant team in light of the scope of the project, work classes involved, and GDOT policies.
- **Suitability.** GDOT reviews the ability of the firm to do the work, including specialized qualifications and the capacity of the consultant team to accomplish the work given current staff workloads.

- **Past performance.** Past performance of the firm is also considered during the evaluation process, which may include references from GDOT and other past projects well as GDOT selection committee members' experience with the firm.

From the list of consultants that submit proposals, the GDOT committee selects a "short list" of consultants to be asked to an interview. GDOT typically includes at least the three highest-ranking consultants in the interview process. The committee then determines the award based on an evaluation of the interview and the firm's past performance. In accordance with regulations regarding qualifications-based procurement, GDOT negotiates price after the consultant is selected.

BBC analyzed MBE and WBE success when competing for engineering-related contracts.

- The study team was able to collect and analyze proposal evaluation data for 28 GDOT engineering-related projects for contracts executed during the study period. Of the 167 proposals submitted, six (4%) were submitted by MBEs and 12 (7%) were submitted by WBEs.

- The proportion of proposal submissions from MBEs and WBEs was low compared with the share of prequalified firms that were MBEs (16%) and WBEs (12%).

There were disparities in percentage of proposals that were short-listed by GDOT. The top portion of Figure 8-15 illustrates that:

- Only one of the proposals from MBEs (17% of MBE proposals) resulted in short-listing;

- Three-quarters (75%) of proposals from WBEs were short-listed; and

- About 55 percent of majority-owned firms' proposals were placed on the short list.

As shown in the lower portion of Figure 8-15, BBC also calculated the percentage of proposal submissions that resulted in contract awards:

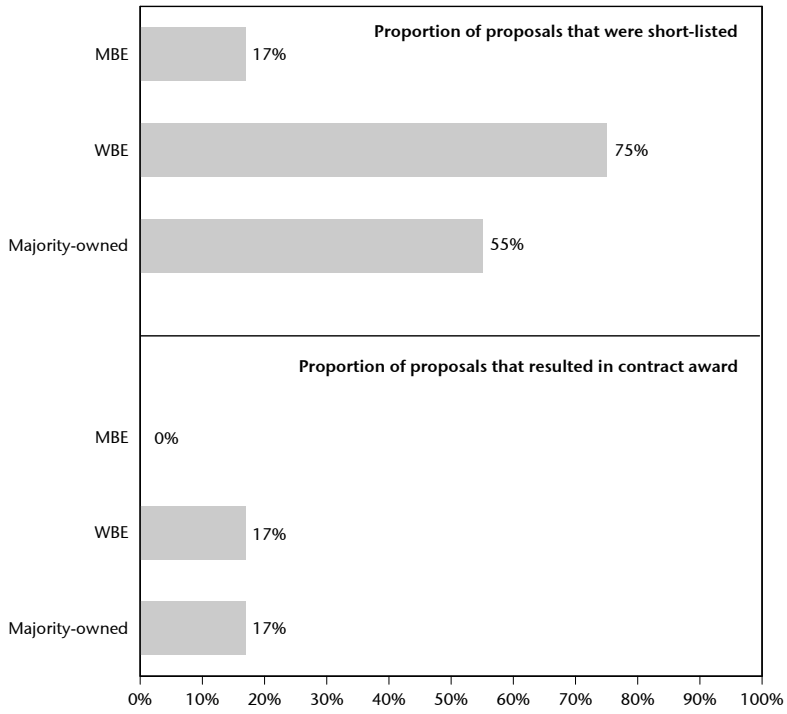
- None of the six proposals from MBEs resulted in a contract award (0% success).
- Two proposals from WBEs resulted in an award, a success rate of 17 percent.
- All but two of the analyzed contract awards went to majority-owned firms (26 awards from 149 submissions for a success rate of 17%).

WBEs experienced a similar success rate to majority firms on these projects.

Figure 8-15. Proportion of proposals for GDOT engineering-related contracts that were short-listed and that resulted in contract awards, 2009–June 2011

Note:
Based on 28 awards (167 proposals).

Source:
BBC Research & Consulting from GDOT contract records.



For the 167 proposal submissions received on 28 engineering-related projects, BBC compared the proposal evaluation scores received by majority-owned firms with those received by MBEs and WBEs. On average, scores GDOT gave to the group of MBE proposals were lower than scores assigned to majority-owned firms in three of the four evaluation categories:

- Stability and resources;
- Experience and qualifications; and
- Suitability.

In the past performance category, MBE proposals averaged about the same score as majority firms. The differences in average scores identified for MBEs were not evident when examining scores for WBEs.

In sum, it appears that GDOT receives fewer proposals from MBEs and WBEs than might be expected given MBE/WBE representation among all prequalified firms and from BBC's analysis of the availability of MBE/WBEs for engineering-related prime contracts. White women-owned firms submitting proposals appeared to have similar success as majority-owned firms that proposed on GDOT contracts. Although the number of proposals from minority-owned firms was small, somewhat limiting the analysis, it appears that MBE proposers did not have the same success pursuing GDOT contracts as other firms.

E. Is there any evidence of "overconcentration" of DBEs in certain types of work?

The Federal DBE Program requires agencies implementing the program to take certain steps if they determine that "DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work" (see 49 CFR Section 26.33(a)).

The Federal DBE Program does not specifically define "overconcentration." For purposes of examining this issue, BBC examined:

- How DBE participation was distributed across subindustries;
- Whether DBEs obtained more than one-half of the subcontract dollars in any construction or engineering-related subindustry; and
- If so, whether firms in those subindustries tended to only work in those subindustries, as subcontractors on public sector contracts, or also work in other subindustries (or as prime contractors or in the private sector).

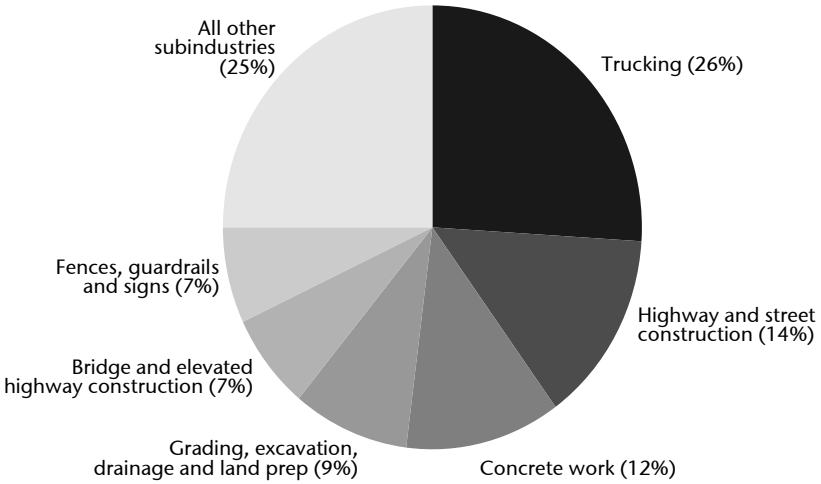
BBC focused on subcontract dollars awarded to DBEs and all firms by subindustry. All subcontract dollars for which BBC had data were examined, including FHWA- and state-funded contracts for both GDOT and local agencies.

Distribution of DBE participation across subindustries. About one-quarter of DBE subcontract dollars identified in GDOT and local agency contracts went to trucking firms. Beyond this subindustry, no other construction or engineering-related subindustry accounted for more than 14 percent of DBE subcontract dollars. Figure 8-16 examines these results.

Figure 8-16. Distribution of DBE subcontract dollars by subindustry for GDOT and local agency construction and engineering-related contracts, 2009—June 2011

Source:

BBC Research & Consulting from GDOT contract data.



DBE share of total subcontract dollars within a subindustry. There were two subindustries for which DBEs obtained more than one-half of subcontract dollars based upon GDOT and local agency contract information:

- DBEs accounted for 72 percent of subcontract dollars related to trucking; and
- DBEs obtained 56 percent of the subcontract dollars going to fencing, guardrails and signs.

It is possible that not all trucking dollars for non-DBEs were included in GDOT contract data, so the 72 percent figure may somewhat overstate the percentage of dollars going to DBEs. (Note that about one-half of the DBE dollars for trucking on GDOT contracts went to white women-owned firms.)

Degree of specialization of firms in the trucking subindustry. BBC further researched information concerning firms available for trucking work on GDOT contracts. From information provided by firms available for trucking and hauling work in the availability telephone interviews conducted as part of this study, it appears that:

- About one-third of firms available for GDOT trucking work also perform work outside of trucking and hauling;
- About 90 percent of the firms available for GDOT trucking work also pursue work on private sector contracts.

Therefore, it appears that many firms available for GDOT trucking work do not solely specialize in public sector (or GDOT) trucking subcontracts.

F. Summary

Chapter 8 explored five areas of questions:

- Are disparities found in some regions of the state and not in others?
- Is there any difference in disparities for 2009 compared with January 2010 through June 2011?
- Are there disparities for GDOT construction contracts?
- Are there disparities for GDOT engineering contracts?
- Is there any evidence of "overconcentration" of DBEs in certain types of work?

Results by region. BBC's analysis identified overall disparities in the utilization of MBE/WBEs across regions of the state.

Results by time period. There were disparities in the use of MBE/WBEs on GDOT contracts in 2009 and from 2010 through June 2011.

GDOT construction contracts. There were disparities for MBW/WBEs overall for state-funded construction contracts, and for FHWA-funded contracts even with application of the DBE contract goals program. On state-funded contracts, there were substantial disparities for white women-owned businesses and African American-, Asian-Pacific American, Subcontinent Asian American-, Hispanic American- and Native American-owned firms.

There were disparities in the utilization of MBEs and WBEs as prime contractors on GDOT construction contracts (except for Subcontinent Asian American-owned firms). There were disparities in the utilization of MBE/WBEs on small construction contracts.

MBE/WBEs received about 35 percent of subcontract dollars on GDOT FHWA-funded construction contracts and about 25 percent of subcontract dollars on state-funded contracts. In general, utilization of MBEs and WBEs as subcontractors on GDOT's FHWA-funded construction contracts exceeded what might be expected from the availability analysis. Utilization of African American- and Asian-Pacific American-owned firms as subcontractors was below what might be expected from the availability analysis, even with application of DBE contract goals to most of these contracts.

A number of aspects of GDOT's process for awarding prime construction contracts appeared to negatively affect contract opportunities for small contractors. These components may have more of a negative effect on minority- and women-owned firms. Although such components are required by state law, there may be some opportunities for GDOT to mitigate these potential negative impacts, as discussed later in this report.

GDOT engineering-related contracts. There were disparities in the utilization of MBE/WBEs in GDOT engineering-related contracts. BBC identified disparities for both FHWA-funded and state-funded contracts.

Disparities in the utilization of MBE/WBEs in engineering-related contracts are primarily due to very low utilization of minority- and women-owned firms as prime consultants, even on small contracts.

In part because of application of DBE contract goals, utilization of MBE/WBEs on GDOT engineering-related subcontracts exceeded what might be expected based on the availability analysis.

BBC's review of MBE/WBE participation in each stage of GDOT's process for awarding engineering-related contracts identified some evidence of disadvantages for minority-owned firms. Although the prequalification process authorizes engineering-related firms for GDOT work without regard to financial history, the selection process for individual proposals includes evaluation of the financial capacity and proposed workload of the firm. Financial capacity and workload requirements may present barriers to any small business, but analysis indicates MBEs were disproportionately affected.

Analysis of potential overconcentration. When considering DBE participation by type of work, BBC identified that DBE trucking firms accounted for about one-quarter of GDOT and local agency contract dollars. About 72 percent of the trucking work identified in GDOT and local agency contract data went to DBEs (about one-half to white women-owned DBEs and one-half to minority-owned DBEs). In accordance with 49 CFR Section 26.33, GDOT may need to consider steps to ensure that future DBE participation is not overconcentrated in trucking. Chapter 12 further discusses this issue.

CHAPTER 7.
Disparity Analysis for GDOT Contracts

Chapter 6 reported the share of GDOT contract dollars that went to MBE/WBEs. Disparity analysis compares MBE/WBE utilization to the availability benchmarks for each racial/ethnic/gender group introduced in Chapter 5. The analysis identifies whether or not minority- and women-owned firms were underutilized in GDOT contracts.

Chapter 7 presents BBC's disparity analysis in five parts:

A. Overview of disparity analysis methodology;

B. Overall disparity results for GDOT contracts;

C. Results for FHWA-funded and state-funded contracts;

D. Results for local agency construction contracts;

E. Analysis of statistical significance; and

F. Summary.

A. Overview of Disparity Analysis Methodology

BBC compared actual utilization of MBE/WBEs (as a percentage of total contract dollars) with the share of contract dollars that might be expected to go to MBE/WBEs based on BBC's availability analysis. The following discussion also refers to "expected share of contract dollars" as a "benchmark" or simply "availability." BBC calculated a unique benchmark for each MBE/WBE group, for each set of GDOT contracts examined.

Both the actual utilization and the benchmark are expressed as a percentage of the dollars involved in those contracts. They are expressed in terms that are directly comparable (e.g., 5% actual utilization compared with a benchmark of 4%).

To help compare results between groups or across sets of contracts, BBC calculates a disparity index, as described in Figure 7-1. An index of "100"

Figure 7-1.
Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of an MBE/WBE group matches what might be expected given the relative availability of that MBE/WBE group for the work involved in a specific set of contracts. An index of "100" indicates an exact match between actual and expected utilization for that group (also referred to as "parity"). In BBC's disparity analysis, a disparity index is calculated for each MBE/WBE group for each set of contracts examined. One can directly compare an index for one group to another group, and between sets of contracts.

BBC calculates the disparity index for a particular group through the following formula:

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

For example, if actual utilization of WBEs in a set of GDOT contracts was 2% and the availability benchmark was 10% for those contracts, the index would be 2%÷10%, which is then multiplied by 100 to derive an index of 20. In this example, WBEs would have received 20 cents for every dollar expected to go to WBEs based on the availability benchmark.

indicates a level of actual utilization that exactly matches what might be expected from the availability analysis. An index less than 100 may indicate a disparity between utilization and availability.

Example of a disparity analysis table. Disparity results presented in Chapters 7 and 8 are based on detailed disparity tables in Appendix K. Each table reports results for a different set of GDOT contracts. One of the disparity tables in Appendix K, Figure K-2, provides results for all contracts examined in the disparity analysis — combined FHWA-funded and state-funded construction and engineering-related contracts that GDOT awarded for 2009–June 2011.

Appendix K contains similar tables for different sets of contracts, including those that separate results for FHWA- and state-funded contracts; prime contracts and subcontracts; construction and engineering-related contracts; and small contracts. Note that the parameters for the set of contracts being examined are reported in the heading of each table in Appendix K.

Because each of the Appendix K disparity tables uses the same calculations and format for presenting results, a review of Figure K-2 provides an introduction to each of these tables. Figure K-2 from Appendix K is replicated as Figure 7-2 on the following page.

Utilization. Each of the disparity tables includes the same columns and rows:

- Column (a) notes the number of prime contracts and subcontracts in the set of contracting data under examination (in Figure 7-2, 4,838 total contracts and subcontracts).
- Column (b) identifies the dollars examined in the set of contract elements. Dollars are reported in thousands. This disparity table examines contract dollars totaling approximately $2 billion. Because "prime contract dollars" refers to the dollars retained by the prime contractor after deducting subcontract dollars, the combined prime/subcontract analyses equals the total contract amounts.
- Column (c) provides utilization dollars by group after pro-rating any money going to firms identified as MBEs for which specific race/ethnicity information was not available. In the GDOT disparity analysis, there were no contract elements for which race/ethnicity of an MBE firm could not be determined.
- Column (d) presents relative utilization on a percentage basis. Each percentage in column (d) is calculated by dividing dollars going to a group in column (c) by the total dollars in the set of contracts or subcontracts as shown in row (1) of column (c).

Figure 7-2 includes separate rows for each firm type:

- "All firms" in row (1) pertains to combined majority-, minority- and women-owned firms.
- Row (2) provides results for all minority- and women-owned firms, whether or not they are certified (as MBEs, WBEs or DBEs). As shown in Figure 7-2, minority- and women-owned firms received 12.4 percent of the dollars on GDOT construction and engineering-related contracts from 2009 through June 2011.
- Row (3) pertains to "WBEs," which are white women-owned firms.
- Row (4) pertains to "MBEs," or all minority-owned firms.

Figure 7-2.
MBE/WBE utilization, availability and disparity analysis for prime contracts/subcontracts on GDOT FHWA- and state-funded funded construction and engineering-related contracts, 2009–June 2011

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	4,838	$1,987,419	$1,987,419				
(2) MBE/WBE	1,910	$246,350	$246,350	12.4	22.0	-9.6	56.3
(3) WBE	1,383	$166,616	$166,616	8.4	5.2	3.2	161.9
(4) MBE	527	$79,734	$79,734	4.0	16.8	-12.8	23.8
(5) African American-owned	397	$47,959	$47,959	2.4	14.1	-11.7	17.1
(6) Asian-Pacific American-owned	4	$122	$122	0.0	1.5	-1.5	0.4
(7) Subcontinent Asian American-owned	27	$7,318	$7,318	0.4	0.6	-0.2	64.4
(8) Hispanic American-owned	81	$21,341	$21,341	1.1	0.5	0.6	200+
(9) Native American-owned	18	$2,995	$2,995	0.2	0.1	0.0	115.6
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,528	$192,451	$192,451	9.7			
(12) Woman-owned DBE	1,018	$117,174	$117,174	5.9			
(13) Minority-owned DBE	510	$75,277	$75,277	3.8			
(14) African American-owned DBE	387	$47,320	$47,320	2.4			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	27	$7,318	$7,318	0.4			
(17) Hispanic American-owned DBE	75	$17,548	$17,548	0.9			
(18) Native American-owned DBE	18	$2,995	$2,995	0.2			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Notes: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 11 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Data for individual minority groups are shown in subsequent rows. Combined, those utilization dollars add up to the total for MBEs (in some cases, numbers may not perfectly add due to rounding).

The bottom half of Figure 7-2 reports utilization for firms that were certified as DBEs. BBC included a row for white male-owned DBEs, though no such DBE-certified firms appeared to have received GDOT contracts or subcontracts examined in this study. DBE utilization data reported in the bottom half of Figure 7-2 were prepared independently from GDOT's DBE participation reports and thus do not match DBE utilization presented in those reports (for a discussion of differences, see Chapter 6).

Figure 7-3.
Definition of "substantial disparity"

Some courts deem a disparity index below 80 as "substantial" and accepted as evidence of adverse impact. See e.g., *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix A for additional discussion.

Utilization benchmark (availability). BBC developed estimates of the share of contract dollars that might be expected to go to each racial/ethnic/gender group given their relative availability for that work following the procedures described in Chapter 5. These availability results, represented as a percentage of contract dollars, provide a benchmark against which to compare relative utilization for a specific group. BBC separately calculated benchmarks for each group specific to each set of contracts examined in the study.

Column (e) of Figure 7-2 reports the availability benchmark for each group for GDOT's combined FHWA- and state-funded construction and engineering contracts. Based on the types of work involved in the prime contracts and subcontracts included in the Figure 7-2 analysis, plus the sizes of the contract elements when they were awarded, BBC estimated that 22.0 percent of GDOT contract dollars from 2009 through June 2011 might be expected to go to minority- and women-owned firms. This result can be found in row (2) of column (e) in Figure 7-2.

Differences between utilization and availability. The next step in analyzing whether there was a disparity between the relative utilization of a particular group and its relative availability is to subtract percentage utilization from percentage availability. For example, as reported in row (2), column (f) of Figure 7-2, MBE/WBE utilization was 9.6 percentage points below the benchmark based on MBE/WBE availability.

It is sometimes difficult to interpret absolute differences between percentage utilization and a benchmark, especially when the percentages are relatively small. Therefore, BBC also calculated a "disparity index," which divides percentage utilization by percentage availability and multiplies the result by 100. An index of "100" means that there is "parity" between relative utilization and availability for a particular group. An index below 100, particularly below 80, may indicate a substantial disparity, as discussed in Figure 7-3 above.

Column (g) provides the disparity index for each group. For example, the disparity index of 56 for MBE/WBEs shown in row (2) of column (g) means that utilization of MBE/WBEs in GDOT contracts during the study period was much lower than what would be expected from the availability analysis. BBC calculated this index by dividing 12.4 percent MBE/WBE utilization by 22.0 percent MBE/WBE availability, and then multiplying that result by 100.

The disparity index of 162 for WBEs shown in row (3) of column (g) indicates no underutilization of white women-owned firms.[1] Utilization of WBEs in GDOT contracts (8.4%) considerably exceeded what might be expected based on the availability analysis (5.2%).

Results when disparity indices are very large or when availability is zero. BBC applied the following rules when the disparity indices calculated were exceedingly large or could not be calculated because no firms were identified as available for the contracts under examination:

- When BBC's calculations showed a disparity index exceeding 200, BBC reported an index of "200+." This level of disparity index means that utilization was more than twice as much as might be expected based on the availability analysis.

- When there was no utilization and 0 percent availability for a particular group for a set of contracts, BBC reported "parity" between utilization and availability (indicated by a disparity index of "100").

- When BBC identified utilization for a group at 0 percent availability (which could occur for many reasons, including the fact that one or more utilized firms were out of business by the time of BBC's availability survey), BBC reported a disparity index of "200+."

The DBE utilization statistics at the bottom of Figure 7-2 are provided as reference. BBC did not conduct disparity analyses for just certified DBEs for the reasons described in Chapter 5.

B. Overall Disparity Results for GDOT Contracts

BBC created graphs from the detailed disparity tables to summarize results, as shown below.

Graphs showing disparity indices. BBC created graphs using disparity indices from column (g) in the Appendix K disparity tables. Figure 7-4 uses the information from Figure 7-2.

- The line down the center of the graph shows an index of 100, which indicates "parity" between utilization and availability for a particular group.
- Indices under 100 indicate a disparity between utilization and availability.
- The graph ends at a disparity index of 200 even though, in some cases, disparity indices in BBC's analysis exceed 200.
- For reference, a line is also drawn at an index of 80. Some courts use 80 as a threshold for what may indicate a substantial disparity, as discussed in Figure 7-3.

[1] Note that all percentages in the disparity tables were rounded to the nearest tenth of 1 percent after making all calculations. Percentages correctly add and subtract, even though the rounding may make actual sums appear to differ by one tenth of 1 percent. In addition, the disparity index is derived from the detailed data for percentage utilization and availability before any rounding.

Results for combined GDOT contracts. Figure 7-4 shows disparity indices for each MBE/WBE group when analyzing the combined FHWA- and state-funded GDOT contracts. Because these contract dollars are predominantly FHWA-funded contracts ($1.9 billion out of the $2.0 billion total), the Federal DBE Program had a strong influence on the utilization of certain MBE/WBE groups. Utilization of WBEs, Hispanic American-owned firms and Native American-owned businesses exceeded what might be expected based upon the availability analysis for those groups.

Even with the effect of the Federal DBE Program, however, utilization of African American-, Asian Pacific American- and Subcontinent Asian American-owned firms was substantially below what might be expected given the availability of these firms for GDOT prime contracts and subcontracts. For example, African American-owned firms received less than one-quarter of the dollars of GDOT contracts that might be expected from the availability of African American-owned businesses for that work. Disparity indices were also very low for Asian-Pacific American- and Subcontinent Asian American-owned firms. As noted in Figure 7-3, some courts deem a disparity index below 80 as "substantial."

Figure 7-4. Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on FHWA- and state-funded GDOT construction and engineering-related contracts, 2009–June 2011

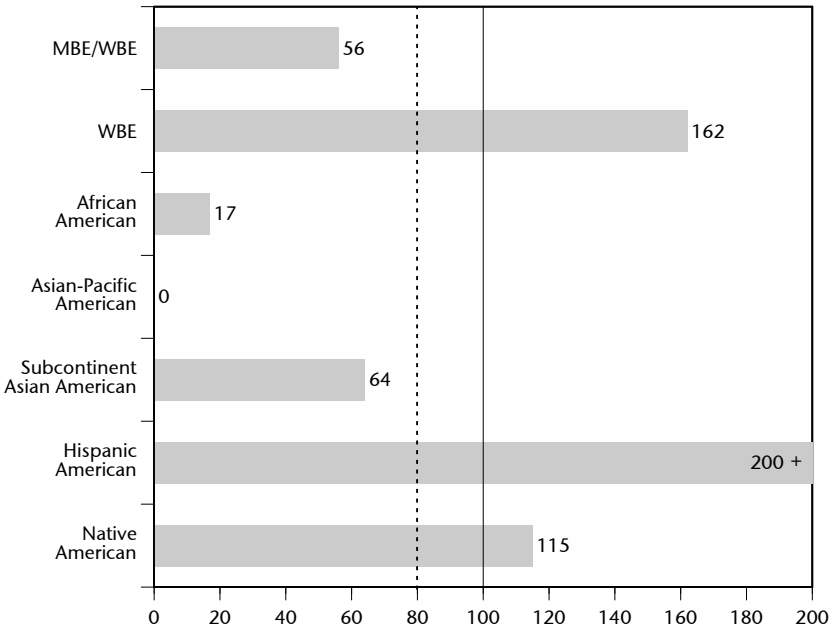
Note:

Number of contracts/subcontracts analyzed is 4,838.

For more detail, see Figure K-2 in Appendix K (which is the same as Figure 7-2).

Source:

BBC Research & Consulting.



C. Results for FHWA-funded and State-funded Contracts

BBC also separately analyzed results for FHWA-funded and state-funded contracts. The disparity analysis examined $1.9 billion of FHWA-funded contracts and $123 million in state-funded contracts awarded from 2009 through June 2011. Figure 7-5 compares disparity results for state-funded contracts (lighter bars in Figure 7-5) with the results for FHWA-funded contracts (darker bars in Figure 7-5). Figure 7-5 presents results for WBEs and for MBEs, combining individual MBE groups. Additional detail for MBE groups is provided in Figures K-3 and K-4 in Appendix K.

FHWA-funded contracts. MBE/WBE utilization on FHWA-funded contracts was 12.8 percent, which is less than the 21.7 percent that might be expected based on the availability analysis for FHWA-funded contracts. The disparity index for MBE/WBEs was 59.

As with combined GDOT contracts, utilization of WBEs on FHWA funded contracts exceeded availability (disparity index of 173). Utilization of African American-, Asian-Pacific American- and Subcontinent Asian American-owned firms was substantially below availability, even with application of DBE contract goals for many of these contracts. Utilization of Hispanic American- and Native American-owned firms exceeded availability. Figure K-3 in Appendix K provides detailed results.

State-funded contracts. MBE/WBE utilization on state-funded contracts (5.5%) was substantially less than what might be expected based upon the availability analysis for state-funded contracts (25.6%). The disparity index was 22. There were disparities for WBEs and for each MBE group, as shown in Figure 7-5. (See Figure K-4 in Appendix K for detailed results.) No contract goals applied to state-funded contracts.

Figure 7-5. Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on GDOT FHWA- and state-funded construction and engineering-related contracts, 2009–June 2011

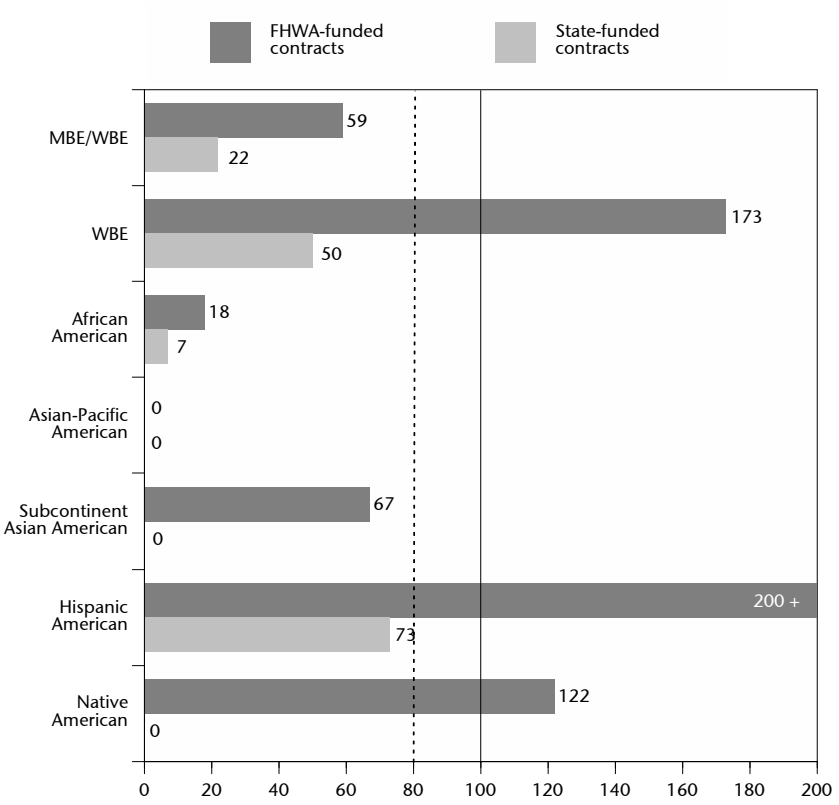
Note:

Number of contracts/subcontracts analyzed is 4,390 for FHWA-funded and 448 for state-funded contracts.

For more detail, see Figures K-3 and K-4 in Appendix K.

Source:

BBC Research & Consulting.



D. Results for Local Agency Construction Contracts

As discussed in Chapter 6, BBC was able to analyze utilization of MBE/WBEs for 14 of the 22 largest local agency construction contracts. FHWA-funded contracts accounted for more than 90 percent of the total dollars examined on these local agency awards.

MBE/WBE utilization on local agency contracts (7.6%) was substantially below what might be expected from the availability analysis (20.5%). The resulting disparity index was 37.

Figure 7-6 presents disparity results by racial/ethnic/gender group. Similar to the results for GDOT's FHWA-funded contracts, there were no disparities for WBEs and Subcontinent Asian American-, Hispanic American- and Native American-owned firms. Utilization of African American- and Asian-Pacific American-owned firms was very low compared with the availability benchmarks for those groups.

Figure 7-6. Disparity indices for MBE/WBE utilization as prime contractors and subcontractors on FHWA- and state-funded local agency construction contracts, 2009–June 2011

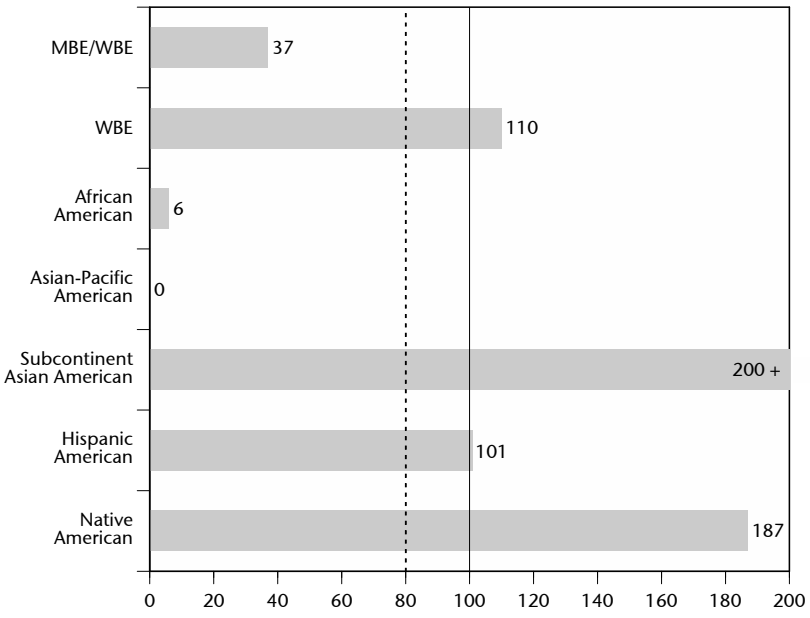
Note:

Number of contracts/subcontracts analyzed is 150.

For more detail, see Figure K-41 in Appendix K.

Source:

BBC Research & Consulting.



E. Analysis of Statistical Significance of Disparities

Statistical significance relates to the degree to which a researcher can reject "random chance" as a cause of an observed difference.

Data sampling. Random chance in data sampling is the factor that researchers consider most in determining statistical significance of results. However, BBC attempted to contact every firm in Georgia that Dun & Bradstreet (D&B) identified as doing business within relevant subindustries (as described in Chapter 5), mitigating many of the concerns associated with random chance in data sampling as it relates to BBC's availability analysis.

The utilization analysis also approaches a "population" of contracts. Therefore, any disparity found when comparing overall utilization with availability might be considered "statistically significant."

Random chance in prime contract and subcontract awards. There were many opportunities for minority- and women-owned firms to be awarded work in the sets of prime contracts and subcontracts that BBC analyzed. Some contract elements exceeded $1 million and others only involved a few thousand dollars.

Monte Carlo analysis is a useful tool to use for statistical significance testing because there were many individual chances at winning work with GDOT from 2009 through June 2011, each with a different monetary payoff. BBC's application of the Monte Carlo simulation is described in Figure 7-7.

BBC identified disparities overall for MBEs overall for both FHWA- and for state-funded contracts, and for WBEs for state-funded contracts — the Monte Carlo simulation focused on these results. Because of the limited number of state-funded prime contracts and subcontracts, and the relatively small benchmarks for all MBE groups except for African American-owned firms, the statistical significance of disparities was tested for MBEs overall.

Figure 7-7.
Application of Monte Carlo simulation

The Monte Carlo technique was applied as follows:

Each "run" of the Monte Carlo simulation starts by examining an individual contract element (a prime contract or subcontract).

BBC's availability database provides information on individual firms "available" for that contract element based on type of work, prime versus subcontract role, size of the prime contract or subcontract, and year the contract was awarded.

In each Monte Carlo simulation run, a firm is randomly selected to "receive" that contract element from the pool of available firms identified as available for that contract element. For example, the probability of a woman-owned firm receiving that contract element is equal to the number of women-owned firms available for that work divided by the total number of firms available for that contract element. Each firm in BBC's availability database identified as available for a particular contract element was assumed to have the same chance of being awarded that prime contract or subcontract as every other firm identified as available for that work.

The Monte Carlo simulation run repeats the above process for all other contract elements in the set. The output of a single Monte Carlo simulation for all contracts in the set represents simulated utilization of minority- and women-owned firms for that set of contract elements.

The Monte Carlo simulation is then repeated 1 million times for each set of contracts. The combined output from all 1 million simulation runs represents a probability distribution of the overall utilization of minority- and women-owned firms if contracts were awarded randomly based on the relative availability of Georgia firms working in relevant subindustries.

Out of 1 million simulation runs, zero (less than 0.1%) produced a result that was equal to or below the observed 4.2 percent MBE utilization identified for GDOT FHWA-funded contracts. The difference between utilization and availability for MBEs is statistically significant at the 95 percent confidence level.

Disparities for MBEs were also statistically significant for GDOT state-funded contracts as shown in Figure 7-8.

When examining disparities for WBEs on GDOT state-funded contracts, BBC's Monte Carlo analysis determined that the disparities were statistically significant.

Therefore, the disparities identified for MBEs and WBEs in GDOT contracts could not be easily replicated by chance in the procurement process.

Figure 7-8.
Statistical significance of disparities in overall MBE and WBE utilization on GDOT FHWA- and state-funded construction and engineering-related contracts, 2009–June 2011

MBE/WBE Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"	Reject chance in awards of contracts as a cause of disparity?
FHWA-funded contracts				
MBE	25	0	<0.1 %	Yes
WBE	173	N/A	N/A	N/A
State-funded contracts				
MBE	10	0	<0.1 %	Yes
WBE	50	8,109	0.8	Yes

Note: "N/A" means "not applicable" because utilization exceeded availability.
Utilization and availability includes non-DBE-certified firms.
Source: BBC Research & Consulting.

F. Summary

The disparity analysis indicates substantial underutilization of minority- and women-owned firms in GDOT contracts when the Federal DBE Program did not apply (GDOT's state-funded contracts). There were substantial disparities for each racial/ethnic/gender group — white women-owned firms and African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned businesses.

Even when the Federal DBE Program did apply (GDOT's FHWA-funded contracts), there were substantial disparities between the utilization and availability of African American-, Asian-Pacific American- and Subcontinent Asian American-owned firms.

BBC was also able to examine 14 local agency construction contracts within the study period (predominantly FHWA-funded contracts). Results by racial/ethnic/gender group were similar to those for GDOT FHWA-funded contracts, although overall disparities for MBE/WBEs were greater on local agency contracts.

Using additional disparity analyses and other research, Chapter 8 of the report further explores why disparities may be occurring in GDOT contracts.

CHAPTER 6.
GDOT Utilization of Minority- and Women-owned Firms

Chapter 6 examines participation of minority- and women-owned firms in GDOT contracts. The disparity analyses that follow in Chapter 7 compare the utilization data with the availability results introduced in Chapter 5.

BBC analyzed both FHWA-funded and state-funded GDOT transportation contracts. As FHWA only requires GDOT to prepare DBE participation reports for its FHWA-funded contracts, the utilization information for state-funded contracts is especially instructive. USDOT suggests that agencies examine utilization for contracts without DBE contract goals when designing their future implementation of the Federal DBE Program.[1] GDOT did not set any DBE goals on its state-funded contracts during the study period, nor did it apply any other race- or gender-based programs for these contracts.

Figure 6-1.
Defining and measuring "utilization"

"Utilization" of minority- and women-owned firms refers to the share of contract dollars going to these MBEs and WBEs. BBC reports results for both certified DBEs (firms certified as disadvantaged business enterprises in the year of the specific contract) and for all minority- and women-owned firms. BBC also examines results by race/ethnic/gender group.

Utilization is expressed as a percentage of prime contract and subcontract *dollars*. ("Prime contract dollars" are total contract dollars less the money identified as going to subcontractors.) For example, WBE utilization of 5 percent means that 5 percent of the contract dollars examined went to women-owned firms. Expressed another way, 5 cents of every contract dollar went to WBEs.

Information concerning utilization of minority- and women-owned firms is useful on its own, but is even more instructive when compared with a benchmark for the level of utilization expected given relative availability of minority- and women-owned firms for a particular set of contracts. BBC introduces this "disparity analysis" in the next section of the report (see Chapter 7).

GDOT also administers FHWA and state funds to local agencies for transportation work. The local agencies independently award these contracts. Although GDOT does not collect information on the individual prime contractors and subcontractors involved in local agency contracts, as part of this disparity study BBC and GDOT were able to obtain such data for some of the contracts in the 2009 through June 2011 study period.

Chapter 6 is organized in five parts:

A. Overview of the utilization analysis;

B. MBE/WBE and DBE utilization in GDOT transportation contracts;

C. MBE/WBE and DBE utilization in GDOT construction contracts;

D. MBE/WBE and DBE utilization in GDOT engineering-related contracts; and

E. MBE/WBE and DBE utilization in local agency contracts.

[1] http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc.

A. Overview of the Utilization Analysis

BBC examined utilization of minority- and women-owned firms as prime contractors and subcontractors in GDOT transportation contracts from January 2009 through June 2011.

Definition of utilization. As outlined in Figure 6-1, "utilization" of minority- and women-owned firms refers to the percentage of contract dollars going to MBE/WBEs. If MBE/WBEs were awarded $10 million in prime contracts and subcontracts out of a total of $100 million in contract dollars, MBE/WBE utilization would be 10 percent.

Differences between GDOT and BBC utilization analyses. BBC's analysis of MBE/WBE utilization goes beyond what GDOT currently reports to the USDOT, as explained below.

BBC identified minority- and women-owned businesses in addition to firms certified as DBEs. Because USDOT regulations require state and local agencies to report participation of DBEs on FHWA-funded contracts, GDOT's participation reports to FHWA focus on DBEs. GDOT does not track utilization of other firms owned by minorities and women.

In addition to counting certified DBEs in the utilization statistics, BBC examined minority- and women-owned firms that may have once been DBE-certified and graduated (or let their certifications lapse), and MBE/WBEs that have never been DBE-certified. BBC identified race/gender ownership through:

- GDOT DBE certification records and local agencies' DBE/MBE/WBE directories;
- Study team telephone interviews with owners and managers of utilized firms (the study team attempted to reach each utilized firm via phone, fax or e-mail);
- Other sources, including Dun & Bradstreet (D&B) data; and
- GDOT staff review.

BBC also reports utilization for firms certified as DBEs. Although firms owned by socially- and economically-disadvantaged white men can receive DBE certification, BBC identified no DBE certified as a white male-owned firm at the time of the study. Therefore, Chapter 6 results for DBE participation in GDOT contracts are a subset of overall MBE/WBE utilization — all DBE firms in the data are minority- or women-owned.

The disparity study also examined state-funded contracts. GDOT's DBE utilization reports are for FHWA-funded contracts, not state-funded contracts (contracts solely funded through non-USDOT sources). In addition to analyzing FHWA-funded contracts, BBC examined MBE/WBE and DBE participation in GDOT's state-funded contracts.

B. MBE/WBE and DBE Utilization in GDOT Transportation Contracts

The following figures present MBE/WBE and DBE utilization as a percentage of GDOT contract dollars. Utilization in these figures includes prime contractor and subcontractor participation.[2]

Each figure separately reports results for GDOT's FHWA- and state-funded transportation contracts. The figures also show aggregate results across all FHWA- and state-funded contracts.

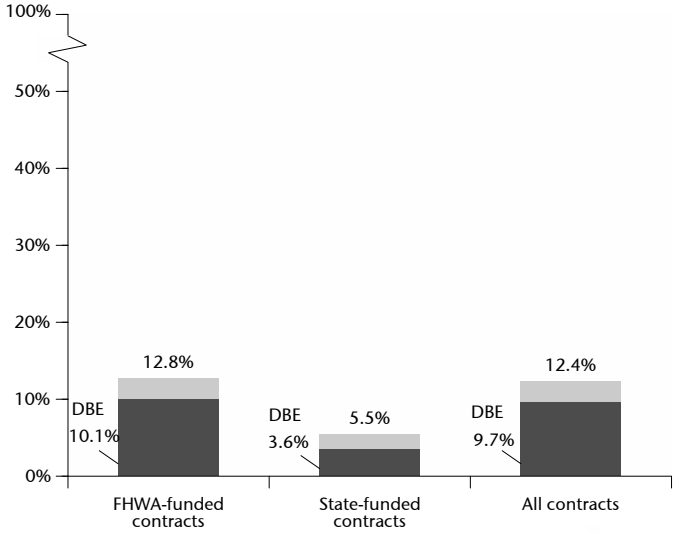
Figure 6-2 combines results for construction and engineering contracts.

- Each bar in the graph indicates the percentage of overall contract dollars going to minority- and women-owned firms (the statistic shown on the top of the bar), including the share going to certified DBEs.
- The dark shading in the bottom portion of the bar presents the share of overall contract dollars going to DBEs alone.
- The difference between DBE utilization and total MBE/WBE utilization corresponds to the participation of MBE/WBEs that were not certified as DBEs.

Figure 6-2.
MBE/WBE and DBE share of prime contract/subcontract dollars for GDOT construction and engineering contracts, 2009–June 2011, FHWA vs. state funding

Note:
Certified DBE utilization.
Number of contracts/subcontracts analyzed is 4,390 for FHWA-funded contracts, 448 for state-funded contracts and 4,838 for all contracts.
For more detail and results by group, see Figures K-3, K-4 and K-2 in Appendix K.

Source:
BBC Research & Consulting from data on GDOT contracts.



FHWA-funded contracts. BBC examined 939 GDOT FHWA-funded transportation construction and engineering contracts from 2009 through June 2011. BBC was able to obtain data for 3,451 subcontracts associated with these contracts. In total, BBC identified $1.9 billion for these 4,390 contract elements.

Minority- and women-owned firms obtained 12.8 percent of the dollars of FHWA-funded contracts from 2009 through June 2011, as presented in Figure 6-2. DBE utilization for these contracts was 10.1 percent.[3]

[2] When calculating prime contractor utilization, BBC counts dollars retained by the prime contractor (total dollars less subcontract dollars for the contract). In this way, addition of prime contractor and subcontractor utilization for a contract equals the contract amount.

State-funded contracts. BBC analyzed 201 GDOT state-funded contracts, which included 247 subcontracts. State-funded contracts for 2009–June 2011 totaled $123 million. MBE/WBEs (including DBEs) received a much lower percentage of total state-funded contract dollars — 5.5 percent — than for FHWA-funded contracts. The share of contract dollars going to DBEs was 3.6 percent.

Combined contracts. Of the $2.0 billion in combined FHWA- and state-funded contract dollars examined for 2009–June 2011, MBE/WBEs received $246 million, or 12.4 percent. DBEs accounted for 9.7 percentage points ($192 million) of the overall MBE/WBE participation.

Utilization by MBE/WBE group. Figure 6-3 details utilization for minority- and women-owned firms (top half of the figure) and for only DBEs (bottom half of the figure) by specific racial/ethnic/gender groups. As noted previously, DBE utilization is a subset of total MBE/WBE utilization.

White women-owned firms accounted for two-thirds of the MBE/WBE utilization in GDOT contracts.[4] WBEs received 8.4 percent of total contract dollars compared with 2.4 percent for African American-owned firms and 1.1 percent for Hispanic American-owned firms. Other minority-owned firms combined received about 0.5 percent of contract dollars.

Results only considering FHWA-funded contracts are similar to the results for all GDOT transportation contracts, as provided in Figure 6-3. Figure 6-3 also shows that minority-owned firms certified as DBEs accounted for $73 million of the $77 million in FHWA-funded contract dollars going to minority-owned firms. White women-owned firms that were DBE-certified represented a smaller portion of total WBE utilization ($115 million out of $162 million).

Turning to state-funded contracts, WBEs received 3.7 percent of contract dollars, which again is two-thirds of total dollars going to minority- and women-owned firms. More than one-half of the WBE utilization was to firms that were not DBE-certified. African American-owned firms received 1.1 percent of state–funded contract dollars and Hispanic American-owned firms received 0.8 percent of these contract dollars. No other minority-owned firms were identified among the firms receiving state-funded prime contractors or subcontracts. Figure 6-3 examines these results.

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[3] By comparison, GDOT utilization reports for FY 2009, FY 2010 and FY 2011 combined showed DBE participation to be 9.8 percent of FHWA-funded contracts. GDOT examined $2.4 billion in FHWA contracts for this three-year time period.

[4] WBE refers to white women-owned firms in the utilization analysis to match the use of WBE in the availability analysis, as discussed in Chapter 5.

Figure 6-3.
MBE/WBE and DBE share of prime/subcontract dollars for GDOT construction and engineering contracts, by race/ethnicity/gender, 2009–June 2011 (thousands)

	FHWA-funded contracts		State-funded contracts		Total	
	$ in thousands	Percent	$ in thousands	Percent	$ in thousands	Percent
MBE/WBEs						
African American-owned	$46,598	2.5 %	$1,360	1.1 %	$47,959	2.4 %
Asian-Pacific American-owned	122	0.0	0	0.0	122	0.0
Subcontinent Asian American-owned	7,318	0.4	0	0.0	7,318	0.4
Hispanic American-owned	20,394	1.1	946	0.8	21,341	1.1
Native American-owned	2,995	0.2	0	0.0	2,995	0.2
WBE (white women-owned)	162,093	8.7	4,523	3.7	166,616	8.4
Total MBE/WBE	$239,520	12.8 %	$6,830	5.5 %	$246,350	12.4 %
Majority-owned	1,624,524	87.2	116,545	94.5	1,741,069	87.6
Total	$1,864,044	100.0 %	$123,375	100.0 %	$1,987,419	100.0 %
DBEs						
African American-owned	$45,960	2.5 %	$1,360	1.1 %	$47,320	2.4 %
Asian-Pacific American-owned	97	0.0	0	0.0	97	0.0
Subcontinent Asian American-owned	7,318	0.4	0	0.0	7,318	0.4
Hispanic American-owned	16,601	0.9	946	0.8	17,548	0.9
Native American-owned	2,995	0.2	0	0.0	2,995	0.2
WBE (white women-owned)	115,043	6.2	2,131	1.7	117,174	5.9
White male-owned DBE	0	0.0	0	0.0	0	0.0
Total DBE	$188,013	10.1 %	$4,438	3.6 %	$192,451	9.7 %
Non-DBE	1,676,031	89.9	118,937	96.4	1,794,968	90.3
Total	$1,864,044	100.0 %	$123,375	100.0 %	$1,987,419	100.0 %

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.
Number of contracts/subcontracts analyzed is 4,390 for FHWA-funded contracts, 448 for state-funded contracts and 4,838 for all contracts.
For more detail and dollars by group, see Figures K-3, K-4 and K-2 in Appendix K.

Source: BBC Research & Consulting from data on GDOT contracts.

C. MBE/WBE and DBE Utilization in GDOT Construction Contracts

Figure 6-4 presents MBE/WBE and DBE participation in GDOT FHWA- and state-funded transportation construction contracts.

FHWA-funded contracts. From 2009 through June 2011, GDOT awarded 561 FHWA-funded construction contracts for $1.7 billion that were within the scope of the disparity study. BBC examined 3,179 subcontracts associated with these contracts.

MBEs and WBEs obtained 13.2 percent of FHWA-funded construction contract dollars for this time period. White women-owned firms received 9.1 percent of contract dollars, which accounted for more than two-thirds of the total utilization of MBE/WBEs. African American-owned firms received 2.6 percent of contract dollars and Hispanic American-owned firms received 1.0 percent of contract dollars. DBE utilization for these contracts was 10.6 percent. Figure K-6 in Appendix K provides additional information concerning MBE/WBE/DBE utilization for these contracts.

State-funded contracts. There were 173 GDOT state-funded construction contracts for 2009–June 2011 included in the utilization analysis. These contracts totaled $111 million.

MBE/WBEs received 4.8 percent of state-funded construction contract dollars — WBE utilization was 3.4 percent, firms owned by African Americans received 0.6 percent of contract dollars and Hispanic American-owned firms received 0.8 percent of contract dollars. No prime contractors or subcontractors were identified as owned by other minority groups. Overall DBE participation was 2.7 percent. (No DBE contract goals applied to these contracts.) Figure K-7 in Appendix K provides additional information concerning MBE/WBE and DBE utilization for these contracts.

Combined contracts. Combining FHWA- and state-funded construction, MBE/WBE participation was 12.7 percent (10.1% DBE utilization). Utilization by racial/ethnic/gender group can be found in Figure K-5.

Figure 6-4.
MBE/WBE and DBE share of prime contract/subcontract dollars for GDOT construction contracts
2009–June 2011, FHWA vs. state funding

Note:

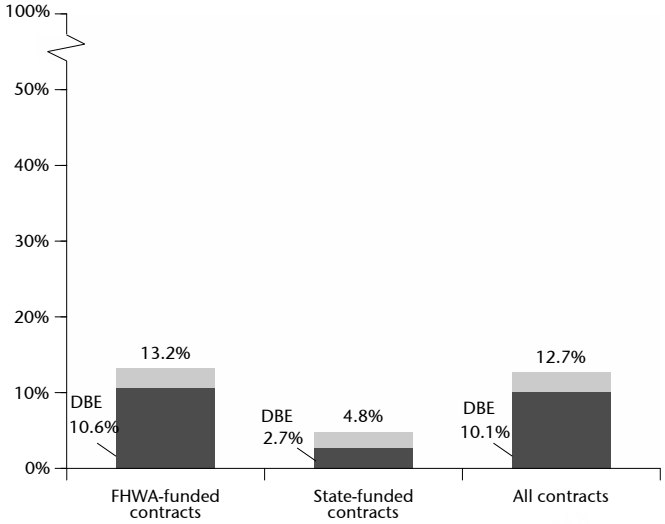
Certified DBE utilization.

Number of contracts/subcontracts analyzed is 3,740 for FHWA-funded contracts, 410 for state-funded contracts and 4,150 for all contracts.

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

Source:

BBC Research & Consulting from data on GDOT contracts.



D. MBE/WBE and DBE Utilization in GDOT Engineering-related Contracts

Figure 6-5 presents information for GDOT contracts for engineering-related services. MBE/WBE and DBE participation results in Figure 6-5 include prime consultant and subconsultant participation.

FHWA-funded contracts. BBC examined 378 FHWA-funded engineering-related contracts ($180 million) and was able to analyze information for 272 related subcontracts.

MBE/WBE participation on these contracts was 9.3 percent. WBEs obtained 5.1 percent of contract dollars. Utilization of African American-owned firms was 1.4 percent, and 2.1 percent of contract dollars went to Hispanic American-owned firms. Subcontinent Asian American-owned businesses received 0.6 percent of contract dollars.

DBE utilization for FHWA-funded engineering-related contracts was 5.8 percent. Figure K-9 in Appendix K provides additional information concerning MBE/WBE/DBE utilization for these contracts.

State-funded contracts. BBC analyzed 28 state-funded engineering-related contracts for 2009–June 2011 totaling $12 million. Ten subcontracts were identified for these contracts. MBE/WBE participation was 12.3 percent of total contract dollars, with WBEs and African American-owned firms each receiving about 6 percent of contract dollars. Each of the MBE/WBEs utilized was certified as a DBE. Figure K-10 in Appendix K provides additional information concerning MBE/WBE and DBE utilization for these contracts.

Combined contracts. Of the $192 million in combined FHWA- and state-funded engineering-related contracts, MBE/WBEs utilization was $18 million, or 9.5 percent of contract dollars (6.2% DBE participation). Utilization by racial/ethnic/gender group can be found in Figure K-8.

Figure 6-5.
MBE/WBE and DBE share of prime contract/subcontract dollars for GDOT engineering-related contracts 2009–June 2011, FHWA vs. state funding

Note:

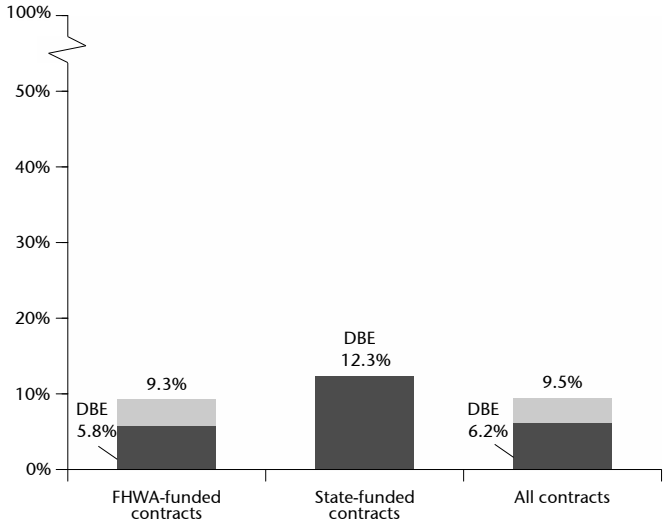
Certified DBE utilization.

Number of contracts/subcontracts analyzed is 650 for FHWA-funded contracts, 38 for state-funded contracts and 688 for all contracts.

For more detail and results by group, see Figures K-9, K-10 and K-8 in Appendix K.

Source:

BBC Research & Consulting from data on GDOT contracts.



E. MBE/WBE and DBE Utilization in Local Agency Contracts

In addition to its own contracts, GDOT administers certain FHWA and state transportation funds that are provided through GDOT to cities, counties and other local governments. From 2009 through June 2011, there were 22 local agency construction contracts of $750,000 or more that used GDOT-administered FHWA or state funds. (Local agencies do not typically receive money for engineering contracts through GDOT.)

GDOT does not collect and maintain comprehensive information concerning prime contractors and subcontractors on local agency contracts that use FHWA or state funds. Therefore, the BBC study team worked with GDOT to request certain information on prime contracts and subcontracts from local agencies and their prime contractors. BBC was able to obtain data for 14 out of the 22 local agency contracts within the study period that were $750,000 or more. These 14 contracts totaled about $60 million. Based upon the data provided, BBC identified 136 subcontracts for these contracts. The 10 contracts that were FHWA-funded accounted for more than 90 percent of the contract dollars examined. Chapter 3 and Appendix B describe the methods BBC used to determine race/ethnicity/gender ownership of the prime contractors and subcontractors for these contracts.

MBE/WBE participation was 7.6 percent (5.9% DBE utilization) on the 14 local agency contracts. White women-owned firms (4.6% utilization) and Subcontinent Asian American-owned firms (1.6% utilization) accounted for most of the MBE/WBE participation on these contracts. Less than 1 percent of contract dollars went to African American-owned firms.

Figure 6-6 compares the utilization of MBE/WBEs and DBEs on the 14 local agency contracts compared with MBE/WBE and DBE utilization for GDOT construction contracts. As shown, MBE/WBE and DBE participation was much lower on the local agency contracts examined than on GDOT contracts for 2009 through June 2011.

Figure 6-6.
MBE/WBE and DBE share of prime contract/subcontract dollars for FHWA- and state-funded construction contracts, 2009–June 2011, GDOT versus local agency contract awards

Note:

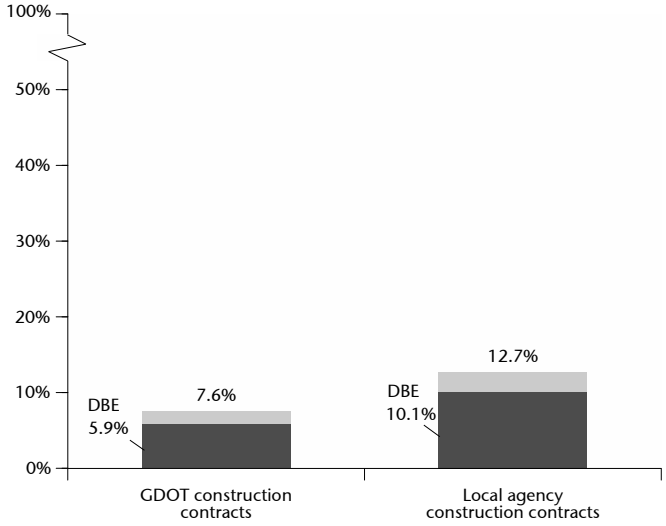
Certified DBE utilization.

Number of contracts/subcontracts analyzed is 150 for local agency construction contracts and 4,150 for GDOT construction contracts.

For more detail and results by group, see Figures K-41 and K-5 in Appendix K.

Source:

BBC Research & Consulting from data on GDOT and local agency contracts.



CHAPTER 5.
Analysis of MBE/WBE/DBE Availability

BBC analyzed the relative availability of minority- and women-owned firms that are ready, willing and able to perform GDOT prime contracts and subcontracts. Chapter 5 contains six parts:

A. Purpose of the availability analysis and definitions of MBEs, WBEs and potential DBEs;

B. Information on firms available for GDOT work;

C. Number of minority-, women- and majority-owned firms included in the availability database;

D. Calculation of MBE/WBE availability as inputs to the disparity analysis;

E. Base figure for overall goal for DBE participation in FHWA-funded contracts; and

F. Implications for any DBE contract goals.

Appendices C and J provide supporting information.

A. Purpose of the Availability Analysis and Definition of MBEs, WBEs and Potential DBEs

BBC developed information on the availability of minority-, women- and majority-owned firms for GDOT contracts as an input for the disparity analysis and for developing a base figure for GDOT's overall goal for DBE participation.

Input for the disparity analysis. In the disparity analysis, BBC compares the percentage of GDOT contract dollars going to MBEs and WBEs (for each racial/ethnic/gender group) to the percentage of dollars that might be expected to go to MBE/WBEs given their relative availability for specific types and sizes of GDOT prime contracts and subcontracts.

- In the disparity study, the actual percentage of dollars going to MBEs and WBEs is referred to as *utilization*.
- The percentage of dollars that might be expected to go to MBEs and WBEs is referred to as *availability*.
- The disparity analysis compares *utilization* and *availability* to identify whether there was a disparity between the dollars actually going to MBEs and WBEs and what might be expected based upon the availability analysis.

BBC examined the availability of minority-, women- and majority-owned firms for each GDOT prime contract and subcontract to calculate the availability benchmarks for use in the disparity analysis, as explained later in this chapter.

Definition of MBEs and WBEs. As discussed in Chapter 1, the disparity study follows the definitions of specific minority groups contained in 49 CFR Part 26. The study team separately examined utilization and availability for African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American- and white women-owned firms.

The availability benchmarks for the disparity analysis count firms as minority- and women-owned regardless of whether they are or could be certified as DBEs. Most minority- and women-owned firms doing business in Georgia are not currently certified.[1] BBC used the same methodology to count firms owned by minorities and women as MBEs and WBEs in both the utilization and the availability analyses.

Definition of majority-owned firms. "Majority-owned firms" in the disparity study are businesses that are not owned by minorities or women.

Majority-owned firms include any white male-owned firms certified as disadvantaged business enterprises.

Definition of DBEs. Disadvantaged business enterprises (DBEs) are businesses that are certified as such in Georgia (which means that they are certified as being below revenue and personal net worth limits included in 49 CFR Part 26). Because implementation of the Federal DBE Program requires GDOT to track DBE utilization, BBC reports certain utilization data for DBE-certified firms. It is not proper to compare utilization and availability of DBEs, however.

Inputs for the base figure analysis related to the overall DBE goal. When establishing its overall goal for DBE participation in its FHWA-funded contracts, GDOT must begin by calculating a "base figure" for the relative availability of DBEs.[2] The Final Rule effective February 28, 2011, and USDOT "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program"[3] explain that minority- and women-owned firms that are not currently certified but could be counted as DBEs in the base figure; however, firms that have been decertified or appear that they will soon graduate from the DBE Program should not be counted as DBEs in the base figure calculation.

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[1] Of the 281 MBE/WBE firms included in the availability database, 41, or about 15 percent, had DBE certification.

[2] 49 CFR Section 26.45 (c).

[3] USDOT. *Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program* http://www.osdbu.dot.gov/dbeprogram/tips.cfm

Definition of potential DBEs. BBC's analysis of the base figure is the same as determining MBE/WBE availability benchmarks for the disparity analysis, except that firms are grouped into two sets: "potential DBEs" and all other firms. A small number of minority- and women-owned firms are not counted as "potential DBEs" in the base figure analysis — firms for which DBE certification has been denied, that were ineligible for the DBE Program, that graduated from the DBE Program, or that appear to have revenues in excess of the limits for DBE certification (and are not currently certified). Figure 5-1 provides further explanation of the firms that were counted as potential DBEs when calculating the base figure for GDOT's overall DBE goal.

Definition of "all other firms" in the base figure calculations. In the base figure analysis, all firms that are not "potential DBEs" are categorized as "all other firms." This includes all majority-owned firms that are not DBE certified (which is nearly all majority-owned firms) and those minority- and women-owned firms that are not currently DBE-certified and have been denied DBE certification, graduated from the DBE Program or appear to be too large for DBE certification.

Figure 5-1.
Definitions of potential DBEs

To formulate the overall DBE goal, BBC included all minority- and women-owned firms as potential DBEs except for firms that had recently graduated from the DBE Program, firms that had applied for certification with GDOT and been denied or found to be ineligible, and firms that appeared to have annual revenue so high as to preclude their certification as DBEs. At the time of this study, the overall revenue limit was $22,410,000 (three-year average for gross receipts). There were also lower revenue limits for specific subindustries according to SBA small business size standards. Only a few minority- and women-owned firms appeared to exceed these revenue limits based upon information they provided in the availability survey.

Firm owners must also meet USDOT personal net worth limits. Personal net worth of the owners of firms was not available as part of this study and thus was not considered when determining potential DBE status.

B. Information about Firms Available for GDOT Work

BBC's availability analysis focused on specific construction and engineering subindustries in Georgia. Chapter 3 discusses BBC's identification of specific subindustries for inclusion in the availability analysis, and selection of Georgia as the relevant market area for GDOT contracting.

Once the subindustries and relevant geographic market area were determined, BBC developed a database of available firms by attempting to interview each business establishment within the relevant Georgia construction and engineering subindustries. This method of examining availability is sometimes referred to as a "custom census."

Overview of the availability interviews. BBC collected information from firm owners and managers to identify firms potentially available for GDOT work.

BBC first obtained all business establishment listings under the 8-digit industry codes maintained by Dun & Bradstreet (D&B) that were most pertinent to the subindustries involved in GDOT transportation contracts. D&B provided 14,614 business listings related to these subindustries.

BBC then worked with the telephone survey research firm Customer Research International (CRI), which performs business and consumer interviews throughout the country,[4] to conduct telephone interviews with the owners or managers of identified business establishments. About 9,600 D&B listings had accurate working phone numbers. CRI was able to successfully contact 4,571 (48%) of these business establishments.[5] About 2,500 establishments that were successfully contacted indicated they were not interested in participating in a discussion about their availability for GDOT work. More than 2,100 firms completed interviews about firm characteristics, their interest and qualifications for GDOT work and other topics. Interview topics included:

- Whether the organization was a subsidiary or branch of another company;
- Whether the organization was a private business or tribally-owned organization (and not a public agency or not-for-profit organization);
- Qualifications and interest in transportation contracting work for state and local agencies;
- Qualifications and interest in work as a prime, a subcontractor or a supplier/trucker;
- Firm specialization;
- The largest contract or subcontract bid on or performed in the past five years;
- Ability to work in specific geographic regions of Georgia;
- How long the firm has been in business; and
- Race/ethnicity/gender of firm ownership.

Appendix C provides an example of a telephone survey instrument.

Firm representatives were offered the option of answering questions that were e-mailed or faxed if they preferred not to complete an interview over the phone. (About 2 percent of interviews were completed through e-mail or fax.)

[4] CRI's work includes many tens of thousands of business interviews as part of BBC disparity studies for other state and local agencies.

[5] Other establishments could not be reached after multiple attempts (see Appendix C) or could not make a responsible staff member available to complete the interview.

C. Number of Minority-, Women- and Majority-owned Firms in the GDOT Availability Database

A useful starting point in the availability analysis is to simply count the number of minority-, women- and majority-owned firms in the availability database for the GDOT disparity study.

Total number of firms included in the availability database. The availability database for the GDOT study totaled 929 firms after screening for qualifications and interest in work with government agencies and firm location. The fundamental availability criteria for inclusion in the database were:

- Performance of work related to transportation contracting (in the lines of business pertinent to this study);
- Indication of qualifications and interest in performing work for state or local agencies in the future, as a prime contractor and/or subcontractor (or supplier or trucker);
- Past performance or bidding on work (in the public or private sector); and
- An office in Georgia.

The types of information above were gathered from the availability interviews with Georgia firms.

Minority-, women- and majority-owned firms in the availability database. Figure 5-2 provides race/ethnicity/gender information for the firms in the availability database for GDOT contracts and subcontracts. Of the 929 firms counted as potentially available, 281 indicated that they were minority- or women-owned. As shown in Figure 5-2, African American-owned firms comprised 14 percent and white women-owned firms were 11 percent of the firms in the availability database. Other minority-owned firms totaled about 5 percent of the firms. MBE/WBEs overall accounted for 30 percent of the firms in the availability database.

Figure 5-2.
MBE/WBEs as a percentage of firms available for GDOT contracts and subcontracts, by race, ethnicity and gender

Source: BBC Research & Consulting from Availability Database.

Race, ethnicity and gender	Total MBE/WBE Number of firms	Total MBE/WBE Percent of firms
African American-owned	131	14.1 %
Asian-Pacific American-owned	12	1.3
Subcontinent Asian American-owned	12	1.3
Hispanic American-owned	14	1.5
Native American-owned	9	1.0
Total MBE	178	19.2 %
WBE (white women-owned)	103	11.1
Total MBE/WBE	281	30.2 %
Total other firms	648	69.8
Total firms	929	100.0 %

The data in Figure 5-2 reflect a simple count of firms, with no analysis of a firm's availability for specific types, sizes or locations of GDOT contracts. Thus, the percentages shown in Figure 5-2 are presented for informational purposes and are not the measures of MBE and WBE availability used as

benchmarks in the disparity analysis. Additional analyses were required to develop these availability benchmarks, as described below.

Database designed to provide availability figures, not to identify every firm available for GDOT contracts. The availability database is suitable for producing statistically reliable availability benchmarks for use in determining whether there were disparities in GDOT's utilization of MBEs and WBEs and for calculating a base figure for the overall DBE goal. This methodology has been accepted in federal court, including the favorable review of a BBC disparity study for the California Department of Transportation by the Federal District Court in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*[6]

The availability data allow BBC to develop a representative depiction of firms qualified and interested in state and local transportation agency work, but it should not be considered an exhaustive list of every minority-, woman- and majority-owned firm that could participate in a GDOT contract. Reasons for this are further discussed in Appendices C and J.

D. Calculation of MBE/WBE Availability as Inputs to the Disparity Analysis

After developing the availability database, BBC analyzed that information to developed dollar-weighted availability benchmarks for use in the disparity analysis.

Purpose. The availability analysis calculates the percentage of contract dollars that might be expected to go to MBE/WBEs given the availability of minority-, women- and majority-owned firms for the specific types and sizes of a particular set of GDOT prime contracts and subcontracts.

Steps to calculating availability. For any given GDOT prime contract, subcontract or other procurement (collectively referred to here as "contract elements"), only a subset of the GDOT firms in the availability database were counted as potentially available for that work.

As described below, BBC first examined the characteristics of the specific contract element, including type of work involved, contract size, location and contract date. BBC then identified firms in the availability database that performed work of that type, size, location and in that role (as a prime

Figure 5-3.
Example of an availability calculation for a GDOT subcontract

On a GDOT contract issued in 2010, the prime contractor awarded a subcontract for striping work for $19,662. To determine the overall availability of minority- and women-owned firms for this subcontract, the study team identified firms in the availability database that:

a. Were in business in 2010;
b. Indicated that they performed striping work;
c. Reported bidding on work of similar size or greater in the past;
d. Reported qualifications and interest in working as a subcontractor on local government agency projects; and
e. Indicated that they could perform work in that region.

The study team found 48 firms in the availability database that met these criteria. Of those firms, 19 (40%) were minority- or women-owned. BBC applied 40 percent as the MBE/WBE availability figure for this subcontract.

This process was completed for all prime contract and subcontracts included in the disparity analysis, weighting the results for each contract element by the dollars for that prime contract or subcontract.

[6] U.S.D.C., E.D. Cal, Civil Action No. S-09-1662, Slip Opinion (E.D. Cal. April 20, 2011).

contractor or subcontractor), and were in business in the year the contract was awarded. This is a bottom up, contract-by-contract approach to determining availability measures specific to particular sets of GDOT contracts. The example in Figure 5-3 shows how BBC calculated availability for a subcontract on a specific GDOT project.

1. For each of the more than 4,800 GDOT prime contracts and subcontracts, BBC determined the type of work, contract role (prime/sub) and size of the work.

2. BBC then identified firms in the availability database that reported they:
   - Are qualified and interested in performing that role (prime or subcontractor) for the specific type of work, for local governments;
   - Have bid on or performed work of that size;
   - Report that they could work in that region; and
   - Were in business in the year the contract was awarded.

3. BBC counted the number of MBEs (by race/ethnicity), WBEs and majority-owned firms among all firms in the database available for that specific type of work.

4. The study team then translated the numeric availability of firms for a contract element into percentage availability for the contract element (e.g., the percentage of firms counted as available for a contract that are MBEs and WBEs).

   This process was repeated for each prime contract and subcontract.

5. BBC weighted the relative availability for each prime contract and subcontract by the dollars of work corresponding to each contract element.
   - For MBEs (for each race/ethnic group) and for WBEs, BBC multiplied percentage availability for each GDOT contract element by the dollars associated with the contract element;
   - Added the results across contract elements; and
   - Divided by total dollars for all GDOT contract elements to produce a dollar-weighted estimate of overall availability for MBE/WBEs and for each MBE/WBE group.

Results for GDOT contracts. Overall, MBE/WBE availability is 22 percent for GDOT contracts. Figure 5-4 shows complete results, including availability for GDOT contracts by race/ethnic group. These values serve as benchmarks to evaluate the actual percentage of GDOT contract dollars going to MBEs and WBEs from January 2009 through June 2011 (pertains to combined FHWA- and state-funded contracts).

Figure 5-4.
Dollar-weighted availability of firms for GDOT contracts, 2009 – June 2011, by race, ethnicity and gender

Note: See Figure K-2 in Appendix K.

Source: BBC Research & Consulting from Availability Database.

Race, ethnicity and gender	Utilization benchmark (availability %)
African American-owned	14.1 %
Asian-Pacific American-owned	1.5
Subcontinent Asian American-owned	0.6
Hispanic American-owned	0.5
Native American-owned	0.1
Total MBE	16.8 %
WBE (white women-owned)	5.2
Total MBE/WBE	22.0 %

Unique availability benchmark for each set of contracts. BBC did not just conduct a disparity analysis for all GDOT contracts, but also performed analyses for subsets of contracts (e.g., separating FHWA- and state-funded contracts, as well as construction contracts and engineering-related contracts and prime contracts and subcontracts). Therefore, BBC needed to determine availability benchmarks for each set of GDOT contracts and subcontracts examined in the disparity analysis. A number of tables in Appendix K report MBE/WBE availability and disparity analysis results for subsets of GDOT contracts and subcontracts. MBE/WBE availability varies from around 20 percent to about 31 percent depending upon the work examined. In general:

- MBE/WBE availability is greater for small GDOT contract elements;
- MBE/WBE availability is greater for subcontracts; and
- MBE/WBE availability is greater for state-funded contracts (26%) than for FHWA-funded contracts (22%).

Availability benchmarks improve upon what would be derived from a simple "headcount" of firms. The availability benchmark for GDOT contracts identified above (22%) is lower than the percentage of firms in the availability database that are MBE/WBEs (30%). There are a number of reasons why the overall availability benchmark is lower than what might be calculated by just counting MBEs and WBEs and dividing the sum by the total number of firms in the availability database. The most important reasons are:

- The availability analysis considered *specialization of work* involved in GDOT contracts;
- BBC considered a firm's qualifications and interest in *prime contract* work and *subcontract* work when determining availability for a GDOT contract element;
- The availability analysis considered *size of contracts* that firms have bid on when counting firms as available for a contract element;
- Consideration of the *geographic location* of the work and the firms indicating that they could perform work in that region; and
- BBC *dollar-weighted results* of the contract-by-contract availability analyses when determining an overall availability figure.

Specialization of work. USDOT suggests considering the availability of firms based on their ability to perform specific types of work. The example USDOT gives in "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" is as follows: If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction firms that are MBEs or WBEs and the percentage of trucking firms that are MBEs or WBEs, and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall MBE/WBE availability.[7]

BBC examined more than 20 areas of specialization ("subindustries") in the GDOT disparity study. The study team determined the work type for each prime contract and subcontract from the information in GDOT contract records and the primary line of work of the prime contractor or subcontractor performing the work item. Some subindustries reflect grouping of certain specializations.

Once BBC identified the work type for each prime contract and subcontract, the study team matched firms performing that type of work with the work type. Study team members conducting the availability interviews asked owners and managers of construction-related firms to identify the types of work they perform based upon the following work descriptions:

- Grading, excavation, drainage or other land prep;
- Paving, concrete work, or other heavy construction related to road work;
- Bridge or elevated highway construction or repair;
- Underground utilities;
- Electrical work related to highways such as lighting and signal installation;
- Painting, striping or pavement marking;
- Installation of highway fences, guardrails or signs;
- Temporary traffic control;
- Trucking and hauling for road projects; and
- Grassing or erosion control.

Interviewers also asked if the firm sold:

- Asphalt, concrete or other paving materials;
- Erosion control materials;
- Traffic or highway signs;
- Traffic signals;
- Fence or guardrail materials;
- Steel; and
- Petroleum.

[7] Id.

Interviewers asked firms performing engineering-related services whether they conducted one or more of the following types of work:

- Transportation planning;
- Bridge design;
- Highway design;
- Soils and materials testing;
- Construction management;
- Surveying and mapping;
- Erosion control planning and inspection;
- Mass transit operation and design; and
- Traffic control systems.

As with the interviews of construction firms, engineering-related services firms could identify more than one work type, and could point out other services they performed.

Qualifications and interest in prime contractor and subcontractor work. BBC collected information on whether firms reported qualifications and interest in working as a *prime contractor* and as a *subcontractor*. In BBC's availability analysis for GDOT construction and engineering contracts:

- Only firms reporting that they are qualified and interested in working with GDOT as a prime contractor are counted as available for GDOT-awarded prime contracts;

- Only firms reporting qualifications and interest in working with GDOT as a subcontractor, trucker/hauler or supplier are counted as available for these contract elements;

- Firms reporting qualifications and interest in both contract roles can be counted as available for either role.

Consideration of the size of contracts and subcontracts. BBC considered the size of contracts or subcontracts that a firm had bid on in the previous five years (referred to as "bid capacity") when determining whether to count that firm as available for a GDOT contract or subcontract of a certain size. When counting available firms for a prime contract or subcontract, BBC considered whether a firm had previously worked or bid on a project of equivalent size (in dollars) to the specified contract or subcontract element.

BBC used this approach to examining bid capacity in the California Department of Transportation disparity study that was favorably reviewed in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. BBC's approach is consistent with guidance from the U.S. Court of Appeals for the Federal Circuit regarding capacity of firms to perform different sizes of contracts (see *Rothe Development Corp. v. Department of Defense*).[8]

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

Location of contract. GDOT provided information on the district in which each contract was performed. BBC considered a firm available for work in a region if it indicated that it could do work or serve customers in that region. The definitions of regions are as follows:

- **Atlanta Metro Area (GDOT District 7).** This includes Fulton, DeKalb, Rockdale, Clayton, Cobb, and Douglas Counties.
- **Northwest Georgia (GDOT District 6).** This region extends from the Chattanooga Valley to the Cartersville area.
- **Northeast Georgia (GDOT District 1).** This includes the Gainesville, Lawrenceville, and Athens areas.
- **Middle Georgia (GDOT Districts 2 and 3).** This region extends from the Columbus to Augusta areas.
- **Southeast Georgia (GDOT District 5).** This region extends from the Savannah area to the Florida border.
- **Southwest Georgia (GDOT District 4).** This includes the Albany and Valdosta areas.

Note that BBC combined several of these regions when reporting disparity results.[9]

Dollar-weighting results. BBC examined availability contract-by-contract and subcontract-by-subcontract, and then dollar-weighted the results for each specific set of contracts. In calculating overall availability, the availability results for a large prime contract or subcontract contribute more to the overall calculation than small contract elements.

This is the same approach that BBC used in the California Department of Transportation disparity study that was favorably reviewed in the case cited above. "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" also suggests a dollar-weighted approach to determining availability.[10]

The effect of considering bid capacity and then dollar-weighting availability results is lower availability figures for MBEs and WBEs than if BBC had simply used a simple "head count" of MBEs, WBEs and majority-owned to determine availability.

[9] Disparity analysis results reported for North Georgia, the Atlanta Metro Area, Middle Georgia and South Georgia.

[10] Id.

Availability benchmarks are determined for MBE/WBEs and not just certified DBEs. Analysis of utilization and availability of minority- and women-owned firms (by race, ethnicity and gender) allows one to analyze whether there are disparities affecting minority- and women-owned firms.

- In other words, the possibility that race or gender discrimination affects utilization of firms is analyzed by comparing outcomes for firms based on the race/ethnicity/gender of their ownership, not certification status.

- Firms may be discriminated against because of the race or gender of the business owner regardless of whether that owner has applied for DBE certification.

- Furthermore, analysis of whether firms face disadvantages based on the race/ethnicity/gender of the firm owner counts the most successful, highest-revenue minority- and women-owned firms in the statistics for all minority- and women-owned firms. A disparity analysis focusing on DBEs would improperly compare outcomes for certified DBEs (by definition, "economically disadvantaged" minority- and women-owned firms) with all other firms (combining majority-owned firms with very successful firms owned by minorities and women). One might find disparities for any group of firms for which membership is limited to low-revenue firms.[11]

Another reason not to base the disparity analysis on DBEs is that white male-owned firms can be certified as DBEs under the Federal DBE Program.

The courts that have reviewed utilization and availability analyses have accepted analyses based on race/ethnicity/gender ownership and not certification status.

Coding of minority women-owned firms. In the GDOT disparity study, BBC combines firms owned by minority women and firms owned by minority men into "minority-owned firms." "WBEs" are firms owned by white women. Figure 5-5 discusses BBC rationale for that classification.

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

Figure 5-5.
Coding of firms owned by minority women

Firms owned by minority women present a data coding challenge in both the availability analysis and the utilization analysis. BBC considered four options for coding firms owned by minority women:

a. Coding these firms as both minority- and women-owned;

b. Creating a unique group of minority female-owned firms;

c. Grouping minority female-owned firms with all women-owned firms; and

d. Grouping minority female-owned firms with the relevant racial/ethnic group.

BBC chose not to code the firms as both women-owned and minority-owned to avoid potential double-counting when reporting total MBE/WBE utilization and availability. Dividing each racial/ethnic group into firms owned by men versus women (e.g., African American male-owned firms, African American female-owned firms, etc.) was also unworkable for purposes of the disparity analysis because some minority groups had utilization and availability so low that further disaggregation made it more difficult to interpret results.

After rejecting the first two options, BBC then considered whether to group minority female-owned firms with the relevant minority group or with all women-owned firms. BBC chose the former — to group African American women-owned firms with all African American-owned firms, etc. "WBE" in this report refers to white women-owned firms. Any evidence of discrimination against white women-owned firms should, in general, be considered evidence of discrimination against women of any race or gender. This definition of WBEs also gives GDOT information to answer questions that often arise pertaining to utilization of white women-owned firms, such as whether a disproportionate share of work goes to firms owned by white women compared with firms owned by minorities.

E. Base Figure for Overall Goal for DBE Participation in FHWA-funded Contracts

Establishing the base figure is the first step in calculating an overall annual goal for DBE participation in GDOT FHWA-funded contracts. BBC calculated the base figure using the same availability database and approach for determining MBE/WBE availability as described above, except that calculations were specific to "potential DBEs." This methodology is consistent with court-reviewed methodologies in states including California, Illinois and Minnesota, instructions in the 2011 revisions to the Federal DBE Program, and USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."[12]

As Figure 5-1 explained, BBC counted firms as potential DBEs if they were certified as DBEs in Georgia or were minority- and women-owned and did not have DBE certification applications denied, had graduated from the DBE Program or appeared to be too large to meet the revenue limits for DBE certification (overall or for the specific subindustry).

It is also important to note that just one in seven of the MBE/WBE firms interviewed in the availability analysis was certified as a DBE.

Base figure. BBC's availability analysis indicates that minority- and women-owned firms currently or potentially certified as DBEs might be expected to receive 19.8 percent of prime contract and subcontract dollars for GDOT FHWA-funded transportation contracts.

[12] Id.

GDOT should consider 19.8 percent as the base figure for its overall goal for DBE participation if the distribution of FHWA-funded contracts for the time period covered by the goal is expected to be similar to FHWA-funded contracts from 2009 through June 2011.

Difference from overall availability of MBE/WBEs for FHWA-funded contracts. If BBC had counted all minority- and women-owned firms as potential DBEs, the base figure would have been 21.8 percent.

Calculation of base figure if mix of FHWA-funded contracts will differ in the future. Figure 5-6 presents the construction and engineering components of the base figure for the overall DBE goal. The base figure reflects a weight of 90 percent for construction and 10 percent for engineering based on dollars of FHWA-funded contracts for 2009 through June 2011 examined in the availability analysis. If the dollars of FHWA-funded construction contracts as compared with FHWA-funded engineering-related service contracts varies in the future, GDOT may wish to apply different weights to the base figure data for each set of contracts when calculating a base figure.

Similarly, GDOT could consider adjusting the base figure if the future geographic mix of contracts were to differ substantially from the 2009 through June 2011 time period. MBE/WBE availability was several percentage points higher for contracts in North Georgia and the Atlanta Metropolitan Area than in Middle Georgia and South Georgia.

In addition, the availability analysis included a number of projects funded through the American Recovery and Reinvestment Act. When considering an overall DBE goal for the next three fiscal years, GDOT should consider how its future mix of FHWA-funded projects may differ from the 2009 through June 2011 time period.

Figure 5-6. Construction and engineering components of base figure for GDOT FHWA-funded transportation contracts

Potential DBEs	Availability percentage		
	Construction	Engineering	Total
African American-owned	14.2 %	9.2 %	13.7 %
Asian-Pacific American-owned	1.3	1.3	1.3
Subcontinent Asian American-owned	0.1	3.5	0.4
Hispanic American-owned	0.1	1.6	0.2
Native American-owned	0.1	0.0	0.1
WBE (white women-owned)	4.1	3.1	4.0
Total potential DBEs	19.9 %	18.7 %	19.8 %
Sector weight	90 %	10 %	

Note:

Weights are based dollars of FHWA-funded contracts for 2009–June 2011.

Source:

BBC Research & Consulting.

The 19.8 percent base figure presented in Figure 5-6 is higher than the overall DBE goals GDOT has adopted in the past, which have been around 12 percent.

Additional steps before determining the overall annual DBE goal. GDOT must consider whether to make a "step 2" adjustment to the base figure before determining a final overall DBE goal. The step 2 adjustment can be upward or downward. Chapter 10 of the report presents information GDOT should consider in choosing whether to make such an adjustment.

F. Implications for any DBE Contract Goals

If GDOT chooses to utilize DBE contract goals in the future, it might use the availability database, the current DBE directory at that time, a newly-developed bidders list and/or other information to examine the availability of DBEs to participate in that contract. If it uses DBE contract goals, GDOT should continue to:

- Set goals on a contract-by-contract basis given the unique attributes of a contract and the availability of DBEs to perform that work.
- Set DBE contract goals only on FHWA-funded contracts.
- Only set DBE contract goals on contracts that have meaningful subcontracting opportunities.
- Retain flexibility in how prime contractors could comply with the contract goals program, including showing good faith efforts to meet the contract goal.

CHAPTER 4.
Conditions for Minorities and Women in the Georgia Marketplace

Federal courts have found that Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[1] Congress found that discrimination had impeded the formation and expansion of qualified minority business enterprises.

BBC examined whether barriers for minority- and women-owned firms found on a national level also appear in the Georgia construction and engineering industries. Such barriers could affect MBE/WBE availability and utilization for GDOT construction and engineering-related contracts. [2] BBC examined the Georgia marketplace primarily in four areas:

A. Entry and advancement;

B. Business ownership;

C. Access to business credit, bonding and insurance; and

D. Success of businesses.

These areas correspond to some of the topics an agency implementing the Federal DBE Program would consider when setting the overall goal for DBE participation in USDOT-funded contracts, as discussed in 49 CFR Section 26.45(d).

Appendices D through H present the detailed quantitative analyses concerning the Georgia marketplace that are summarized in Chapter 4.

A. Entry and Advancement

BBC examined the representation of minorities and women in the Georgia construction and engineering workforce relative to all industries. In addition, the study team reviewed the advancement of minorities and women into supervisory or managerial roles. As discussed in Appendix D, a number of studies throughout the United States have taken the position that race and gender discrimination has affected the employment and advancement of certain groups in the construction and engineering industry.

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[1] *Sherbrooke Turf, Inc.*, 345 F.3d at 970, (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167 – 76 (10th Cir. 2001)); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005) at 992.

[2] As in other sections of the report, the term "MBE/WBEs" refers to minority business enterprises and women business enterprises, whether or not they are certified as MBEs, WBEs or DBEs. Disadvantaged business enterprises (DBEs) are a subset of MBE/WBEs in this report.

Entry and advancement in the Georgia construction industry. Quantitative analysis of the Georgia marketplace — based primarily on data from the 2000 U.S. Census and the 2007-2009 American Community Survey (ACS) — showed that certain MBE/WBE groups appear to be underrepresented in the construction industry compared to all industries considered together. In addition, some of those groups appear to face barriers regarding advancement to supervisory or managerial positions (see Appendix D).

- In 2000 and 2007-2009, relatively fewer African Americans worked in the Georgia construction industry compared to all industries.

- In 2000 and 2007-2009, women were represented in the Georgia construction industry in particularly low numbers considering their representation among all workers.

Barriers to advancement in the construction industry may also be an important reason for the relatively low number of minority and female business owners. In 2000 and 2007-2009:

- There were large differences in the representation of African Americans among construction occupations, suggesting barriers to entry or advancement into certain construction fields. This was also true for Hispanic Americans and for women (often in the same occupations).

- There is some evidence of barriers to advancement based on the relative number of minorities and women working in the Georgia construction industry who were first line supervisors and managers.

Entry and advancement in the engineering industry. BBC also used 2000 U.S. Census data and 2007-2009 ACS data to examine employment and advancement for different racial, ethnic and gender groups working in Georgia engineering-related business establishments (referred to here as the "engineering industry"). As with construction, certain minority groups as well as women were underrepresented in the engineering industry relative to the statewide workforce.

Education is an important factor for entry and advancement in the engineering industry. Barriers to college education may represent a barrier to entering the industry for certain minority groups.

- Lack of education appears to be a barrier to entry into the Georgia engineering industry for certain minority groups, including African Americans.

- After controlling for a college education, however, a smaller number of African Americans were working in the Georgia engineering industry compared with representation of African Americans among people with a college degree.

- In 2000 and 2007-2009, only about one-in-four workers in the Georgia engineering industry were women, despite the fact that women comprised nearly one-half of the population with a college degree.

Effects of entry and advancement barriers on the Georgia marketplace. Employment and advancement are preconditions to business ownership in the construction and engineering industries. Because disparities exist in entry and advancement for certain MBE/WBE groups, it follows that those disparities may prevent some minority- and women-owned businesses from ever forming, reducing overall MBE/WBE availability in the Georgia marketplace.

Because of the nature of entry and advancement data, it is difficult to quantify the effect that associated barriers may have had on the availability of minority- and women-owned firms for GDOT contracts.

B. Business Ownership

Prior studies have found that race, ethnicity and gender affect opportunities for business ownership, even after accounting for other factors. Figure 4-1 summarizes how courts have used those studies when considering implementation of the Federal DBE Program in other states.

BBC examined whether there are disparities in business ownership for minorities and women in the Georgia workforce compared to non-Hispanic white males. The study team developed regression models of business ownership rates using 2007-2009 ACS data (prepared by the U.S. Bureau of the Census) for the Georgia construction and engineering industries. The models identified disparities for certain minority groups and women after accounting for personal characteristics including education, age and ability to speak English. For groups exhibiting statistically significant disparities, BBC compared actual business ownership rates with simulated rates if those groups, based on personal characteristics, owned businesses at the same rate as similarly-situated non-Hispanic white males. Appendix E provides details about BBC's quantitative analyses of business ownership rates in the Georgia marketplace.

Figure 4-1.
Use of regression models of business ownership in defense of the Federal DBE Program

State and federal courts have considered disparities in business ownership rates when reviewing implementation of the Federal DBE Program, particularly when considering DBE participation goals. For example, disparity studies in Minnesota, Illinois and California used regression models to analyze the impact of race/ethnicity/gender on business ownership in the combined construction and engineering industry. Results from those models helped determine whether race- and gender-based disparities exist after statistically controlling for other personal characteristics. Those analyses, which were based on 2000 Census data, were included in materials submitted to courts in subsequent litigation concerning implementation of the Federal DBE Program. BBC used the same sources of data and similar regression models to analyze business ownership in Georgia.

Business ownership in construction. Quantitative analysis of the Georgia construction industry revealed statistically significant disparities in business ownership for several racial/ethnic/gender groups, after accounting for various neutral factors such as age, personal net worth, ability to speak English and education. Compared to non-Hispanic whites and non-Hispanic white males, BBC observed significant disparities for:

- African Americans;
- Hispanic Americans; and
- White women.

For each of the minority groups above, Figure 4-2 compares observed business ownership rates to simulated business ownership rates if those groups owned construction businesses at the same rate as similarly-situated non-Hispanic whites (i.e., "benchmark business ownership rate"). The study team generated similar simulations for non-Hispanic white women compared to non-Hispanic white men.

Based on the simulation, about 28 percent of African Americans working in the Georgia construction industry would own businesses if race did not have an impact on self-employment. However, the actual 2007-2009 self-employment rate for African Americans was 21 percent. Larger disparities were identified for Hispanic Americans and women working in the Georgia construction industry.

The study team calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the benchmark business ownership rate (and then multiplying by 100). A value of 100 would indicate "parity" in business ownership rates; a small index indicates a larger disparity. Results indicate that:

- Compared to similarly-situated non-Hispanic whites, there were large disparities in business ownership rates for African Americans (disparity index of 76) and Hispanic Americans (disparity index of 50) working in the Georgia construction industry.
- There was also a large disparity for non-Hispanic white women (disparity index of 56) compared to non-Hispanic white men.

Figure 4-2.
Comparison of actual business ownership rates to simulated rates for Georgia construction workers, 2007-2009

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
African American	21.2%	28.0%	76
Hispanic American	12.3%	24.8%	50
White female	20.4%	36.7%	56

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure E-1.

Source: BBC Research & Consulting from 2007-2009 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Business ownership in engineering. As with construction, BBC examined business ownership rates for minorities and non-Hispanic white women working in the Georgia engineering industry compared to non-Hispanic whites and non-Hispanic white males.

- African Americans working in the Georgia engineering industry were self-employed at substantially lower rates than non-Hispanic whites in both 2000 and 2007-2009. (This difference was statistically significant in the 2007-2009 data only). Business ownership rates were also lower for other minorities, but differences were not statistically significant in part due to small sample sizes of these groups.

- In 2000 and in 2007-2009, women working in the engineering industry in Georgia also had substantially lower self-employment rates than men (statistically significant differences).

- BBC used regression models to investigate the presence of race/ethnicity and gender disparities in business ownership in the engineering industry after accounting for the effects of neutral factors. Analyses for 2000 and 2007-2009 did not identify statistically significant disparities for minorities and women.

Effects of business ownership barriers on the Georgia marketplace. The barriers that certain minority groups and women face regarding business ownership in the Georgia construction industry may have substantial effects on business outcomes for minority- and women-owned firms.

- There is quantitative evidence that some number of minority- and women-owned construction firms may have never formed as a result of different barriers related to race, ethnicity and gender in Georgia.

- Chapter 10 of this report provides quantitative analyses of the effect of race and gender disparities in business ownership on the availability of MBE/WBEs for GDOT construction contracts.

C. Access to Capital, Bonding and Insurance

Access to capital represents one of the key factors that researchers have examined when studying business formation and success. If discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start or expand a business, as discussed in Appendix G. BBC examined whether minorities and women have access to capital — both home mortgage lending and business capital — that is comparable to that of non-Hispanic whites and non-Hispanic white males. In addition, the study team examined qualitative information about whether minorities and women face any barriers in obtaining bonding and insurance.

Access to capital. There is evidence that minorities and women continue to face certain disadvantages in accessing capital necessary to start and expand businesses, based upon analysis of 2000 and 2007-2009 U.S. Census Bureau data; 2006 and 2009 Home Mortgage Disclosure Act (HMDA) data; and the 1998 and 2003 Survey of Small Business Finances (SSBF) data.

- Home equity is an important source of funds for business start-up and growth. Relatively fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Georgia own homes than non-Hispanic whites. African Americans, Hispanic Americans and Native Americans in Georgia who do own homes have lower home values than non-Hispanic whites.

- African Americans, Asian Americans, Hispanic Americans and Native Americans applying for home mortgages in Georgia are more likely than non-minorities to have their applications denied.

- African American and Hispanic American home purchase mortgage borrowers in Georgia have been more likely to have subprime loans.

- Minority- and women-owned firms in the South Atlantic region have been more likely to forgo applying for loans due to fear of denial.

- Based on a regression analysis using 1998 SSBF data, African American, Asian American and Hispanic American business owners were more likely to be denied a loan (results relevant to the South Atlantic region).

- Data indicate that minority- and women-owned firms receiving business loans obtained smaller loans than majority-owned firms. There is some evidence for the South Atlantic region that minority- and women-owned firms receiving business loans pay higher interest rates on those loans.

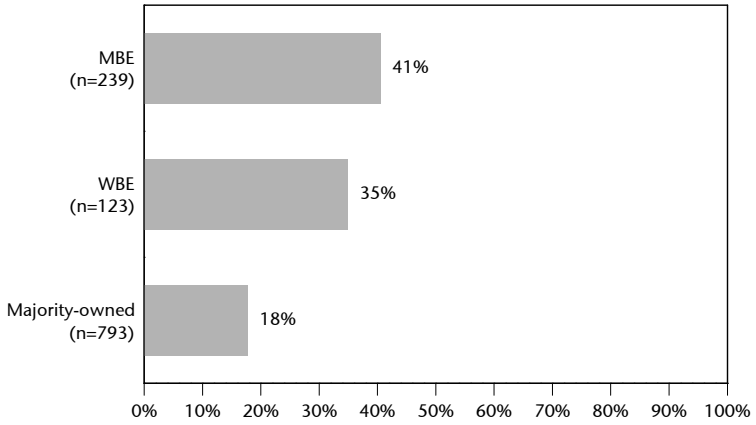
At the close of the 2011 availability interviews conducted as part of the GDOT disparity study, BBC asked, "Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as we ask you these questions."

The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?"

As shown in Figure 4-3 below, 41 percent of MBEs and 35 percent of WBEs reported difficulties obtaining lines of credit or loans. Fewer majority-owned firms (18%) reported that they had experienced difficulties obtaining lines of credit or loans.

Figure 4-3.
Has your company experienced any difficulties in obtaining lines of credit or loans?

Source:
BBC Research & Consulting from 2011 Availability Interviews.



Minority-, women- and majority-owned firms alike reported slow payment to be a difficulty (nearly one-half of all respondents, with little difference between groups).

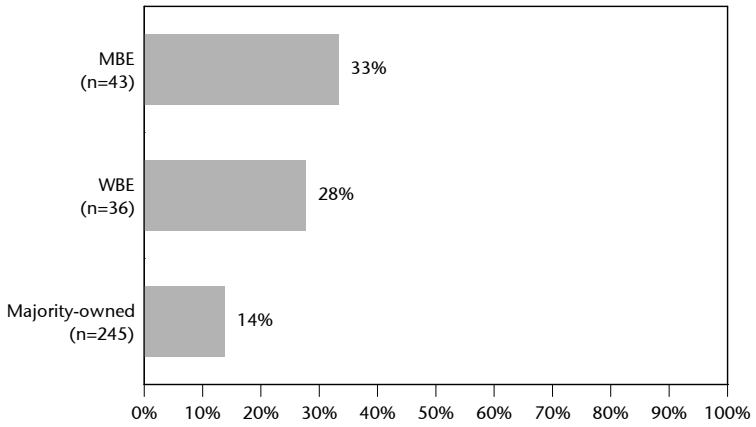
Bonding. To research whether bonding represented a barrier for Georgia businesses, BBC asked firms completing availability interviews:

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

Among firms reporting that they had obtained or tried to obtain a bond, one-third of MBEs indicated difficulties obtaining bonds needed for a project. A somewhat smaller share of WBEs (28%) reported difficulties. Only 14 percent of majority-owned firms that had obtained or tried to obtain a bond reported difficulties. Figure 4-4 presents these results from the 2011 availability interviews.

Figure 4-4.
Has your company had any difficulties obtaining bonds needed for a project?

Source:
BBC Research & Consulting from 2011 Availability Interviews.



MBEs were also more likely to report difficulties obtaining insurance.

Effects of access to capital, bonding and insurance barriers on the Georgia marketplace. The disadvantages for certain MBE/WBE groups associated with access to capital, bonding and insurance may affect various business outcomes for minority- and women-owned firms.

- Quantitative evidence suggests that it is more difficult for certain minority groups and women to obtain capital, bonding and insurance. Such difficulties may prevent some minority- and women-owned businesses from ever forming, reducing overall MBE/WBE availability in the Georgia marketplace.

- Access to capital, bonding and insurance are often required for businesses to expand. Particularly in the public sector, large construction and engineering contracts demand more from firms in terms of financing, bonding and insurance. Because disparities exist in access to those markets for certain MBE/WBE groups, it follows that those disparities may make it difficult for existing MBE/WBE firms to compete for large transportation contracts, reducing overall MBE/WBE utilization in the Georgia marketplace.

Because of the nature of the data pertaining to the credit, bonding and insurance markets, it is difficult to quantify the effect that associated barriers may have had on GDOT availability and utilization during the study period.

D. Success of Businesses

BBC completed quantitative analyses that assessed whether the success of minority- and women-owned businesses differ from that of majority-owned businesses in the Georgia construction and engineering industries. The study team examined information compiled from the availability telephone interviews with Georgia businesses, U.S. Small Business Administration (SBA) analyses, U.S. Census data, and the Survey of Business Owners (SBO).

Markets, contracting roles, size of contracts and bid capacity. The telephone interview results show that many MBE/WBEs attempt to work in a variety of markets and roles, with varying capacities to bid on work.

Markets and contracting roles. The telephone interview results show that many MBE/WBEs attempt to work as prime contractors and as subcontractors on both public and private sector contracts:

- The telephone interview results for firms in the transportation construction industry found that MBE/WBEs were more likely to have pursued work in the private sector than the public sector within the past five years.

- Many MBEs, WBEs and majority-owned construction and engineering-related firms have bid as both prime contractors and subcontractors.

Data from the availability interviews showed more indicators of success for WBEs than for MBEs:

- WBEs that had bid on public and private sector construction work were more successful in obtaining work compared with MBEs and majority-owned firms.
- WBEs in the engineering industry were also more successful in receiving public and private sector work than MBEs and majority-owned firms.
- However, WBE engineering-related firms were less likely than majority-owned firms to bid as prime consultants.

Some results indicated certain differences for MBEs:

- For both public and private sector work, MBE construction firms were less likely than majority-owned and WBE firms to have bid as a prime contractor.
- MBEs were also less likely to report that they had been successful when pursuing public and private sector work.

Size of contracts awarded. There were also differences in the largest transportation-related contract or subcontract that firms had received in Georgia in the past five years. Among construction firms, more majority-owned firms than MBE/WBEs had received contracts or subcontracts worth at least $1 million. Majority-owned engineering-related firms were also more successful than MBE/WBEs when examining contracts of $5 million or more.

Size of contracts bid ("bid capacity"). BBC also examined the largest contracts on which firms had bid in the transportation contracting industry in Georgia in the past five years, which is referred to as "bid capacity" in this disparity study. Key results include:

- Minority- and women-owned construction firms were less likely than majority-owned firms to have bid capacity exceeding the median for their subindustry. Further analysis, however, found that these differences could be explained by the age of these firms.
- Minority-owned firms in the engineering industry were more likely to have above-average bid capacity than other firms with similar specializations. This difference persisted even after controlling for firm age.
- On the other hand, WBEs were less likely than other engineering-related firms to report bidding or winning relatively large contracts. Age of firm explained most of these differences for WBEs.

Business closures, contractions and expansions. BBC used the most recent available analyses of SBA data to examine business closures, contractions and expansions in Georgia and in the U.S. as a whole. The SBA analyses compared business outcomes for minority-owned firms to business

outcomes for all firms considered together for 2002 to 2006.[3] The SBA only reported results for specific industries at the national level.

- Among groups examined in Georgia, African American-owned firms were the most likely to close and the least likely to expand. National data show the same pattern for African American-owned construction firms and professional, scientific and technical services firms (including engineering firms).

- Hispanic American-owned businesses were also more likely to close than white-owned firms in Georgia. National data show higher closure rates for Hispanic American-owned firms in the construction and the professional, scientific and technical services industries.

- Asian American-owned firms were more likely to close than white-owned firms in Georgia. National data show the same pattern for Asian American-owned professional, scientific and technical services companies.

- National data indicate that closures for firms owned by African Americans, Hispanic Americans and other minority groups were much more likely to be "unsuccessful closures" compared with firms owned by non-minorities.[4]

- Overall, minority-owned firms were less likely to contract than white-owned firms in Georgia. Hispanic American- and Asian American-owned businesses in Georgia were as likely to expand as white-owned businesses.

Business receipts and earnings. Annual receipts and business earnings are also an indicator of the success of a business. The study team examined business receipts data published by the U.S. Census Bureau in the 2007 SBO, data on business earnings for business owners from the 2000 Census and 2007-2009 ACS, and annual revenue data for firms in the Georgia construction and engineering-related industries collected as part of BBC availability interviews.

- The above data sources indicate a pattern of lower receipts for minority- and women-owned firms compared will all firms in the construction and the professional, scientific and technical services industries.

- Regression analyses using 2000 Census and 2007-2009 ACS data for business owner earnings indicate that there were statistically significant disparities in earnings for the following groups after taking account of neutral factors:

  - African American business owners tended to earn less than non-Hispanic white business owners in 1999 in the Georgia construction industry; and

  - Female business owners tended to earn less than male business owners in the Georgia construction industry and the South Atlantic region engineering-related industry in both 1999 and 2006-2009.

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[3] The SBA did not report results for women-owned firms.

[4] See Appendix F for a discussion of "successful" versus "unsuccessful" closures.

- BBC also analyzed revenue data for firms in the Georgia transportation contracting industry collected as part of the disparity study's availability interviews.
  - Data indicate that most businesses, MBE/WBEs and majority-owned firms alike, report annual revenue of $1 million or less.
  - However, few minority- and women-owned firms relative to majority-owned firms reach high revenue levels. This result is evident for both construction and engineering-related firms.

Telephone interview results concerning potential barriers. As part of the availability interviews with Georgia businesses completed in the disparity study, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business. BBC asked if:

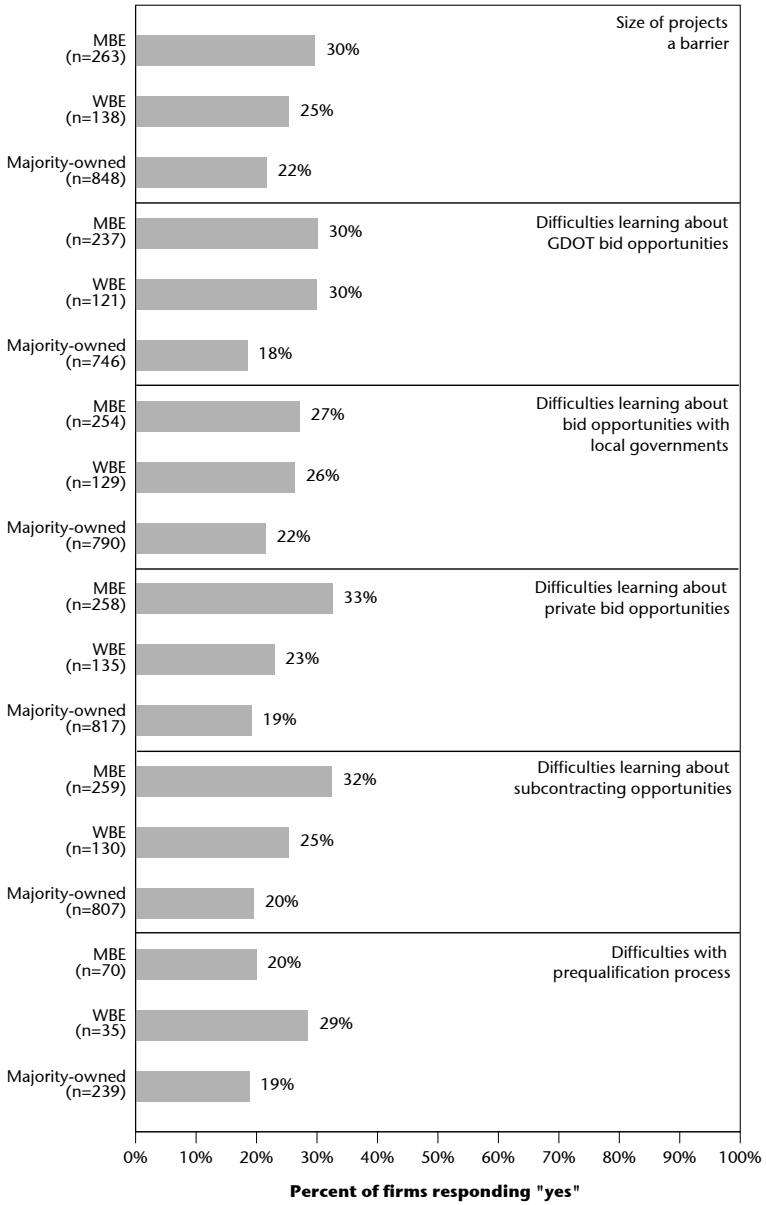
- The size of projects had presented a barrier to bidding;
- The firm had experienced difficulties learning about bid opportunities with GDOT;
- The firm had experienced difficulties learning about bid opportunities with local governments or private companies;
- The firm had experienced difficulties learning about subcontracting opportunities in Georgia; and if
- The prequalification process for GDOT work had presented difficulties for the firm.

Figure 4-5 summarizes responses to these questions. Responses for construction and engineering-related firms have been combined.

- As shown in Figure 4-5, MBEs and WBEs were more likely than majority-owned firms to report that the size of projects had been a barrier to bidding.
- MBEs and WBEs were also more likely than majority-owned firms to report difficulties learning about:
  - GDOT bid opportunities;
  - Local government bid opportunities;
  - Private sector bid opportunities; and
  - Subcontracting opportunities.
- Among firms that had looked into or applied for prequalification for GDOT contracts, WBEs appeared to be more likely than majority-owned firms to report difficulties with the prequalification process.

Figure 4-5 summarizes responses to these questions. Responses for construction and engineering-related firms have been combined.

Figure 4-5.
Responses to 2011 availability interview questions from Georgia MBE, WBE and majority-owned construction and engineering-related firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: BBC Research & Consulting from 2011 Availability Interviews.

Effects that barriers have on business success in the Georgia marketplace. Disparities regarding business success may affect outcomes for minority- and women-owned firms in Georgia.

- Analyses suggest that, in general, MBE/WBE firms may be less successful than majority-owned firms in Georgia. Differences in business success have manifested themselves in higher closure rates for certain MBE groups, potentially reducing overall MBE availability in the Georgia marketplace.

- Lower business receipts and earnings for certain MBE/WBE groups may make it difficult for existing MBE/WBE firms to obtain the resources to effectively compete for transportation construction and engineering contracts, particularly high dollar value contracts. Such limitations may reduce overall MBE/WBE utilization in the Georgia marketplace.

- In telephone interviews with businesses in the Georgia transportation contracting industry, minority- and women-owned firms were more likely than majority-owned firms to report difficulties learning about bidding opportunities. MBEs and WBEs were also more likely to indicate that size of project presented a barrier to bidding.

Because of the nature of the data pertaining to business success, it is difficult to quantify the effect that associated barriers may have had on GDOT availability and utilization during the study period.

Information from Other Disparity Studies in Georgia

The BBC study team identified four disparity studies completed by local governments in Georgia after January 1, 2009:

- City of Atlanta study (only the Executive Summary has been made public);

- Clayton County study;

- Augusta-Richmond County (ARC) study; and

- City of Savannah study (along with the County and School District).

At the time of this draft report, BBC was awaiting release of the disparity study conducted in Savannah.

Quantitative analyses using secondary data. The Atlanta and the Augusta-Richmond County disparity studies used many of the same sources of secondary data to examine firm ownership rates, owners' earnings and access to business capital that BBC utilized in the GDOT Disparity Study (e.g., Current Population Survey, decennial Census of Population, Survey of Small Business Finances). Results of these analyses were similar to BBC's results summarized in Chapter 4.

The Atlanta study also compared annual revenue of African American-, Asian-Pacific American-, Hispanic American- and women-owned firms to revenue of other firms based on revenue information from Dun & Bradstreet.

For construction and professional services, there were statistically significant disparities, after controlling for neutral factors, for:

- African American-, Hispanic American- and women-owned firms in the construction industry; and
- African American, Asian-Pacific American-, Hispanic American and women-owned firms in the professional, scientific and technical services industry (which includes engineering).

Results of business surveys. The Augusta-Richmond County study included a survey of businesses in the Augusta metropolitan area. In the survey, more than 40 percent of minority- and women-owned firms reported that they had experienced as least one instance of disparate treatment in one or more areas of business dealings listed in the survey. For example, 47 percent of African American-owned firms indicated that they had been treated less favorably due to their race when applying for commercial loans. Further analyses indicated that size, qualifications and experience of firms could not explain the differences in survey responses for minorities and women compared with majority-owned companies.

The Augusta-Richmond County survey also asked firms, "How often do prime contractors who use your firm as a subcontractor on public-sector projects with requirements for minority, women and/or disadvantaged businesses also hire your firm on projects (public or private) *without* such goals or requirements?" Most minority- and women-owned firms responded that this seldom or never occurs. A similar question asked whether firms were even solicited for bids on non-goals projects. Again, most minority- and women-owned firms responded that this seldom or never occurs.

Similar results were reported in the Atlanta disparity study. The Atlanta study team conducted interviews with minority- and women-owned businesses that had worked as subcontractors on City projects. Many of the minority- and women-owned firms indicated that prime contractors using them on City contractors did not contact them for work on private sector projects or those public projects not requiring efforts to obtain minority or female firm participation.

Group interviews and in-depth interviews with business owners. The Clayton County and the Augusta-Richmond County disparity studies included group interviews and individual in-depth interviews with business owners within the local market areas for those studies. The interviews identified qualitative evidence of:

- Discrimination by prime contractors against subcontractors on the basis of race.
- Unequal pay for contractors' work based on the race and gender of the business owner.
- Unequal access to public sector professional services contracts for minority-owned firms.
- Double-standards for work performed by minority- and women-owned construction and professional services firms compared with majority-owned firms.
- Racist and sexist comments made to minority and female business owners or representatives by non-minorities and men.

- Existence of a "good old boys' system" in the local areas and across Georgia that negatively affects opportunities for firms outside that network.
- Fraudulent use of MBE/WBE certification status by prime contractors and existence of MBE/WBE front companies.
- Stereotypical attitudes and stigmas that negatively affect minorities and women in business.
- The possibility that suppliers quote MBE/WBEs higher prices than other firms.
- Discrimination against minorities and women when applying for commercial loans.
- Difficulties obtaining surety bonds, which were reported to have a negative effect on prime contract and subcontract opportunities in the construction industry.

Implications of information for local disparity studies. The quantitative and qualitative information from the local government disparity study provides further insights into marketplace conditions for minority- and women-owned firms in Georgia. Results of the local government studies are consistent with much of the information from BBC's analysis of the Georgia construction and engineering industries.

Summary

There is evidence of disparities in the Georgia construction and engineering industries for certain MBE/WBE groups that are related to:

- Entry and advancement;
- Business ownership;
- Access to business capital, bonding and insurance; and
- Success of businesses.

There is also qualitative evidence of discrimination against minority- and women-owned businesses from the 2009 disparity study completed for ARC.

The information concerning Georgia marketplace conditions and barriers that MBE/WBEs may face is important as GDOT considers:

- Setting its overall annual goal for DBE participation (explained further in Chapter 10);
- Determining the extent to which it can achieve its DBE goal through neutral efforts and the specific groups that might be included in certain Program measures such as DBE contract goals (see Chapter 11); and
- Specific measures to be included in its implementation of the Federal DBE Program and to better open opportunities for small businesses in its state-funded contracts (see Chapter 12).

CHAPTER 3.
GDOT Transportation Contracts

Chapter 3 provides an overview of GDOT transportation contracts and describes the process for collecting information on prime contracts and subcontracts. Chapter 3 also analyzes types of work involved and the geographic distribution of businesses performing these contracts. It is organized into four parts:

A. Overview of GDOT transportation contracts;

B. Collection and analysis of GDOT contract data;

C. Types of work involved in GDOT contracts; and

D. Location of businesses performing GDOT work.

Appendix B provides additional discussion of the methods BBC used to collect and analyze the contract data.

A. Overview of GDOT Transportation Contracts

GDOT uses FHWA and state resources to fund highway and related construction and engineering contracts for projects throughout the state. Examples of GDOT projects include constructing new highway segments, widening and resurfacing roads, and improving bridges.

A typical construction contract involves a prime contractor and a number of subcontractors. Many GDOT projects have an engineering phase prior to construction that requires contracting with engineering companies and related firms. The engineering prime consultant may retain specialized subconsultants to perform work on these contracts.

GDOT also administers FHWA and state funding that goes to transportation projects overseen by cities, counties and other local governments. State funding for local government projects comes through the Local Maintenance and Improvement Grant Program, which in mid-2010 replaced the State Aid and Local Assistance Road (LARP) programs. The Local Maintenance and Improvement Grants Program supports local government surface transportation improvement projects (road resurfacing, widening, etc.). It does not provide funds for related engineering contracts.

Beyond traditional highway projects, GDOT also funds contracts through programs including the federal Transportation Enhancement (TE) program, which supports projects from bike paths and pedestrian walkways to landscaping and historic preservation. GDOT works with the Atlanta Regional Commission on similar Livable Centers Initiative projects.

B. Collection and Analysis of Prime Contract and Subcontract Data

BBC collected data on GDOT's FHWA- and state-funded construction and engineering-related prime contracts and subcontracts as well as some of the contracts local agencies awarded with funds administered by GDOT.

Study period. BBC examined prime contracts and subcontracts for GDOT contracts awarded from January 1, 2009 through June 30, 2011. The study team also collected data for task orders issued within this time period on engineering-related contracts awarded before 2009.

- Because GDOT began collecting comprehensive information on subcontracts for its construction contracts in 2009, January 1, 2009 was selected as the starting date for the study period.
- BBC initiated the disparity study in early 2011, and was able to extend data collection for contracts awarded through the end of the state fiscal year (June 2011).

Data sources for GDOT contracts. BBC used several information sources to compile contract, subcontract and vendor data, as described in Appendix B.

- Much of the information concerning GDOT construction prime contracts and subcontracts came from electronic records provided by GDOT. GDOT staff in district offices then reviewed and supplemented these data.
- Information on GDOT engineering-related contracts came from a combination of electronic information and hard copy monthly invoices. BBC collected information for both FHWA- and state-funded contracts.
- Limited information was available for suppliers in GDOT contract records. GDOT provided some supplemental information from certain businesses known by GDOT to be involved as suppliers in its contracts. (See Appendix B for further information.)

GDOT contract records were used to determine whether or not the contract was FHWA-funded.[1] BBC determined contract size based on dollars at time of contract award. The time period for each contract was based on the date of contract award.

Total number of GDOT contracts examined in the initial data collection. BBC identified more than 700 GDOT construction contracts and over 140 GDOT engineering-related contracts within the study period.[2] These contracts totaled about $2 billion.

All but a few of these contracts were suitable for inclusion in the utilization and disparity analyses, as described below.

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[1] Any dollars of FHWA funding caused GDOT to treat a contract as FHWA-funded.

[2] On task-order engineering contracts, BBC considered each task order as separate prime contract in the analysis. When considering task-order engineering contracts in this manner, the number of engineering-related contracts analyzed in the utilization and disparity analyses totaled more 400 contracts.

Contracts included in the utilization and disparity analyses. The disparity study focuses on "transportation-related contracts" — those contracts involving the planning, design, construction, maintenance or repair of transportation infrastructure by GDOT. The following types of contracts were included in BBC's utilization and disparity analyses based on analysis of the contracts and firms receiving the contracts:

- The firm completing the work was a for-profit business; and
- The contract was for transportation construction or engineering-related services.

For each contract and subcontract, the study team researched whether the firm was a for-profit business and identified the subindustry that characterized its primary line of business. "Electrical work" (included under construction) and "surveying" (included under engineering) are two examples of subindustries examined in the disparity study. BBC identified the subindustry based on GDOT contract data and the primary line of work for the contractor.

Based on GDOT data that could be provided for transportation contracts and the above criteria, BBC examined 1,140 contracts totaling $2 billion. About $1.8 billion of those contracts involved FHWA funds, counting the entire contract amount for contracts that were just partially funded through FHWA monies. Figure 3-1 summarizes the number and dollars of contracts included in the disparity study.

Figure 3-1.
Number of GDOT transportation contracts, 2009-June 2011

Source:
BBC Research & Consulting from GDOT contract data.

GDOT contracts	Number	Dollars (millions)
Construction contracts		
FHWA-funded	561	$1,684
State-funded	173	111
Total	734	$1,795
Engineering-related contracts		
FHWA-funded contracts	378	$180
State-funded	28	12
Total	406	$192
Total contracts		
FHWA-funded	939	$1,864
State-funded	201	123
Total	1140	$1,987

BBC obtained data for 3,698 subcontracts involved in GDOT contracts. Combining prime contracts and subcontracts, BBC examined 4,838 contract elements.

Contracts not included in the utilization and disparity analyses. Because of limited subcontract information available for about 20 engineering-related task-order contracts, these contracts were not included in the utilization, availability and disparity analyses.

Local agency contracts. GDOT does not collect comprehensive information on local agency contracts that use FHWA or state funds administered by GDOT. The BBC study team worked with GDOT to request certain information on prime contracts and subcontracts from local agencies and their prime contractors. (Local agencies do not typically receive money through GDOT for engineering contracts.) BBC was able to obtain data for 14 out of the 22 local agency contracts within the study period that were $750,000 or more. These 14 contracts totaled about $60 million.

Determination of contract amounts performed by the subcontractors and the prime contractor. For each construction and engineering contract, BBC examined dollars awarded to subcontractors and retained by the prime contractor.

- The value of each was based on the dollar amounts committed to the subcontractor at time of award or at the time that the subcontractor was added to the contract.
- If a contract involved subcontracting, BBC calculated the dollars that went to the prime contractor by subtracting the dollars listed for subcontractors and suppliers from the total contract amount.

When contract award information was not available, BBC used information on payments to prime contractors and subcontractors. For task orders on engineering-related contracts, BBC collected information from invoices submitted.

C. Types of Work Involved in GDOT Contracts

The study team coded types of work involved in each prime contract and subcontract based upon data in GDOT contract records and, as a supplement, information about the primary line of business for the firm performing the prime contract or subcontract. BBC developed the work types based in part on the coding systems used by GDOT as well as Dun & Bradstreet's 8-digit classification codes.

Highway and street construction work accounted for the most dollars of GDOT transportation contracts during the study period — $1.2 billion out of the $2.0 billion examined. Bridge and elevated highway construction ($252 million) was the second-largest grouping of work, following by engineering ($99 million) and electrical work ($70 million).

When types of work accounted for a small portion of total dollars, they were combined. For example, dollars spent on contractors installing fences, guardrails and signs totaled less than 1 percent of the contract dollars in the study, and BBC combined these types of work. Other types of work that were small or did not fit into other categories were included in "other construction" or "other engineering-related services." Figure 3-2 presents dollars for each work type examined in the study.

Figure 3-2.
Dollars of GDOT prime contracts and subcontracts by subindustry, 2009-June 2011

Industry	Total (in thousands)
Construction	
Highway and street construction	$1,176,823
Bridge and elevated highway construction	251,696
Electrical work	70,040
Painting, striping and marking	51,252
Trucking, hauling and storage	47,746
Concrete work	40,356
Grading, excavation, drainage and land prep	24,195
Grassing and erosion control	16,980
Water, sewer and utility lines	16,410
Fences, guardrails and signs	16,209
Asphalt, concrete and other paving materials	15,450
Other construction materials	15,881
Other construction	44,603
Total construction	**$1,787,640**
Engineering-related	
Engineering	$99,109
Traffic control systems	38,791
Construction management	21,541
Transportation planning	20,709
Environmental services	8,518
Surveying and mapping	7,452
Environmental and materials testing	3,132
Other engineering-related services	527
Total engineering-related	**$199,778**
Total	**$1,987,419**

Source: BBC Research & Consulting from GDOT contract data.

D. Location of Businesses Performing GDOT Work

In a disparity study, analysis of local marketplace conditions and the availability of firms to perform contracts and subcontracts focuses on the "relevant geographic market area" for agency contracting.

- The study team summed the dollars going to each prime contractor and subcontractor involved in GDOT contracts from 2009 through June 2011.
- For each prime contractor and subcontractor, BBC determined whether the company had a business establishment in Georgia based upon GDOT vendor records and additional research.
- BBC then added the dollars for firms with Georgia locations and compared the total with that for companies with no establishments within the state.

Based upon this analysis, 96 percent of GDOT transportation contract dollars from 2009 through June 2011 went to firms with locations in Georgia.

This information indicated that Georgia should be selected as the relevant geographic market area for the study. Therefore, BBC's availability analysis examined firms with locations in Georgia. The quantitative analyses of marketplace conditions in Chapter 4 also focused on Georgia.

Appendix B provides additional explanation of the methods used to collect and analyze GDOT contract data.

CHAPTER 2.
Legal Framework

U.S. Supreme Court decisions, other federal court rulings and USDOT guidance help to form the legal framework for this disparity study. Appendix A provides in-depth analysis of relevant legal decisions.

Federal regulations (49 CFR Part 26) provide the requirements as to how state and local governments receiving USDOT funds must implement the Federal DBE Program.[1] GDOT also administers USDOT funds that flow through the Department to cities, counties and local transportation agencies in Georgia. USDOT requires that the Federal DBE Program also be applied to these contracts.

To further explain the context for this disparity study, it is useful to review:

A. Race-conscious and neutral measures of the Federal DBE Program;

B. Race-conscious and neutral measures of state and local programs; and

C. Legal standards that race-conscious programs must satisfy.

A. Race-conscious and Neutral Measures of the Federal DBE Program

Rules governing state and local government implementation of the Federal DBE Program require that a government agency meet the maximum feasible portion of its overall goal for DBE participation through race-neutral means (49 CFR Section 26.51). Race-neutral measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses.

If a state or local government can meet its overall annual DBE goal solely through race-neutral means, it must not use race-conscious measures. If it cannot, setting DBE contract goals is a permissible race-conscious measure under the Federal DBE Program. Because DBE contract goals consider the utilization of firms based in part on their race or gender ownership, such programs must satisfy certain legal and regulatory standards in order to be valid, as discussed below.

[1] http://www.fhwa.dot.gov/HEP/49cfr26.htm.

Given this context, general approaches that state and local governments receiving USDOT funds use to implement the Federal DBE Program include:

1. **Applying race-conscious measures such as DBE contract goals, as well as neutral measures, with all certified DBEs eligible for race- and gender-conscious measures.** Many states use both race-neutral and race-conscious measures when implementing the Federal DBE Program. Their race-conscious measures include applying DBE contract goals under the Federal DBE Program.

   GDOT currently implements the Federal DBE Program in this fashion. On FHWA-funded contracts, GDOT specifies a goal for DBE participation in the contract (contract goals are expressed as a percentage of the contract dollars that might go to DBEs). Prime contractors bidding on the contract must include a level of participation of DBEs that would meet the goal or show good faith efforts to do so. GDOT sets DBE goals for FHWA-funded construction and FHWA-funded engineering contracts.

   A number of non-minority contractors and other groups have filed lawsuits challenging the constitutionality of the Federal DBE Program, or the constitutionality of the state and local governments' implementation of the Program, or both. For example, contractors have filed lawsuits against state departments of transportation implementing the Federal DBE Program in California, Illinois, Minnesota, Nebraska and Washington. The Federal DBE Program and its implementation by a state were successfully defended in California, Illinois, Minnesota and Nebraska, but not in Washington. (The legal standards applied in these and other cases are explained later in Chapter 2 and in Appendix A of this report.)

2. **Applying more restrictive race-conscious measures only in extreme circumstances (combined with neutral programs).** The Federal DBE Program provides that a recipient may not set aside contracts for DBEs, except that, in limited and extreme circumstances, a recipient may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination. (49 CFR Section 26.43). Quotas for DBE participation are prohibited under the Program.

3. **Applying race-conscious measures, but limit application to a subset of DBEs.** Some state DOTs limit participation in the race- and gender-conscious measures of the Federal DBE Program to certain racial, ethnic or gender groups based upon the evidence in a state for those groups. For example, the Colorado Department of Transportation (CDOT) received a waiver from USDOT that has allowed CDOT to set contract goals for "Underutilized DBEs" (UDBEs), which might not necessarily include all DBE groups. CDOT has counted the participation of all DBEs toward CDOT's overall annual goal, but only UDBEs can be used to meet individual contract goals. Over a number of years, CDOT has tracked utilization of minority- and women-owned firms by group to identify the racial, ethnic and gender groups that are "underutilized" and therefore eligible to be UDBEs. (At the time of this report, all DBEs were included as eligible for meeting DBE contract goals.) The California Department of Transportation has operated a similar subcontracting goals program for UDBEs.

4. **Operate an entirely race-neutral program.** Some state DOTs have implemented the Federal DBE Program without DBE contract goals or other race-conscious measures. For example, the Florida Department of Transportation implements the Federal DBE Program by using entirely race-neutral means.

B. Race- and Gender-Conscious State and Local Programs

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

GDOT does not currently apply any race-conscious programs to its non-federally-funded contracts. However, GDOT had a program for state-funded contracts for several years in the 1990s that was similar to the Federal DBE Program. The Georgia Attorney General prepared a letter dated August 12, 1996 indicating that GDOT had not met the legal standards for race- or gender-conscious programs on its state-funded contracts. The Attorney General recommended that GDOT suspend its state program "until (1) information is gathered by the Department which shows with particularity that there has been discrimination in the process of contracting for DOT projects or (2) the program is restructured to eliminate the group classification components." GDOT chose to no longer operate a race- or gender-conscious program for its state-funded contracts.

Some state and local governments continue to operate programs for their non-federally-funded contracts that have elements similar to DBE contract goals. For example, the Texas Department of Transportation operates a Historically Underutilized Business Program that includes contract goals on certain state-funded projects. The North Carolina Department of Transportation has had a Minority Business and Women Business Enterprise Program that mirrors the Federal DBE Program.

Several local governments in Georgia have also operated minority business enterprise programs. For example, the City of Atlanta operates an Equal Business Opportunity Program and the City of Savannah has a Minority and Women Business Enterprise Program. A number of local government programs in Georgia have been challenged in court, including those operated by the City of Atlanta, the City of Augusta, Fulton County and the DeKalb County School District. Courts considering the programs of the City of Augusta, Fulton County and DeKalb County School District have found the minority business programs to be unconstitutional.

The legal standards that race- and gender-conscious programs must meet are discussed below.

C. Legal Standards that Race-Conscious Programs Must Satisfy

The U.S. Supreme Court has established that government programs with race-conscious measures must meet the "strict scrutiny" standard of constitutional review. The two key U.S. Supreme Court cases in this area are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;[2] and

- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the same standard of review for federal race-conscious programs.[3]

As described in detail in Appendix A, the strict scrutiny standard is extremely difficult for a government entity to meet — it presents the highest threshold for evaluating the legality of race-conscious programs short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

- Have a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and

- Establish that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination. There are a number of factors a court considers when determining whether a program is narrowly tailored (see Appendix A).

A government agency must meet both components of the strict scrutiny standard; a program that fails either one is unconstitutional.

Examples of race-conscious programs that have not satisfied the strict scrutiny standard. As discussed in Appendix A, many state and local race-conscious programs have been challenged in court and found to be unconstitutional.

The *Thompson Building Wrecking Co. v. Augusta, Georgia*[4] and the *Virdi v. DeKalb County School District*[5] cases in Georgia are examples of local government programs that did not meet the strict scrutiny standard by failing to be narrowly tailored. Appendix A examines these cases, as well as examples where courts found that the state or local agency did not meet the strict scrutiny standard because it did not sufficiently show a compelling governmental interest for its program.

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

[3] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

[4] *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07 CV019, 2007 WL 926153 (S. D. Ga. Mar. 14, 2007).

[5] *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion).

Examples of race-conscious programs that have satisfied the strict scrutiny standard. The Federal DBE Program, on its face, has been held to be constitutional in legal challenges to date (see discussion in Appendix A of *Northern Contracting, Inc. v. Illinois DOT*,[6] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,[7] *Western States Paving Co. v. Washington State DOT*[8] and *Adarand Constructors, Inc. v. Slater*[9]). Some of the key court decisions are discussed below.

Seventh Circuit Court of Appeals decision in *Northern Contracting*. In the *Northern Contracting* decision (2007), the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting … cannot collaterally attack the federal regulations through a challenge to IDOT's program."[10]

The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis:

- The Seventh Circuit 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.[11]

- 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.[12] The court held that Northern Contracting failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).[13]

Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program. (See the discussion of the *Northern Contracting* decision in Appendix A.)

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[6] 473 F.3d 715 (7th Cir. 2007).

[7] 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

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

[9] *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) *cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001).

[10] 473 F.3d at 722

[11] *Id*. at 722.

[12] *Id*. at 723-24.

[13] *Id*.

Ninth Circuit Court of Appeals decision in *Western States Paving*. The constitutionality of the Federal DBE Program was also upheld by the Ninth Circuit Court of Appeals in *Western States Paving*; however, the Ninth Circuit found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored. Since that 2005 ruling, state DOTs in Ninth Circuit states operated entirely race-neutral programs until studies could be completed that analyzed whether there was evidence of discrimination in the local transportation contracting industry, and if so, whether any race-conscious measures set forth in the Federal DBE Program were appropriate in those states (and if so, for which racial, ethnic and gender groups).[14] The first court to examine a state implementation of the Federal DBE Program in the Ninth Circuit after *Western States Paving* found that the state's implementation of the Federal DBE Program to be constitutional (see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*[15]).

Relevant cases within the Eleventh Circuit. Because Georgia is located within the jurisdiction of the Eleventh Circuit Court of Appeals, neither the Seventh Circuit nor the Ninth Circuit cases are necessarily controlling or binding on GDOT. They are instructive, however, as to legally defensible implementation of the Federal DBE Program. The one case within the Eleventh Circuit to consider this issue held that the Seventh Circuit ruling should apply.

- The plaintiff in *South Florida Chapter of the Associated General Contractors v. Broward County, Florida* argued that the Ninth Circuit's ruling in *Western State Paving* should govern the court's consideration of the implementation of the Federal DBE Program within the Eleventh Circuit. [16]

- The defendant, Broward County, pointed to case law from the Seventh Circuit to contend that, as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations.

- The district court found that there was no case law on point in the Eleventh Circuit. [17] The district court concluded that it would apply the case law as set out in the Seventh Circuit and concurring circuits, and that the trial in the case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program.[18]

- Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

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[14] Disparity studies have been completed or are underway for state DOTs in each state within the Ninth Circuit — Alaska, Hawaii, Washington, Idaho, Montana, Oregon, California, Nevada and Arizona — as well as many local transit agencies and airports in those states.

[15] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D.Cal, Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011). The decision of the district court has been appealed to the Ninth Circuit Court of Appeals

[16] *South Florida Chapter of the Associated General Contractors v. Broward County, Florida,* 544 F. Supp. 2d 1336 (S.D. Fla. 2008).

[17] *Id.* at 1338.

[18] *Id.* at 1341.

Appendix A reviews this case in considerable detail.

Guidance from decisions that have upheld state and local programs. In addition to the Federal DBE Program, some state and local government minority-business programs have been found to meet the strict scrutiny standard. Appendix A discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver*[19] and (upheld in part as to certain groups) *H.B. Rowe Company, Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al.*[20]

Appendix A of this report as well as USDOT Guidance[21] provide further analysis of these issues and instruction regarding the legal issues in a state or local government's implementation of the Federal DBE Program.

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

[20] *H.B. Rowe Company., Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al*; 589 F. Supp. 2d 587 (E.D.N.C. 2008), *appeal pending* in the Fourth Circuit Court of Appeals.

[21] http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm.

CHAPTER 1.
Introduction

The federal government requires state and local governments to implement the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Georgia Department of Transportation (GDOT) has been implementing some version of the Federal DBE Program since the 1980s. The USDOT recommends that agencies such as GDOT conduct disparity studies to develop the information needed to effectively implement the Program.

- GDOT must set overall goals for DBE participation in its USDOT-funded contracts. Some of the information most useful in setting overall DBE goals and fine-tuning program implementation requires the types of research developed in a disparity study.
- When challenged in court, state and local agencies that have successfully defended their implementation of the Federal DBE Program relied on the types of information developed in a disparity study.
- The study can provide insights into improving opportunities for all small businesses.
- An independent, objective review of an agency's contracting is valuable to its leadership and outside groups interested in the agency's practices.

In 2011, GDOT retained BBC Research & Consulting to conduct a disparity study that would help it implement the Federal DBE Program. The analysis is referred to as a "disparity study" because it examines whether there is a disparity between an agency's *utilization* of minority- and women-owned firms and what would be expected based on *availability* of minority- and women-owned firms to perform this work. The study incorporates other quantitative and qualitative information as well. GDOT last conducted a disparity study in 2005.

Results of this study will help GDOT implement the Federal DBE Program for its contracts funded in whole or in part by the Federal Highway Administration (FHWA). The Federal DBE Program also applies to contracts funded by the Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Because GDOT receives relatively little funding from the FTA and FAA, the study did not focus on those contracts. Information from the disparity study is also useful to GDOT as it seeks to ensure a non-discriminatory environment for its state-funded contracting.

In Chapter 1, the study team:

A. Introduces firms that prepared the study;

B. Provides background on the Federal DBE Program; and

C. Outlines the analyses performed in the study and where results appear in the report.

A. Study Team

The BBC study team included five firms:

- **BBC Research & Consulting (BBC)**, a Denver-based economic and policy research firm (prime consultant). BBC has overall responsibility for this study and performed most of the required quantitative analyses.
- **Keen Independent Research LLC**, a Denver-based economic and market research firm that specializes in disparity studies. Keen Independent Research co-directed the study.
- **Holland & Knight LLP (H&K)**, a national law firm with offices throughout the country, including Atlanta. H&K provides a legal analysis for this study.
- **Red Bridge Consulting, Inc.,** an information technology and business process analysis firm. Red Bridge supported BBC in the collection of electronic and hard copy contract and proposal data as well as the review of GDOT's contracting procedures. Red Bridge is certified as a DBE with GDOT.
- **TCG Consulting, Inc. (TCG),** a marketing communications and market research firm specializing in market research studies, community outreach, customer communications and public education campaigns. TCG compiled and analyzed past complaints filed with GDOT concerning DBE issues and will conduct public forums to obtain community feedback about the draft report. TCG is a veteran-, minority- and woman-owned business and is certified with GDOT as a DBE.
- **Customer Research International (CRI)**, a national telephone survey firm based in San Marcos, Texas. CRI performed telephone interviews with owners and managers of Georgia businesses as part of the availability analysis. CRI performed similar services on other BBC disparity studies. CRI is a minority-owned firm.

Each of these team members has extensive experience with state departments of transportation and other agencies implementing the Federal DBE Program. Several team members have helped to successfully defend DBE and minority business enterprise programs in court.

B. Background on the Federal DBE Program

GDOT has been implementing some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be implemented by state and local agencies receiving USDOT funds. It was most recently revised in early 2011.

Federal regulations in 49 CFR Part 26 guide how state and local governments implement the Federal DBE Program. If necessary, under the federal regulations, the Program allows state and local agencies to use DBE contract goals, which GDOT sets on certain FHWA-funded contracts. When awarding those contracts, in accordance with federal regulations, GDOT considers whether or not a bidder meets the DBE contract goal or shows good faith efforts to do so.

The Federal DBE Program also applies to cities, counties, transportation authorities and other jurisdictions that receive USDOT funds through agencies such as GDOT.

Key elements of the Program. Key components of the Federal DBE Program include the following:

Setting an overall goal for DBE participation. GDOT must develop an overall three-year goal for DBE participation in its FHWA-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a "base figure" and consideration of possible "step 2" adjustments to the goal.[1]

GDOT's overall goal for DBE participation is aspirational — the Department does not need to meet the goal and failure to do so does not automatically cause any USDOT penalties. Its goal for the three-year period beginning 2010 is 12 percent DBE participation.

Establishing the portion of the overall DBE goal to be met through neutral means. Regulations governing implementation of the Federal DBE Program allow for state and local governments to implement the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through "race-neutral means." Race-neutral program measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses (see 49 CFR Section 26.51(b) for more examples of race-neutral program measures). If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements.

The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, that it will meet through any race-conscious measures such as DBE contract goals. USDOT has outlined a number of factors for an agency to consider when making that determination.[2]

Many states project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures. Some state and local agencies have implemented the Federal DBE Program solely through neutral measures and without the use of DBE contract goals (state DOTs in Florida, Wyoming and Rhode Island are examples). These agencies projected that 100 percent of their DBE goal would be met through neutral means.

GDOT's most recent projection related to FHWA-funded contracts is that it will meet 2 percentage points of its overall three-year DBE goal through race-neutral means and 10 percentage points through race-conscious measures.[3]

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[1] 49 CFR Section 26.45.

[2] See Chapter 11 of this report for an in-depth discussion of these factors.

[3] Georgia Department of Transportation Disadvantaged Business Enterprise Program Goal Setting Process for FY 2009-2010.

Determining whether all racial/ethnic/gender groups will be eligible for race or gender-conscious elements of the Federal DBE Program. Under the Federal DBE Program, the following race/ethnic/gender groups can be presumed to be disadvantaged as long as they do not exceed firm revenue and personal net worth limits:

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

There is a gross receipts limit (not more than $22,410,000 annual average revenue over three years, and lower limits for certain lines of business) and a personal net worth limit ($1.32 million, not including equity in the business and in primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE.[4] White male-owned firms can also meet the federal certification requirements and be certified as DBEs. (Nationally, few DBEs are white male-owned firms.)

GDOT's current implementation of the Program, similar to most states, includes each of the above groups as eligible for race- and gender-conscious portions of the program, including meeting DBE contract goals. However, USDOT provides a waiver provision if an agency determines that it does not need to include certain racial/ethnic/gender groups in the race- or gender-conscious portions of the Federal DBE Program. Some state DOTs have set contract goals for "Underutilized DBEs" (UDBEs), which does not include all DBE groups. These states count the participation of all DBEs toward their overall DBE goals, but only UDBEs can be used to meet individual contract goals. Each state determined the DBE groups that were UDBEs in part by examining results of disparity analyses for each racial/ethnic/gender group.

Promoting DBE participation as prime contractors. The Federal DBE Program calls for agencies to remove any barriers to DBE participation as prime contractors, but does not require agencies to implement programs that give preference to DBE primes. Quotas are prohibited, but under extreme circumstances, an agency can request USDOT approval to use preference programs related to prime contractors.

Agencies such as GDOT are required to develop programs to assist all small businesses. For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

Promoting MBE/WBE participation as subcontractors. In accordance with federal regulations and subject to USDOT approval, an agency can decide that it will use DBE contract goals as part of its implementation of the Federal DBE Program. GDOT currently uses DBE contract goals for certain FHWA-funded contracts.

[4] 49 CFR 26 Subpart D.

Past court challenges to the Federal DBE Program and to state and local agency implementation of the Program. Although agencies are required to implement the Federal DBE Program in order to receive USDOT funds, different groups have challenged that implementation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix A of this report.

- State transportation departments in California, Illinois, Minnesota and Nebraska successfully defended their implementation of the Federal DBE Program, as have several local agencies. The Washington State Department of Transportation was not able to successfully defend its implementation of the Federal DBE Program. Chapter 2 and Appendix A also review these legal cases.

The U.S. District Court for the Eastern District of California reviewed the methodology and the information included in BBC's disparity study for the California Department of Transportation in the case of *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. As discussed in more detail in Appendix A, the district court favorably reviewed the methodology and the quantitative and qualitative information BBC provided in the disparity study.

BBC applied a methodology in the GDOT disparity study that is very similar to what the court reviewed in the California Department of Transportation study.

C. Analyses Performed in the Disparity Study

The disparity study provides information to assist GDOT as the agency:

1. Establishes a new three-year goal for DBE participation in its FHWA-funded contracts;

2. Estimates the portion of its overall DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means;

3. Chooses the specific measures it will apply when implementing the Program; and

4. Considers the specific racial/ethnic/gender groups of DBEs eligible for DBE contract goals if it determines that it will continue to implement race-conscious measures.

The information is also useful to GDOT as it seeks to ensure fairness across all of its contracting, including non-FHWA-funded contracts.

Utilization, availability and disparity analyses. Disparity studies typically include analyses of whether there is a disparity between the *utilization* and *availability* of minority-and women-owned firms (MBE/WBEs).

- "Utilization" typically refers to the percentage of contract dollars (including subcontracts) that went to MBEs and WBEs during the study period. (Percentage of *dollars* has been accepted in courts as an appropriate way of measuring utilization.)

- "Availability" refers to the percentage of contract dollars that one might expect to go to MBEs and WBEs given the number of MBEs and WBEs (relative to all firms) available for specific types and sizes of prime contracts and subcontracts. Understanding firms "ready, willing and able" to perform an agency's contract or subcontract is an important component of the availability analysis.

BBC includes both certified and non-certified minority- and women-owned firms in the utilization and availability results so that the disparity analysis would pertain to any potential barriers related to race, ethnicity or gender of the business owner.[5] The study further disaggregates utilization and availability of minority-owned firms according to the minority groups defined within the Federal DBE Program.[6]

Utilization analysis. BBC analyzed the utilization of minority- and women-owned firms on transportation construction and engineering-related contracts that GDOT awarded from January 2009 through June 2011. The study team analyzed utilization as prime contractors and as subcontractors.

BBC separated GDOT contracts into those that were FHWA-funded (in whole or in part) and those that were solely funded through state monies. GDOT set DBE contract goals on many of its FHWA-funded contracts.

The study team identified the race/ethnicity/gender ownership of firms receiving GDOT contracts and subcontracts through sources including DBE and other certification databases and interviews with owners and managers of those businesses. BBC reports utilization in two ways:

- The percentage of GDOT contract dollars going to certified DBEs (for informational purposes); and

- The percentage of contract dollars going to all minority- and women-owned firms whether or not they were DBE-certified (for use in the disparity analysis).

BBC was also able to collect and analyze information on some of the contracts that local agencies award with the FHWA and state funds they receive through GDOT.

[5] If the disparity analysis were conducted based only on currently certified DBEs, conclusions could not be drawn about the effectiveness or need for programs to assist minority- and women-owned firms.

[6] To further isolate the possible effects of race/ethnicity versus gender, "WBEs" refers to white women-owned firms in the disparity study. Firms owned by minority women are included in the utilization and availability results for minority-owned firms.

Chapter 3 of the report summarizes study team efforts to collect GDOT contract data, with Appendix B providing additional detail. Chapter 6 presents results of the utilization analysis.

Availability analysis. The availability analysis provides a benchmark to use when assessing GDOT's utilization of minority- and women-owned firms. It also produces information for GDOT to consider when setting its three-year goal for DBE participation on FHWA-funded contracts.

BBC analyzed availability of MBEs and WBEs on a contract-by-contract basis for GDOT prime contracts and subcontracts from 2009 through June 2011. Overall availability figures were then developed by adding (on a dollar-weighted basis) the results of the availability analysis for individual prime contracts and subcontracts.

BBC prepared information such as type of work, size, location and date for each individual prime contract and subcontract from GDOT contract records. More than 4,800 prime contracts and subcontracts were examined.

The study team collected information on the availability of minority- and women-owned businesses and other firms to perform specific types and sizes of prime contracts and subcontracts in different locations by interviewing Georgia companies about their qualifications and interest in GDOT work.[7] The study team successfully contacted more than 4,500 business establishments by telephone or other means as part of this research.

BBC determined the percentage of firms available to perform each prime contract and subcontract that were minority- or women-owned; BBC then dollar-weighted the results for individual prime contracts and subcontracts across all GDOT contracts. The resulting availability estimates are expressed as the percentage of GDOT contract dollars that might be expected to go to minority- and women-owned firms if they had the same opportunities as other firms (given their respective qualifications and interest in GDOT work).

Chapter 5 describes the methods used to collect and analyze availability of minority-, women- and majority-owned firms, and also presents information on GDOT's "base figure" for its overall DBE goal. Appendix C provides further information about the availability interviews with Georgia businesses.

Disparity analysis. BBC compared utilization and availability of minority- and women-owned firms to prepare the disparity analyses. The study team examined:

- GDOT FHWA-funded contracts (for which GDOT often set DBE contract goals); and
- GDOT state-funded contracts (for which GDOT did not set DBE goals).

Chapter 7 of the report outlines the approach to the disparity analysis and reviews key results. Chapter 8 and Appendix K provide additional analyses.

[7] Because nearly all of GDOT contract dollars go to firms with Georgia locations, the relevant geographic market area for this analysis was Georgia. Telephone interviews with businesses potentially available for GDOT contracts were made with firms that had locations in Georgia.

Analysis of local marketplace conditions. The study team also examined conditions within the Georgia marketplace. In accordance with USDOT guidance, BBC analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in construction and engineering in Georgia (Appendix D);
- Any differences in rates of business ownership in Georgia (discussed in Appendix E);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (Appendix G);
- Any barriers concerning access to business credit, insurance and bonding (Appendix H); and
- Other issues potentially affecting minorities and women in the local marketplace.

Chapter 4 of the report synthesizes this information about the local marketplace, including comments from telephone interviews with business owners and managers and a review of complaints made with GDOT concerning DBE issues. BBC also included a review of information from recent disparity studies conducted for local agencies in Georgia as part of the marketplace analysis.

Chapter 9 of the report summarizes the disparity analyses and research about the local marketplace.

Information regarding GDOT's future implementation of the Federal DBE Program. GDOT can consider disparity study information presented in Chapter 10 as it develops its new three-year goal for DBE participation. The information in Chapter 11 is pertinent as GDOT projects the portion of its goal to be met through neutral means. Chapter 12 of the report reviews other components of GDOT's implementation of the Federal DBE Program.

Presentation of results in the study. Each chapter in the report provides the documentation and results necessary to help GDOT make future decisions concerning its implementation of the Federal DBE Program. To summarize:

- **Chapter 2** outlines the legal framework for the disparity study.
- **Chapter 3** discusses how the study team collected GDOT contract data and then defined the geographic area and transportation contracting subindustries that are the focus of the study.
- **Chapter 4** reviews information on local marketplace conditions.
- **Chapter 5** presents information related to the relative availability of minority- and women-owned firms for GDOT contracts and subcontracts.
- **Chapter 6** examines the utilization of DBEs and minority- and women-owned firms on GDOT contracts.
- **Chapter 7** compares utilization of minority- and women-owned firms with what might be expected given the availability of firms to perform that work (disparity analysis).

- **Chapter 8** explores possible reasons for any disparities in the utilization of minority- and women-owned firms in GDOT contracts.

- **Chapter 9** summarizes the evidence from the marketplace analyses and disparity analyses.

- **Chapter 10** provides information for GDOT to use in setting a three-year overall DBE goal, including consideration of a "step 2 adjustment."

- **Chapter 11** presents information helpful to GDOT when it determines the percentage of its overall DBE goal to be met through neutral means.

- **Chapter 12** reviews other information related to GDOT implementation of the Federal DBE Program. This chapter addresses future local agency implementation of a GDOT-administered Program.

In addition to the chapters described above, 11 report appendices provide supporting information concerning study methodology and results.

CHAPTER ES.
Executive Summary

The U.S. Department of Transportation (USDOT) requires agencies such as the Georgia Department of Transportation (GDOT) to implement the Federal Disadvantaged Business Enterprise (DBE) Program. GDOT periodically conducts disparity studies to help it make decisions concerning its future implementation of the Federal DBE Program. The last such study was completed in 2005.

GDOT engaged a team led by BBC Research & Consulting (BBC) to prepare the 2012 disparity study, which focuses on participation of minority- and women-owned firms (MBEs and WBEs), including DBEs, in GDOT's contracts from 2009 through June 2011. The disparity study also analyzes conditions for MBE/WBEs within the Georgia marketplace. The study examines steps to encourage utilization of all small businesses in GDOT contracts as well as programs specific to DBEs.

BBC and GDOT developed a process to release a draft disparity study report, solicit public comments and additional information, and review those comments before preparing a final report. This Executive Summary of the draft report briefly addresses the following questions:

1. What is the Federal DBE Program?
2. Why did GDOT undertake the disparity study?
3. What does a disparity study include?
4. Who performed the disparity study?
5. What proportion of firms available for GDOT contracts are MBEs and WBEs?
6. What share of GDOT contract dollars might be expected to go to MBEs and WBEs?
7. What share of GDOT contract dollars did go to MBEs and WBEs (and DBEs)?
8. Was there a disparity between the utilization and availability of MBEs and WBEs on GDOT contracts?
9. Is there any indication of "overconcentration" of DBEs in certain types of work?
10. What are conditions for minorities and women within the Georgia transportation contracting marketplace?
11. How can GDOT use study information when setting an overall goal for DBE participation?
12. How can GDOT use study information when projecting the portion of its overall DBE goal to be met through neutral means?
13. Can GDOT consider use of race- and gender-conscious measures such as DBE contract goals, in accordance with federal regulations?
14. If GDOT determines that it will use DBE contract goals, which racial/ethnic/gender groups of DBEs might be considered eligible for that program, in accordance with federal regulations?
15. What are GDOT's next steps?

1. What is the Federal DBE Program?

The federal government requires state and local governments to implement the Federal DBE Program if they receive USDOT funds for transportation projects, including those funded by the Federal Highway Administration (FHWA). GDOT receives USDOT funds through FHWA and the Federal Transit Administration (FTA), and therefore must implement the Federal DBE Program. This disparity study focuses on GDOT's implementation of the program regarding its FHWA-funded contracts.

The Federal DBE Program is intended to ensure nondiscrimination in the award and administration of USDOT-assisted contracts, remedy past and current discrimination against disadvantaged business enterprises, and ensure a "level playing field" in which those firms can compete fairly for USDOT-funded contracts.[1] Federal regulations (49 CFR Part 26) provide the requirements for how state and local governments implement the Federal DBE Program.

- Firms can only be certified as DBEs if they meet criteria for social and economic disadvantage. In the Federal DBE Program, certain minority groups and women are presumed to be socially and economically disadvantaged. Certification criteria for economic disadvantage include business revenue and personal net worth of the business owner. White male-owned firms can be certified as DBEs if they meet certain criteria.

- Agencies develop overall goals for utilization of DBEs in their USDOT-funded contracts. An agency expresses its overall DBE goal as a percentage of contract dollars that might be expected to go to DBEs absent the effects of discrimination. GDOT's current three-year goal (FY2010 – FY2012) is for 12 percent of its FHWA-funded contract dollars to go to DBEs.

- Under certain circumstances, the Federal DBE Program allows state and local agencies to apply DBE contract goals to individual USDOT-funded contracts. When awarding certain FHWA-funded contracts, GDOT often sets a DBE contract goal and then considers whether or not a bidder meets the goal (by including DBEs as subcontractors in the project) or shows good faith efforts to do so.

- The Federal DBE Program identifies specific the minority groups (as well as women) presumed to be socially and economically disadvantaged and eligible to participate in measures such as DBE contract goals if their firms are certified as DBEs. However, in compliance with federal regulations, some state and local agencies limit participation in race- and gender-conscious elements of the Program to certain racial, ethnic or gender groups (some states refer to these groups as Underutilized DBEs). To do so requires a waiver from USDOT. Currently, all DBEs are eligible to participate in race- and gender-conscious measures that GDOT implements.

- GDOT also has programs to encourage utilization of small businesses in its contracting (an example of "neutral" measures that are part of GDOT's implementation of the Federal DBE Program).

[1] http://www.dotcr.ost.dot.gov/asp/dbe.asp.

Cities, counties and local transportation agencies receiving USDOT funds through GDOT must also implement the Federal DBE Program.

The Federal DBE Program only applies to contracts that are USDOT-funded. Some other states and some local governments in and outside Georgia operate similar programs for their non-federally-funded contracts. Although GDOT had such a program in the 1990s, it has not applied any race-conscious programs to its non-federally-funded contracts since that time.

2. Why did GDOT undertake the disparity study?

The disparity study provides information to assist GDOT when it:

- Establishes a new three-year goal for DBE participation in its FHWA-funded contracts;
- Estimates the portion of its overall DBE goal to be met through race- and gender-neutral means and, if any, the portion to be met through race- and gender-conscious means;
- Chooses the specific measures it will apply when implementing the Program; and
- Considers whether all DBE groups would be eligible to participate in any race- and gender-conscious measures such as DBE contract goals, or whether eligibility would be limited to certain racial/ethnic/gender groups of DBEs (if GDOT determines that it will continue to implement race-conscious measures).

Throughout the country, a number of non-minority contractors and other groups have filed lawsuits challenging the constitutionality of the Federal DBE Program, or the constitutionality of a state or local government's implementation of the Program. Information provided in the disparity study will help GDOT in its implementation of the Federal DBE Program and in following guidance from USDOT and the courts, including U.S. Supreme Court decisions.[2] Legal issues are explained in Chapter 2 and Appendix A of this report.

3. What does a disparity study include?

Disparity studies typically include analyses of whether there is a disparity between the *utilization* and *availability* of minority- and women-owned firms (MBEs and WBEs).

- "Utilization" refers to the percentage of an agency's contract dollars that went to MBEs and WBEs during a certain period of time.
- "Availability" refers to the percentage of contract dollars that one might expect to go to MBEs and WBEs given the relative number of MBEs and WBEs available to perform specific types and sizes of prime contracts and subcontracts.

Most minority- and women-owned firms in Georgia are not certified as DBEs. BBC included both certified and non-certified minority- and women-owned firms in both the utilization and availability results so that the disparity analysis would identify any potential barriers related to race, ethnicity or

[2] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

gender of the business owner. For purposes of this study, "minority" includes groups defined in the Federal DBE Program: African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans. To further isolate the possible effects of gender, "WBEs" refers to white women-owned firms in this disparity study.

To perform the utilization analysis, the BBC study team compiled and analyzed data on more than 4,800 FHWA- and state-funded prime contracts and subcontracts totaling about $2 billion that GDOT awarded from 2009 through June 2011. The study team examined the types of work involved, location, size, timing and funding source for each prime contract and subcontract.

In the availability analysis, the study team analyzed data from telephone interviews completed with firms doing business in relevant subindustries in Georgia. Only firms qualified and interested in transportation contracts for state or local transportation agencies in Georgia were included in the availability analysis. The study team successfully contacted more than 4,500 business establishments in 2011 as part of this research.

BBC compared utilization of MBEs and WBEs on GDOT contracts with the dollars those firms might be expected to receive based on MBE/WBE availability for those types, locations and sizes of prime contracts and subcontracts.

The BBC study team also analyzed GDOT contracting processes, conditions in the Georgia marketplace and potential business assistance programs. As part of those analyses, the study team developed statistical models, compiled and analyzed bids and qualifications statements for GDOT construction and engineering-related contracts, and examined results of disparity studies recently conducted by local governments in Georgia.

4. Who performed the disparity study?

BBC is a Denver-based economic research firm that is one of the leading disparity study consultants in the United States, having conducted disparity studies for more than 70 government agencies since 1989. The disparity study team also included:

- **Keen Independent Research LLC**, a Denver-based economic and market research firm that specializes in disparity studies. Keen Independent Research co-directed the GDOT study.
- **Holland & Knight LLP (H&K)**, a national law firm with offices throughout the country, including Atlanta. H&K provides a legal analysis for this study.
- **Red Bridge Consulting, Inc.,** an information technology and business process analysis firm. Red Bridge supported BBC in the collection of electronic and hard copy contract and proposal data as well as the review of GDOT's contracting procedures. Red Bridge is certified as a DBE with GDOT.
- **TCG Consulting,** a marketing communications and market research firm specializing in market research studies, community outreach, customer communications and public education campaigns. TCG compiled and analyzed past complaints filed with GDOT concerning DBE issues and will conduct public forums to obtain community feedback about the draft report. TCG is a veteran-, minority- and woman-owned business and is certified with GDOT as a DBE.

- **Customer Research International (CRI)**, a national telephone survey firm based in San Marcos, Texas. CRI performed telephone interviews with owners and managers of Georgia businesses as part of the availability analysis. CRI performed similar services on other BBC disparity studies. CRI is a minority-owned firm.

Team members have extensive experience with state departments of transportation and other agencies implementing the Federal DBE Program.

5. What proportion of firms available for GDOT contracts are MBEs and WBEs?

The BBC study team conducted telephone interviews to collect information on the qualifications and interest of firms in local transportation agency work as well as the types and sizes of contracts and subcontracts they perform. The study team successfully contacted 4,571 business establishments concerning their availability for state and local transportation contracts. About 2,500 establishments that were successfully contacted indicated they were not interested in participating in a discussion about their availability for GDOT work. After reviewing responses about firm characteristics, their interest and qualifications for GDOT work and other topics, BBC developed a database of 929 firms to be included in the availability analysis.

Of the firms included in the availability analysis:

- Minorities owned 19 percent of the firms;
- White women owned 11 percent of the businesses; and
- Combined, minority- and women-owned businesses accounted for 30 percent of the firms included in BBC's availability database.

Most MBE/WBEs in the availability database were not certified as DBEs.

The availability data allow BBC to develop a representative depiction of firms qualified and interested in state and local transportation agency work, but it should not be considered an exhaustive list of every minority-, woman- and majority-owned firm that could participate in a GDOT contract. Reasons for this are discussed in Chapter 5 and Appendix C.

6. What share of GDOT contract dollars might be expected to go to MBEs and WBEs?

BBC developed overall estimates of the GDOT contract dollars that might be expected to go to minority- and women-owned firms based on analysis of the specific type, location, size and timing of each GDOT prime contract and subcontract and the relative number of minority- and women-owned firms available for that work. BBC performed an availability analysis for each of the more than 4,800 GDOT prime contracts and subcontracts from 2009 through July 2011. To determine an overall availability figure, BBC then weighted availability results for each contract element based on the size of the prime contract or subcontract.

Using the data and methodology described above, one might expect 22 percent of GDOT contract dollars examined in the disparity study to go to minority- and women-owned firms. African American-owned firms accounted for 14 percentage points and white women-owned firms (WBEs) were 5 percentage points of the overall availability. Figure ES-1 shows overall availability results by group. These values serve as benchmarks to evaluate the actual percentage of GDOT contract dollars going to minority- and women-owned firms from 2009 through June 2011.

The dollar-weighted availability figures are lower than what is indicated from a simple "headcount" of minority-, women- and majority-owned firms (which would be 30%) primarily because relatively few of the firms available for GDOT's largest prime contracts are MBEs or WBEs.

Figure ES-1.
Dollar-weighted availability of firms for GDOT contracts, 2009–June 2011, by race, ethnicity and gender

Source: BBC Research & Consulting from Availability Database.

Race, ethnicity and gender	Utilization benchmark (availability %)
African American-owned	14.1 %
Asian-Pacific American-owned	1.5
Subcontinent Asian American-owned	0.6
Hispanic American-owned	0.5
Native American-owned	0.1
Total MBE	16.8 %
WBE (white women-owned)	5.2
Total MBE/WBE	22.0 %

BBC conducted a disparity analysis for all GDOT contracts, and also performed analyses for subsets of contracts (e.g., separating FHWA- and state-funded contracts, construction contracts and engineering-related contracts, prime contracts and subcontracts, and contracts by region of the state). BBC determined availability benchmarks for each set of GDOT contracts and subcontracts examined in the disparity analysis. Overall MBE/WBE availability varied from 20 percent to 31 percent depending upon the set of contracts examined.

Chapter 5 provides more information about the availability analysis. Appendix B discusses study team collection of GDOT contract data and Appendix C provides more information about how BBC compiled information about businesses availability. Tables in Appendix K present MBE/WBE utilization, availability and disparity results for each subset of GDOT contracts and subcontracts.

7. What share of GDOT contract dollars did go to MBEs and WBEs (and DBEs)?

GDOT contracts. Of the $2 billion in combined GDOT FHWA- and state-funded contract dollars examined for 2009–June 2011, minority- and women-owned firms received $246 million, or 12.4 percent. DBEs accounted for 9.7 percentage points ($192 million) of the overall MBE/WBE participation.

Figure ES-2.
MBE/WBE and DBE share of prime contract/subcontract dollars for GDOT construction and engineering contracts, 2009–June 2011, FHWA vs. state funding

Note:

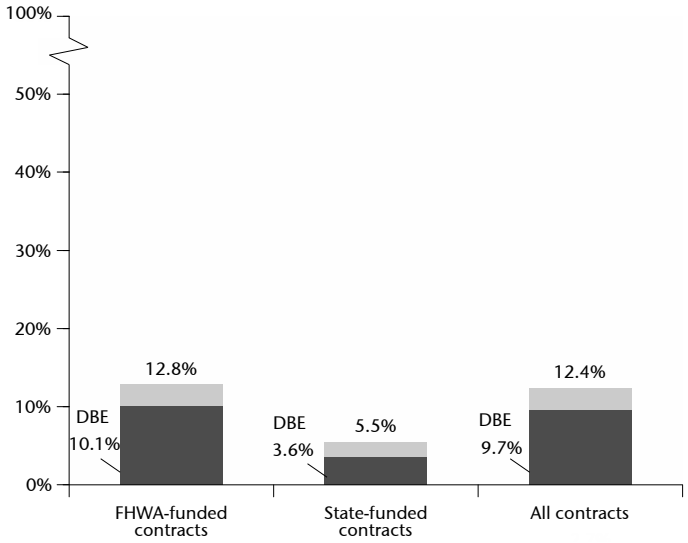
Certified DBE utilization.

Number of contracts/subcontracts analyzed is 4,390 for FHWA-funded contracts, 448 for state-funded contracts and 4,838 for all contracts.

For more detail and results by group, see Figures K-3, K-4 and K-2 in Appendix K.

Source:

BBC Research & Consulting from data on GDOT contracts.



WBEs received 8.4 percent of total contract dollars compared with 2.4 percent for African American-owned firms and 1.1 percent for Hispanic American-owned firms. Other minority-owned firms combined received about 0.5 percent of contract dollars.

Local agency contracts administered by GDOT. BBC was also able to collect and analyze MBE/WBE utilization information for 14 of the 22 largest local agency contracts during the study period that used funds administered by GDOT. All of the contracts were for construction and most were FHWA-funded.

MBE/WBE utilization on local agency contracts was 7.6 percent.

8. Was there a disparity between utilization and availability of MBEs and WBEs on GDOT contracts?

BBC compared GDOT's actual utilization of minority- and women-owned firms with the share of contract dollars that those firms might be expected to receive based on their availability for specific GDOT prime contracts and subcontracts.

- Overall MBE/WBE utilization of 12.4 percent for GDOT contracts was substantially less than what might be expected from the availability analysis (22%). There was about 56 cents of actual participation for every dollar that might be expected to go to minority- and women-owned firms based on the availability analysis for these contracts.

- When examining GDOT state-funded contracts (no DBE contract goals applied), MBE/WBE utilization was 5.5 percent of contract dollars. There was about 22 cents of actual participation for every dollar that might be expected to go to minority- and women-owned firms from the availability analysis. There were substantial disparities in the utilization of each racial/ethnic/gender group included in the Federal DBE Program (firms owned by African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans and white women).

- On FHWA-funded contracts (DBE contract goals applied), there were substantial disparities in the utilization of African American-, Asian-Pacific American- and Subcontinent Asian American-owned firms.

  Utilization of white women-owned firms (8.7%) exceeded availability when DBE contract goals applied.

- Random chance in the awarding of prime contracts and subcontracts can be rejected as a cause of the disparities for minority- and women-owned firms (disparities for MBEs and WBEs are "statistically significant").

Turning to local agency contracts using funds administered by GDOT, MBE/WBE utilization (7.6%) was substantially below what might be expected from the availability analysis (20.5%).

Chapter 7 of the report presents detailed results from the disparity analysis.

9. Is there any indication of "overconcentration" of DBEs in certain types of work?

If an agency implementing the Federal DBE Program finds that DBEs are so overconcentrated in certain types of work as to unduly burden non-DBEs in that type of work, it is required to devise appropriate measures to address that overconcentration.

- When considering DBE participation by type of work, BBC identified that DBE trucking firms accounted for about one-quarter of DBE participation in GDOT and local agency contracts.

- About 72 percent of the trucking work identified in GDOT and local agency contract data went to DBEs (about one-half to white women-owned DBEs and one-half to minority-owned DBEs).

- The 2005 GDOT disparity study also identified DBE participation in trucking and hauling as a potential issue.

In accordance with 49 CFR Section 26.33, GDOT may need to consider steps to ensure that future DBE participation is not overconcentrated in trucking. GDOT would need to obtain the approval of FHWA for any determination of overconcentration and the measures it would employ to address it. Chapters 8 and 12 further discuss this issue.

10. What are conditions for minorities and women within the Georgia transportation contracting marketplace?

Aspects of the local marketplace that an agency implementing the Federal DBE Program might consider when implementing the Federal DBE Program are discussed in 49 CFR Section 26.45(d). BBC's analysis of these factors in Georgia identified evidence of disparities for minorities and women pertaining to:

- Entry and advancement;
- Business ownership;
- Access to business capital, bonding and insurance; and
- Success of businesses.

The evidence of barriers to doing business in the transportation contracting marketplace includes information collected in telephone interviews with Georgia minority-, women- and majority-owned businesses. There was also qualitative evidence of discrimination against minority- and women-owned businesses in the Georgia marketplace collected in disparity studies that local agencies in Georgia completed in the past three years. Chapter 4 and Appendices D, E, F, G and J present results of BBC's marketplace analyses.

11. How can GDOT use study information when setting an overall goal for DBE participation?

The Federal DBE Program outlines how agencies are to set overall goals for DBE participation in their USDOT-funded contracts (49 CFR Section 26.45). Steps include establishing a "base figure" after considering firms available for an agency's USDOT-funded work, and then considering a "step 2 adjustment." The BBC disparity study considered both the base figure and possible step 2 adjustment for a future GDOT overall goal.

Base figure. BBC's availability analysis indicates that minority- and women-owned firms currently or potentially certified as DBEs might be expected to receive 19.8 percent of GDOT FHWA-funded transportation contracts (see discussion of base figure in Chapter 5).

These results are based on analysis of GDOT FHWA-funded prime contracts and subcontracts contracts from 2009 through June 2011, which include a number of projects funded through the American Recovery and Reinvestment Act. When considering an overall DBE goal for the next three fiscal years, GDOT should consider how its future mix of FHWA-funded projects may differ from the 2009 through June 2011 time period.

Step 2 adjustment. Once an agency selects a base figure for its overall DBE goal, the Federal DBE Program requires agencies to consider other factors before setting an overall DBE goal. These factors include level of past DBE participation in agency contracts and information concerning the opportunities for DBEs to form, grow and compete.

BBC's analysis of these factors indicates that GDOT might consider an overall DBE goal of at least 15 percent, as discussed in Chapter 10. Part of the reason to consider a higher DBE goal than the current 12 percent DBE goal is to follow USDOT guidance to include information on non-certified minority- and women-owned firms in the availability analysis.

12. How can GDOT use study information when projecting the portion of its overall DBE goal to be met through neutral means?

The Federal DBE Program requires agencies to meet the maximum feasible portion of the overall DBE goal through race- and gender-neutral means. This requirement has been a long-standing component of the Program, but 2011 additions to the Federal DBE Program include more specific requirements for agencies to develop and implement plans to facilitate competition by small businesses. (GDOT recently submitted its program for small businesses to FHWA.)

Chapter 11 of the report reviews a number of small business program examples for GDOT consideration. These potential measures include changes to GDOT's prequalification, registration and consultant evaluation processes to open more opportunities to smaller, younger businesses. BBC identified evidence of disadvantages for small firms seeking GDOT prime contracts. There appeared to be additional disadvantages for minority-owned firms.

Agencies implementing the Federal DBE Program are required to seriously consider workable neutral remedies that can facilitate DBE participation in their contracts. GDOT is not required to implement every conceivable race-neutral alternative, but must exhibit serious, good-faith consideration of workable race-neutral alternatives. Its consideration of those remedies should be reflected when projecting the portion of its overall DBE goal to be achieved through neutral means.

If an agency projects that it cannot meet its overall DBE goal solely through neutral means, the Federal DBE Program requires that the agency consider use of DBE contract goals to help meet its overall DBE goal. Each agency must project the portion of the goal to be met through neutral means and any portion to be met through race-conscious programs.

As GDOT makes this determination, considerations include the following.

- From 2009 through June 2011, DBEs obtained 3.6 percent of GDOT state-funded contract dollars. No DBE contract goals applied to these contracts.
- Including non-certified firms, minority- and women-owned firms received 5.5 percent of GDOT state-funded contract dollars.[3]
- BBC identified substantial disparities between the utilization of minority- and women-owned firms in GDOT's state-funded contracts and what might be expected based upon the availability analysis (substantial disparities for each racial and ethnic group in the Federal DBE Program).

[3] It is important to note that GDOT would need to encourage non-certified minority- and women-owned firms to become certified as DBEs to be able to count them toward DBE participation in the future. Some of the MBE/WBEs utilized by GDOT might not meet the criteria for DBE certification. In accordance with federal guidance, GDOT should consider the results for past MBE/WBE participation when projecting the portion of its overall DBE goal to be met through neutral measures.

- With DBE contract goals and current neutral measures, DBE utilization on FHWA-funded contracts from 2009 through June 2011 (10.4%) was below GDOT's overall DBE goal (12%).

- GDOT's specific neutral projection will depend on the level of the overall DBE goal it adopts.

13. Can GDOT consider use of race- and gender-conscious measures such as DBE contract goals, in accordance with federal regulations?

As discussed above, the information contained in the disparity study indicates that, without DBE contract goals, utilization of minority- and women-owned firms in GDOT contracts is substantially below what might be expected based on the availability analysis.

GDOT should review all of the analyses in the disparity study, and any additional information it has available, when determining whether it will meet its overall DBE goal solely through neutral measures, or when projecting the portion of the overall DBE goal to be achieved through neutral efforts.

14. If GDOT determines that it will use DBE contract goals, which racial, ethnic or gender groups of DBEs might be considered eligible for that program, in accordance with federal regulations?

GDOT must make a determination whether it will use DBE contract goals as part of its implementation of the Federal DBE Program. If it uses DBE contract goals, it must also determine which racial/ethnic/gender groups will be eligible for the program.

The following information may be useful in that event:

- BBC identified substantial disparities between the utilization of minority- and women-owned firms in GDOT's state-funded contracts and what might be expected based upon the availability analysis. There were substantial disparities for each racial and ethnic group.

- There is evidence of disparities in the Georgia marketplace for certain MBE/WBE groups, as discussed in Chapter 4.

- There is also qualitative evidence of discrimination against minority- and women-owned businesses from disparity studies conducted by local governments in Georgia (see Chapter 4).

Based on the data presented in Chapter 6 concerning the utilization of DBEs on GDOT FHWA-funded contracts, white women-owned DBEs accounted for more than 60 percent of the total DBE participation and minority-owned DBEs were less than 40 percent of DBE participation. One state, the Illinois Department of Transportation, has requested a waiver to implement separate contract goals for women-owned DBEs and minority-owned DBEs. Given the utilization results for white women-owned DBEs and minority-owned DBEs, GDOT might further explore with FHWA what actions might be appropriate and whether any waiver request is warranted.

15. What are GDOT's next steps?

The draft disparity study report presents an independent analysis of information related to GDOT's implementation of the Federal DBE Program. BBC worked with GDOT to design a process to release a draft of the report and receive public input on the information in the draft prior to completing the disparity study. The final report will incorporate study team review of public input.

Once the disparity study is complete, GDOT should review report results and other relevant information when making decisions concerning its implementation of the Federal DBE Program. GDOT will need to submit a Goal and Methodology for a three-year period beginning Federal Fiscal Year 2013. Chapter 12 of the report provides additional information concerning Program components for GDOT consideration.

Going forward, GDOT will need to closely monitor whether it is successful in removing barriers to MBE/WBE and DBE participation in its contracts. It should expand its utilization data collection and reporting to include MBE/WBE and DBE participation for both FHWA- and state-funded contracts, and for local government contracts that use funds administered by GDOT.

USDOT periodically revises components of the Federal DBE Program and issues guidance concerning implementation of the Program. In addition, new court decisions provide insights as to proper implementation of the Federal DBE Program. GDOT should closely follow such developments.

GDOT should further examine staffing, training and information systems necessary to fully implement the Federal DBE Program. Additional resources may be needed to implement some of the options identified in the study.

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2012 Georgia Department of Transportation Disparity Study

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APPENDIX K.
Detailed Disparity Results

Figure K-1 (2 pages)

Figure K- :	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Agency																			
GDOT	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Local agency																			
Funding																			
All funding sources	x			x			x			x			x			x			x
FHWA		x			x			x			x			x			x		
State			x			x			x			x			x			x	
Type																			
Transportation construction and engineering	x	x	x							x	x	x							x
Construction				x	x	x							x	x	x				
Engineering							x	x	x							x	x	x	
Time Period																			
Jan 2009-June 2011	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Jan 2009-Dec 2009																			
Jan 2010-June 2011																			
Contract role																			
Prime/Sub	x	x	x	x	x	x	x	x	x										
Prime										x	x	x	x	x	x	x	x	x	
Sub/supplier																			x
Region																			
Georgia	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
North																			
Atlanta Metro Area																			
Middle																			
South																			
Contract size																			
All	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Under $2M																			
Under $500k																			
Components of DBE goal																			
Analysis of potential DBEs																			

Figure K- :	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43
Agency																							
GDOT	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x			
Local agency																					x	x	x
Funding																							
All funding sources			x			x			x			x			x	x	x	x	x	x	x	x	x
FHWA	x			x			x			x			x										
State		x			x			x			x			x									
Type																							
Transportation construction and engineering	x	x							x	x	x	x	x	x	x	x	x	x					
Construction			x	x	x														x		x	x	x
Engineering						x	x	x												x			
Time Period																							
Jan 2009-June 2011	x	x	x	x	x	x	x	x							x	x	x	x	x	x	x	x	x
Jan 2009-Dec 2009									x	x	x												
Jan 2010-June 2011												x	x	x									
Contract role																							
Prime/Sub									x	x	x	x	x	x	x	x	x	x			x		
Prime																			x	x		x	
Sub/supplier	x	x	x	x	x	x	x	x															x
Region																							
Georgia	x	x	x	x	x	x	x	x	x	x	x	x	x	x					x	x	x	x	x
North															x								
Atlanta Metro Area																x							
Middle																	x						
South																		x					
Contract size																							
All	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x			x	x	x
Under $2M																			x				
Under $500k																				x			
Components of DBE goal																							
Analysis of potential DBEs																							

Figure K-2.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	4,838	$1,987,419	$1,987,419				
(2) MBE/WBE	1,910	$246,350	$246,350	12.4	22.0	-9.6	56.3
(3) WBE	1,383	$166,616	$166,616	8.4	5.2	3.2	161.9
(4) MBE	527	$79,734	$79,734	4.0	16.8	-12.8	23.8
(5) African American-owned	397	$47,959	$47,959	2.4	14.1	-11.7	17.1
(6) Asian-Pacific American-owned	4	$122	$122	0.0	1.5	-1.5	0.4
(7) Subcontinent Asian American-owned	27	$7,318	$7,318	0.4	0.6	-0.2	64.4
(8) Hispanic American-owned	81	$21,341	$21,341	1.1	0.5	0.6	200+
(9) Native American-owned	18	$2,995	$2,995	0.2	0.1	0.0	115.6
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,528	$192,451	$192,451	9.7			
(12) Woman-owned DBE	1,018	$117,174	$117,174	5.9			
(13) Minority-owned DBE	510	$75,277	$75,277	3.8			
(14) African American-owned DBE	387	$47,320	$47,320	2.4			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	27	$7,318	$7,318	0.4			
(17) Hispanic American-owned DBE	75	$17,548	$17,548	0.9			
(18) Native American-owned DBE	18	$2,995	$2,995	0.2			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-3.
Agency: GDOT
Funding: FHWA
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	4,390	$1,864,044	$1,864,044				
(2) MBE/WBE	1,817	$239,520	$239,520	12.8	21.8	-8.9	59.0
(3) WBE	1,299	$162,093	$162,093	8.7	5.0	3.7	172.7
(4) MBE	518	$77,427	$77,427	4.2	16.7	-12.6	24.8
(5) African American-owned	392	$46,598	$46,598	2.5	14.0	-11.5	17.8
(6) Asian-Pacific American-owned	4	$122	$122	0.0	1.5	-1.5	0.4
(7) Subcontinent Asian American-owned	27	$7,318	$7,318	0.4	0.6	-0.2	67.8
(8) Hispanic American-owned	77	$20,394	$20,394	1.1	0.5	0.6	200+
(9) Native American-owned	18	$2,995	$2,995	0.2	0.1	0.0	122.1
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,473	$188,013	$188,013	10.1			
(12) Woman-owned DBE	972	$115,043	$115,043	6.2			
(13) Minority-owned DBE	501	$72,971	$72,971	3.9			
(14) African American-owned DBE	382	$45,960	$45,960	2.5			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	27	$7,318	$7,318	0.4			
(17) Hispanic American-owned DBE	71	$16,601	$16,601	0.9			
(18) Native American-owned DBE	18	$2,995	$2,995	0.2			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-4.
Agency: GDOT
Funding: State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	448	$123,375	$123,375				
(2) MBE/WBE	93	$6,830	$6,830	5.5	25.6	-20.1	21.6
(3) WBE	84	$4,523	$4,523	3.7	7.3	-3.7	49.9
(4) MBE	9	$2,307	$2,307	1.9	18.3	-16.4	10.2
(5) African American-owned	5	$1,360	$1,360	1.1	15.1	-14.0	7.3
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.6	-1.6	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.5	-0.5	0.0
(8) Hispanic American-owned	4	$946	$946	0.8	1.0	-0.3	73.5
(9) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	55	$4,438	$4,438	3.6			
(12) Woman-owned DBE	46	$2,131	$2,131	1.7			
(13) Minority-owned DBE	9	$2,307	$2,307	1.9			
(14) African American-owned DBE	5	$1,360	$1,360	1.1			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	4	$946	$946	0.8			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-5.
Agency: GDOT
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	4,150	$1,795,276	$1,795,276				
(2) MBE/WBE	1,753	$228,100	$228,100	12.7	21.7	-9.0	58.5
(3) WBE	1,257	$156,677	$156,677	8.7	5.1	3.6	171.7
(4) MBE	496	$71,424	$71,424	4.0	16.7	-12.7	23.9
(5) African American-owned	378	$44,700	$44,700	2.5	14.5	-12.0	17.2
(6) Asian-Pacific American-owned	2	$69	$69	0.0	1.5	-1.5	0.3
(7) Subcontinent Asian American-owned	25	$6,205	$6,205	0.3	0.1	0.2	200+
(8) Hispanic American-owned	75	$17,548	$17,548	1.0	0.4	0.6	200+
(9) Native American-owned	16	$2,903	$2,903	0.2	0.1	0.0	131.8
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,413	$180,620	$180,620	10.1			
(12) Woman-owned DBE	928	$109,860	$109,860	6.1			
(13) Minority-owned DBE	485	$70,760	$70,760	3.9			
(14) African American-owned DBE	368	$44,061	$44,061	2.5			
(15) Asian-Pacific American-owned DBE	1	$44	$44	0.0			
(16) Subcontinent Asian American-owned DBE	25	$6,205	$6,205	0.3			
(17) Hispanic American-owned DBE	75	$17,548	$17,548	1.0			
(18) Native American-owned DBE	16	$2,903	$2,903	0.2			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-6.
Agency: GDOT
Funding: FHWA
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	3,740	$1,683,881	$1,683,881				
(2) MBE/WBE	1,669	$222,740	$222,740	13.2	21.5	-8.3	61.6
(3) WBE	1,181	$152,889	$152,889	9.1	4.9	4.1	184.1
(4) MBE	488	$69,851	$69,851	4.1	16.6	-12.4	25.1
(5) African American-owned	374	$44,074	$44,074	2.6	14.4	-11.8	18.2
(6) Asian-Pacific American-owned	2	$69	$69	0.0	1.5	-1.5	0.3
(7) Subcontinent Asian American-owned	25	$6,205	$6,205	0.4	0.1	0.2	200+
(8) Hispanic American-owned	71	$16,601	$16,601	1.0	0.4	0.6	200+
(9) Native American-owned	16	$2,903	$2,903	0.2	0.1	0.0	135.6
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,367	$177,651	$177,651	10.6			
(12) Woman-owned DBE	890	$108,464	$108,464	6.4			
(13) Minority-owned DBE	477	$69,187	$69,187	4.1			
(14) African American-owned DBE	364	$43,435	$43,435	2.6			
(15) Asian-Pacific American-owned DBE	1	$44	$44	0.0			
(16) Subcontinent Asian American-owned DBE	25	$6,205	$6,205	0.4			
(17) Hispanic American-owned DBE	71	$16,601	$16,601	1.0			
(18) Native American-owned DBE	16	$2,903	$2,903	0.2			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-7.
Agency: GDOT
Funding: State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	410	$111,395	$111,395				
(2) MBE/WBE	84	$5,361	$5,361	4.8	25.5	-20.7	18.8
(3) WBE	76	$3,788	$3,788	3.4	7.4	-4.0	46.1
(4) MBE	8	$1,573	$1,573	1.4	18.2	-16.7	7.8
(5) African American-owned	4	$626	$626	0.6	15.5	-14.9	3.6
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.5	-1.5	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	4	$946	$946	0.8	1.1	-0.2	78.0
(9) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	46	$2,969	$2,969	2.7			
(12) Woman-owned DBE	38	$1,396	$1,396	1.3			
(13) Minority-owned DBE	8	$1,573	$1,573	1.4			
(14) African American-owned DBE	4	$626	$626	0.6			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	4	$946	$946	0.8			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-8.
Agency: GDOT
Funding: FHWA and State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

	Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1)	All firms	688	$192,143	$192,143				
(2)	MBE/WBE	157	$18,250	$18,250	9.5	24.5	-15.0	38.8
(3)	WBE	126	$9,939	$9,939	5.2	6.1	-0.9	85.4
(4)	MBE	31	$8,310	$8,310	4.3	18.4	-14.1	23.4
(5)	African American-owned	19	$3,258	$3,258	1.7	10.5	-8.8	16.1
(6)	Asian-Pacific American-owned	2	$53	$53	0.0	1.4	-1.4	1.9
(7)	Subcontinent Asian American-owned	2	$1,113	$1,113	0.6	4.8	-4.2	12.2
(8)	Hispanic American-owned	6	$3,793	$3,793	2.0	1.5	0.5	131.0
(9)	Native American-owned	2	$92	$92	0.0	0.2	-0.2	23.8
(10)	Unknown MBE	0	$0					
(11)	DBE-certified	115	$11,831	$11,831	6.2			
(12)	Woman-owned DBE	90	$7,314	$7,314	3.8			
(13)	Minority-owned DBE	25	$4,517	$4,517	2.4			
(14)	African American-owned DBE	19	$3,258	$3,258	1.7			
(15)	Asian-Pacific American-owned DBE	2	$53	$53	0.0			
(16)	Subcontinent Asian American-owned DBE	2	$1,113	$1,113	0.6			
(17)	Hispanic American-owned DBE	0	$0	$0	0.0			
(18)	Native American-owned DBE	2	$92	$92	0.0			
(19)	Unknown DBE-MBE	0	$0					
(20)	White male-owned DBE	0	$0	$0	0.0			
(21)	Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-9.
Agency: GDOT
Funding: FHWA
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	650	$180,162	$180,162				
(2) MBE/WBE	148	$16,781	$16,781	9.3	24.4	-15.1	38.2
(3) WBE	118	$9,204	$9,204	5.1	6.0	-0.9	85.2
(4) MBE	30	$7,576	$7,576	4.2	18.4	-14.2	22.9
(5) African American-owned	18	$2,525	$2,525	1.4	10.5	-9.1	13.4
(6) Asian-Pacific American-owned	2	$53	$53	0.0	1.4	-1.4	2.1
(7) Subcontinent Asian American-owned	2	$1,113	$1,113	0.6	4.8	-4.2	12.9
(8) Hispanic American-owned	6	$3,793	$3,793	2.1	1.6	0.5	134.4
(9) Native American-owned	2	$92	$92	0.1	0.2	-0.1	29.5
(10) Unknown MBE	0	$0					
(11) DBE-certified	106	$10,362	$10,362	5.8			
(12) Woman-owned DBE	82	$6,579	$6,579	3.7			
(13) Minority-owned DBE	24	$3,783	$3,783	2.1			
(14) African American-owned DBE	18	$2,525	$2,525	1.4			
(15) Asian-Pacific American-owned DBE	2	$53	$53	0.0			
(16) Subcontinent Asian American-owned DBE	2	$1,113	$1,113	0.6			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	2	$92	$92	0.1			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-10.
Agency: GDOT
Funding: State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	38	$11,981	$11,981				
(2) MBE/WBE	9	$1,469	$1,469	12.3	26.5	-14.2	46.3
(3) WBE	8	$735	$735	6.1	7.1	-0.9	86.9
(4) MBE	1	$734	$734	6.1	19.4	-13.3	31.6
(5) African American-owned	1	$734	$734	6.1	11.6	-5.5	52.8
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.1	-2.1	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	4.4	-4.4	0.0
(8) Hispanic American-owned	0	$0	$0	0.0	0.6	-0.6	0.0
(9) Native American-owned	0	$0	$0	0.0	0.6	-0.6	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	9	$1,469	$1,469	12.3			
(12) Woman-owned DBE	8	$735	$735	6.1			
(13) Minority-owned DBE	1	$734	$734	6.1			
(14) African American-owned DBE	1	$734	$734	6.1			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-11.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	1,140	$1,417,259	$1,417,259				
(2) MBE/WBE	61	$45,638	$45,638	3.2	20.9	-17.7	15.4
(3) WBE	53	$35,951	$35,951	2.5	4.3	-1.7	59.2
(4) MBE	8	$9,687	$9,687	0.7	16.6	-15.9	4.1
(5) African American-owned	1	$734	$734	0.1	14.3	-14.2	0.4
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.1	-1.1	0.0
(7) Subcontinent Asian American-owned	2	$4,321	$4,321	0.3	0.7	-0.3	46.8
(8) Hispanic American-owned	5	$4,632	$4,632	0.3	0.6	-0.3	54.3
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	33	$26,622	$26,622	1.9			
(12) Woman-owned DBE	28	$20,557	$20,557	1.5			
(13) Minority-owned DBE	5	$6,065	$6,065	0.4			
(14) African American-owned DBE	1	$734	$734	0.1			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	2	$4,321	$4,321	0.3			
(17) Hispanic American-owned DBE	2	$1,010	$1,010	0.1			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-12.
Agency: GDOT
Funding: FHWA
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	939	$1,309,959	$1,309,959				
(2) MBE/WBE	51	$42,828	$42,828	3.3	20.6	-17.3	15.9
(3) WBE	45	$34,295	$34,295	2.6	4.0	-1.4	64.9
(4) MBE	6	$8,534	$8,534	0.7	16.5	-15.9	3.9
(5) African American-owned	0	$0	$0	0.0	14.2	-14.2	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.1	-1.1	0.0
(7) Subcontinent Asian American-owned	2	$4,321	$4,321	0.3	0.7	-0.3	49.5
(8) Hispanic American-owned	4	$4,212	$4,212	0.3	0.6	-0.2	57.6
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	28	$24,996	$24,996	1.9			
(12) Woman-owned DBE	25	$20,084	$20,084	1.5			
(13) Minority-owned DBE	3	$4,911	$4,911	0.4			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	2	$4,321	$4,321	0.3			
(17) Hispanic American-owned DBE	1	$590	$590	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-13.
Agency: GDOT
Funding: State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	201	$107,300	$107,300				
(2) MBE/WBE	10	$2,810	$2,810	2.6	25.1	-22.5	10.4
(3) WBE	8	$1,656	$1,656	1.5	7.3	-5.8	21.0
(4) MBE	2	$1,154	$1,154	1.1	17.8	-16.7	6.0
(5) African American-owned	1	$734	$734	0.7	14.7	-14.1	4.6
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.4	-1.4	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.5	-0.5	0.0
(8) Hispanic American-owned	1	$420	$420	0.4	1.1	-0.7	34.5
(9) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	5	$1,627	$1,627	1.5			
(12) Woman-owned DBE	3	$473	$473	0.4			
(13) Minority-owned DBE	2	$1,154	$1,154	1.1			
(14) African American-owned DBE	1	$734	$734	0.7			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	1	$420	$420	0.4			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-14.
Agency: GDOT
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	734	$1,250,465	$1,250,465				
(2) MBE/WBE	39	$37,007	$37,007	3.0	20.5	-17.6	14.4
(3) WBE	36	$32,634	$32,634	2.6	4.1	-1.5	63.5
(4) MBE	3	$4,374	$4,374	0.3	16.4	-16.1	2.1
(5) African American-owned	0	$0	$0	0.0	14.8	-14.8	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.1	-1.1	0.0
(7) Subcontinent Asian American-owned	1	$3,363	$3,363	0.3	0.1	0.2	200+
(8) Hispanic American-owned	2	$1,010	$1,010	0.1	0.5	-0.4	17.7
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	22	$22,153	$22,153	1.8			
(12) Woman-owned DBE	19	$17,780	$17,780	1.4			
(13) Minority-owned DBE	3	$4,374	$4,374	0.3			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$3,363	$3,363	0.3			
(17) Hispanic American-owned DBE	2	$1,010	$1,010	0.1			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-15.
Agency: GDOT
Funding: FHWA
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	561	$1,154,302	$1,154,302				
(2) MBE/WBE	33	$35,404	$35,404	3.1	20.1	-17.1	15.2
(3) WBE	31	$31,451	$31,451	2.7	3.8	-1.1	71.0
(4) MBE	2	$3,954	$3,954	0.3	16.3	-16.0	2.1
(5) African American-owned	0	$0	$0	0.0	14.8	-14.8	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.0	-1.0	0.0
(7) Subcontinent Asian American-owned	1	$3,363	$3,363	0.3	0.1	0.2	200+
(8) Hispanic American-owned	1	$590	$590	0.1	0.4	-0.3	12.9
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	21	$21,733	$21,733	1.9			
(12) Woman-owned DBE	19	$17,780	$17,780	1.5			
(13) Minority-owned DBE	2	$3,954	$3,954	0.3			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$3,363	$3,363	0.3			
(17) Hispanic American-owned DBE	1	$590	$590	0.1			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-16.
Agency: GDOT
Funding: State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	173	$96,163	$96,163				
(2) MBE/WBE	6	$1,603	$1,603	1.7	25.0	-23.3	6.7
(3) WBE	5	$1,183	$1,183	1.2	7.4	-6.2	16.6
(4) MBE	1	$420	$420	0.4	17.6	-17.2	2.5
(5) African American-owned	0	$0	$0	0.0	15.1	-15.1	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.3	-1.3	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	1	$420	$420	0.4	1.2	-0.8	36.7
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	1	$420	$420	0.4			
(12) Woman-owned DBE	0	$0	$0	0.0			
(13) Minority-owned DBE	1	$420	$420	0.4			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	1	$420	$420	0.4			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-17.
Agency: GDOT
Funding: FHWA and State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	406	$166,794	$166,794				
(2) MBE/WBE	22	$8,631	$8,631	5.2	23.9	-18.7	21.7
(3) WBE	17	$3,317	$3,317	2.0	5.6	-3.6	35.6
(4) MBE	5	$5,314	$5,314	3.2	18.3	-15.1	17.4
(5) African American-owned	1	$734	$734	0.4	10.3	-9.8	4.3
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.3	-1.3	0.0
(7) Subcontinent Asian American-owned	1	$958	$958	0.6	4.8	-4.2	12.1
(8) Hispanic American-owned	3	$3,622	$3,622	2.2	1.7	0.5	128.1
(9) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	11	$4,469	$4,469	2.7			
(12) Woman-owned DBE	9	$2,777	$2,777	1.7			
(13) Minority-owned DBE	2	$1,692	$1,692	1.0			
(14) African American-owned DBE	1	$734	$734	0.4			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$958	$958	0.6			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-18.
Agency: GDOT
Funding: FHWA
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	378	$155,657	$155,657				
(2) MBE/WBE	18	$7,424	$7,424	4.8	23.7	-18.9	20.1
(3) WBE	14	$2,844	$2,844	1.8	5.5	-3.7	33.1
(4) MBE	4	$4,580	$4,580	2.9	18.2	-15.2	16.2
(5) African American-owned	0	$0	$0	0.0	10.2	-10.2	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.3	-1.3	0.0
(7) Subcontinent Asian American-owned	1	$958	$958	0.6	4.8	-4.2	12.9
(8) Hispanic American-owned	3	$3,622	$3,622	2.3	1.8	0.6	131.5
(9) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	7	$3,262	$3,262	2.1			
(12) Woman-owned DBE	6	$2,305	$2,305	1.5			
(13) Minority-owned DBE	1	$958	$958	0.6			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$958	$958	0.6			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-19.
Agency: GDOT
Funding: State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	28	$11,137	$11,137				
(2) MBE/WBE	4	$1,207	$1,207	10.8	26.0	-15.2	41.6
(3) WBE	3	$473	$473	4.2	6.7	-2.5	63.3
(4) MBE	1	$734	$734	6.6	19.3	-12.7	34.1
(5) African American-owned	1	$734	$734	6.6	11.4	-4.8	57.8
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.1	-2.1	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	4.5	-4.5	0.0
(8) Hispanic American-owned	0	$0	$0	0.0	0.6	-0.6	0.0
(9) Native American-owned	0	$0	$0	0.0	0.7	-0.7	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	4	$1,207	$1,207	10.8			
(12) Woman-owned DBE	3	$473	$473	4.2			
(13) Minority-owned DBE	1	$734	$734	6.6			
(14) African American-owned DBE	1	$734	$734	6.6			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-20.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	3,698	$570,160	$570,160				
(2) MBE/WBE	1,849	$200,712	$200,712	35.2	24.7	10.5	142.5
(3) WBE	1,330	$130,665	$130,665	22.9	7.4	15.5	200+
(4) MBE	519	$70,047	$70,047	12.3	17.3	-5.0	70.9
(5) African American-owned	396	$47,225	$47,225	8.3	13.7	-5.4	60.3
(6) Asian-Pacific American-owned	4	$122	$122	0.0	2.6	-2.5	0.8
(7) Subcontinent Asian American-owned	25	$2,997	$2,997	0.5	0.4	0.2	141.0
(8) Hispanic American-owned	76	$16,708	$16,708	2.9	0.3	2.7	200+
(9) Native American-owned	18	$2,995	$2,995	0.5	0.4	0.1	134.1
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,495	$165,829	$165,829	29.1			
(12) Woman-owned DBE	990	$96,617	$96,617	16.9			
(13) Minority-owned DBE	505	$69,212	$69,212	12.1			
(14) African American-owned DBE	386	$46,586	$46,586	8.2			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	25	$2,997	$2,997	0.5			
(17) Hispanic American-owned DBE	73	$16,537	$16,537	2.9			
(18) Native American-owned DBE	18	$2,995	$2,995	0.5			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-21.
Agency: GDOT
Funding: FHWA
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	3,451	$554,085	$554,085				
(2) MBE/WBE	1,766	$196,692	$196,692	35.5	24.6	10.9	144.4
(3) WBE	1,254	$127,798	$127,798	23.1	7.4	15.7	200+
(4) MBE	512	$68,894	$68,894	12.4	17.2	-4.8	72.3
(5) African American-owned	392	$46,598	$46,598	8.4	13.6	-5.2	61.7
(6) Asian-Pacific American-owned	4	$122	$122	0.0	2.5	-2.5	0.9
(7) Subcontinent Asian American-owned	25	$2,997	$2,997	0.5	0.4	0.2	145.4
(8) Hispanic American-owned	73	$16,182	$16,182	2.9	0.3	2.7	200+
(9) Native American-owned	18	$2,995	$2,995	0.5	0.4	0.1	137.8
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,445	$163,018	$163,018	29.4			
(12) Woman-owned DBE	947	$94,958	$94,958	17.1			
(13) Minority-owned DBE	498	$68,059	$68,059	12.3			
(14) African American-owned DBE	382	$45,960	$45,960	8.3			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	25	$2,997	$2,997	0.5			
(17) Hispanic American-owned DBE	70	$16,011	$16,011	2.9			
(18) Native American-owned DBE	18	$2,995	$2,995	0.5			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-22.
Agency: GDOT
Funding: State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	247	$16,075	$16,075				
(2) MBE/WBE	83	$4,020	$4,020	25.0	29.0	-4.0	86.2
(3) WBE	76	$2,867	$2,867	17.8	7.4	10.4	200+
(4) MBE	7	$1,153	$1,153	7.2	21.6	-14.5	33.2
(5) African American-owned	4	$626	$626	3.9	17.4	-13.5	22.3
(6) Asian-Pacific American-owned	0	$0	$0	0.0	3.0	-3.0	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.4	-0.4	0.0
(8) Hispanic American-owned	3	$527	$527	3.3	0.5	2.8	200+
(9) Native American-owned	0	$0	$0	0.0	0.4	-0.4	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	50	$2,811	$2,811	17.5			
(12) Woman-owned DBE	43	$1,658	$1,658	10.3			
(13) Minority-owned DBE	7	$1,153	$1,153	7.2			
(14) African American-owned DBE	4	$626	$626	3.9			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	3	$527	$527	3.3			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-23.
Agency: GDOT
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	3,416	$544,811	$544,811				
(2) MBE/WBE	1,714	$191,093	$191,093	35.1	24.5	10.6	143.0
(3) WBE	1,221	$124,043	$124,043	22.8	7.3	15.5	200+
(4) MBE	493	$67,050	$67,050	12.3	17.2	-4.9	71.5
(5) African American-owned	378	$44,700	$44,700	8.2	13.8	-5.6	59.5
(6) Asian-Pacific American-owned	2	$69	$69	0.0	2.6	-2.6	0.5
(7) Subcontinent Asian American-owned	24	$2,841	$2,841	0.5	0.2	0.4	200+
(8) Hispanic American-owned	73	$16,537	$16,537	3.0	0.3	2.8	200+
(9) Native American-owned	16	$2,903	$2,903	0.5	0.4	0.1	132.1
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,391	$158,467	$158,467	29.1			
(12) Woman-owned DBE	909	$92,080	$92,080	16.9			
(13) Minority-owned DBE	482	$66,387	$66,387	12.2			
(14) African American-owned DBE	368	$44,061	$44,061	8.1			
(15) Asian-Pacific American-owned DBE	1	$44	$44	0.0			
(16) Subcontinent Asian American-owned DBE	24	$2,841	$2,841	0.5			
(17) Hispanic American-owned DBE	73	$16,537	$16,537	3.0			
(18) Native American-owned DBE	16	$2,903	$2,903	0.5			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-24.
Agency: GDOT
Funding: FHWA
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	3,179	$529,579	$529,579				
(2) MBE/WBE	1,636	$187,335	$187,335	35.4	24.4	11.0	145.0
(3) WBE	1,150	$121,438	$121,438	22.9	7.3	15.6	200+
(4) MBE	486	$65,897	$65,897	12.4	17.1	-4.6	72.9
(5) African American-owned	374	$44,074	$44,074	8.3	13.7	-5.4	60.8
(6) Asian-Pacific American-owned	2	$69	$69	0.0	2.6	-2.5	0.5
(7) Subcontinent Asian American-owned	24	$2,841	$2,841	0.5	0.2	0.4	200+
(8) Hispanic American-owned	70	$16,011	$16,011	3.0	0.3	2.8	200+
(9) Native American-owned	16	$2,903	$2,903	0.5	0.4	0.1	135.7
(10) Unknown MBE	0	$0					
(11) DBE-certified	1,346	$155,918	$155,918	29.4			
(12) Woman-owned DBE	871	$90,684	$90,684	17.1			
(13) Minority-owned DBE	475	$65,234	$65,234	12.3			
(14) African American-owned DBE	364	$43,435	$43,435	8.2			
(15) Asian-Pacific American-owned DBE	1	$44	$44	0.0			
(16) Subcontinent Asian American-owned DBE	24	$2,841	$2,841	0.5			
(17) Hispanic American-owned DBE	70	$16,011	$16,011	3.0			
(18) Native American-owned DBE	16	$2,903	$2,903	0.5			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-25.
Agency: GDOT
Funding: State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	237	$15,231	$15,231				
(2) MBE/WBE	78	$3,758	$3,758	24.7	28.8	-4.2	85.5
(3) WBE	71	$2,605	$2,605	17.1	7.1	10.0	200+
(4) MBE	7	$1,153	$1,153	7.6	21.7	-14.1	34.9
(5) African American-owned	4	$626	$626	4.1	17.6	-13.5	23.3
(6) Asian-Pacific American-owned	0	$0	$0	0.0	3.0	-3.0	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(8) Hispanic American-owned	3	$527	$527	3.5	0.5	3.0	200+
(9) Native American-owned	0	$0	$0	0.0	0.4	-0.4	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	45	$2,549	$2,549	16.7			
(12) Woman-owned DBE	38	$1,396	$1,396	9.2			
(13) Minority-owned DBE	7	$1,153	$1,153	7.6			
(14) African American-owned DBE	4	$626	$626	4.1			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	3	$527	$527	3.5			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-26.
Agency: GDOT
Funding: FHWA and State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	282	$25,349	$25,349				
(2) MBE/WBE	135	$9,619	$9,619	37.9	28.8	9.2	131.8
(3) WBE	109	$6,623	$6,623	26.1	9.1	17.0	200+
(4) MBE	26	$2,996	$2,996	11.8	19.7	-7.8	60.2
(5) African American-owned	18	$2,525	$2,525	10.0	12.4	-2.4	80.6
(6) Asian-Pacific American-owned	2	$53	$53	0.2	2.1	-1.9	10.0
(7) Subcontinent Asian American-owned	1	$155	$155	0.6	4.8	-4.2	12.9
(8) Hispanic American-owned	3	$171	$171	0.7	0.3	0.4	200+
(9) Native American-owned	2	$92	$92	0.4	0.1	0.2	200+
(10) Unknown MBE	0	$0					
(11) DBE-certified	104	$7,362	$7,362	29.0			
(12) Woman-owned DBE	81	$4,536	$4,536	17.9			
(13) Minority-owned DBE	23	$2,826	$2,826	11.1			
(14) African American-owned DBE	18	$2,525	$2,525	10.0			
(15) Asian-Pacific American-owned DBE	2	$53	$53	0.2			
(16) Subcontinent Asian American-owned DBE	1	$155	$155	0.6			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	2	$92	$92	0.4			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-27.
Agency: GDOT
Funding: FHWA
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	272	$24,506	$24,506				
(2) MBE/WBE	130	$9,357	$9,357	38.2	28.7	9.5	133.2
(3) WBE	104	$6,360	$6,360	26.0	9.1	16.9	200+
(4) MBE	26	$2,996	$2,996	12.2	19.6	-7.4	62.3
(5) African American-owned	18	$2,525	$2,525	10.3	12.3	-2.0	83.7
(6) Asian-Pacific American-owned	2	$53	$53	0.2	2.1	-1.9	10.4
(7) Subcontinent Asian American-owned	1	$155	$155	0.6	4.8	-4.2	13.2
(8) Hispanic American-owned	3	$171	$171	0.7	0.3	0.4	200+
(9) Native American-owned	2	$92	$92	0.4	0.1	0.2	200+
(10) Unknown MBE	0	$0					
(11) DBE-certified	99	$7,100	$7,100	29.0			
(12) Woman-owned DBE	76	$4,274	$4,274	17.4			
(13) Minority-owned DBE	23	$2,826	$2,826	11.5			
(14) African American-owned DBE	18	$2,525	$2,525	10.3			
(15) Asian-Pacific American-owned DBE	2	$53	$53	0.2			
(16) Subcontinent Asian American-owned DBE	1	$155	$155	0.6			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	2	$92	$92	0.4			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-28.
Agency: GDOT
Funding: State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	10	$843	$843				
(2) MBE/WBE	5	$262	$262	31.1	32.1	-1.0	96.8
(3) WBE	5	$262	$262	31.1	11.7	19.4	200+
(4) MBE	0	$0	$0	0.0	20.4	-20.4	0.0
(5) African American-owned	0	$0	$0	0.0	14.1	-14.1	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.4	-2.4	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	3.6	-3.6	0.0
(8) Hispanic American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	100.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	5	$262	$262	31.1			
(12) Woman-owned DBE	5	$262	$262	31.1			
(13) Minority-owned DBE	0	$0	$0	0.0			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-29.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: Jan 1, 2009 - Dec 31, 2009
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	2,671	$924,333	$924,333				
(2) MBE/WBE	1,020	$124,678	$124,678	13.5	22.9	-9.4	59.0
(3) WBE	749	$82,338	$82,338	8.9	5.5	3.4	161.9
(4) MBE	271	$42,340	$42,340	4.6	17.4	-12.8	26.4
(5) African American-owned	193	$21,221	$21,221	2.3	14.5	-12.2	15.9
(6) Asian-Pacific American-owned	1	$25	$25	0.0	1.6	-1.6	0.2
(7) Subcontinent Asian American-owned	13	$6,604	$6,604	0.7	0.6	0.1	110.4
(8) Hispanic American-owned	52	$11,771	$11,771	1.3	0.5	0.8	200+
(9) Native American-owned	12	$2,718	$2,718	0.3	0.2	0.1	156.1
(10) Unknown MBE	0	$0					
(11) DBE-certified	839	$101,903	$101,903	11.0			
(12) Woman-owned DBE	579	$60,766	$60,766	6.6			
(13) Minority-owned DBE	260	$41,136	$41,136	4.5			
(14) African American-owned DBE	186	$21,017	$21,017	2.3			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	13	$6,604	$6,604	0.7			
(17) Hispanic American-owned DBE	49	$10,796	$10,796	1.2			
(18) Native American-owned DBE	12	$2,718	$2,718	0.3			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-30.
Agency: GDOT
Funding: FHWA
Type: Construction and Engineering
Time Period: Jan 1, 2009 - Dec 31, 2009
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	2,479	$883,283	$883,283				
(2) MBE/WBE	978	$121,062	$121,062	13.7	22.7	-9.0	60.3
(3) WBE	713	$80,044	$80,044	9.1	5.4	3.7	168.0
(4) MBE	265	$41,019	$41,019	4.6	17.3	-12.7	26.8
(5) African American-owned	189	$20,264	$20,264	2.3	14.5	-12.2	15.9
(6) Asian-Pacific American-owned	1	$25	$25	0.0	1.6	-1.6	0.2
(7) Subcontinent Asian American-owned	13	$6,604	$6,604	0.7	0.6	0.1	119.0
(8) Hispanic American-owned	50	$11,407	$11,407	1.3	0.4	0.9	200+
(9) Native American-owned	12	$2,718	$2,718	0.3	0.2	0.1	163.4
(10) Unknown MBE	0	$0					
(11) DBE-certified	811	$99,410	$99,410	11.3			
(12) Woman-owned DBE	557	$59,594	$59,594	6.7			
(13) Minority-owned DBE	254	$39,815	$39,815	4.5			
(14) African American-owned DBE	182	$20,061	$20,061	2.3			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	13	$6,604	$6,604	0.7			
(17) Hispanic American-owned DBE	47	$10,432	$10,432	1.2			
(18) Native American-owned DBE	12	$2,718	$2,718	0.3			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-31.
Agency: GDOT
Funding: State
Type: Construction and Engineering
Time Period: Jan 1, 2009 - Dec 31, 2009
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	192	$41,050	$41,050				
(2) MBE/WBE	42	$3,615	$3,615	8.8	26.3	-17.5	33.5
(3) WBE	36	$2,294	$2,294	5.6	7.8	-2.2	71.6
(4) MBE	6	$1,321	$1,321	3.2	18.5	-15.3	17.4
(5) African American-owned	4	$956	$956	2.3	14.4	-12.1	16.2
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.0	-2.0	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	1.1	-1.1	0.0
(8) Hispanic American-owned	2	$365	$365	0.9	0.8	0.0	104.8
(9) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	28	$2,493	$2,493	6.1			
(12) Woman-owned DBE	22	$1,172	$1,172	2.9			
(13) Minority-owned DBE	6	$1,321	$1,321	3.2			
(14) African American-owned DBE	4	$956	$956	2.3			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	2	$365	$365	0.9			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-32.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: Jan 1, 2010 - Jun 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	2,167	$1,063,086	$1,063,086				
(2) MBE/WBE	890	$121,673	$121,673	11.4	21.3	-9.8	53.9
(3) WBE	634	$84,278	$84,278	7.9	4.9	3.0	161.9
(4) MBE	256	$37,395	$37,395	3.5	16.4	-12.8	21.5
(5) African American-owned	204	$26,738	$26,738	2.5	13.8	-11.3	18.2
(6) Asian-Pacific American-owned	3	$97	$97	0.0	1.4	-1.4	0.6
(7) Subcontinent Asian American-owned	14	$713	$713	0.1	0.5	-0.4	13.3
(8) Hispanic American-owned	29	$9,569	$9,569	0.9	0.6	0.3	161.8
(9) Native American-owned	6	$277	$277	0.0	0.1	-0.1	32.5
(10) Unknown MBE	0	$0					
(11) DBE-certified	689	$90,548	$90,548	8.5			
(12) Woman-owned DBE	439	$56,407	$56,407	5.3			
(13) Minority-owned DBE	250	$34,141	$34,141	3.2			
(14) African American-owned DBE	201	$26,303	$26,303	2.5			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	14	$713	$713	0.1			
(17) Hispanic American-owned DBE	26	$6,751	$6,751	0.6			
(18) Native American-owned DBE	6	$277	$277	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-33.
Agency: GDOT
Funding: FHWA
Type: Construction and Engineering
Time Period: Jan 1, 2010 - Jun 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	1,911	$980,761	$980,761				
(2) MBE/WBE	839	$118,458	$118,458	12.1	20.9	-8.8	57.8
(3) WBE	586	$82,049	$82,049	8.4	4.7	3.7	177.6
(4) MBE	253	$36,409	$36,409	3.7	16.2	-12.5	22.9
(5) African American-owned	203	$26,334	$26,334	2.7	13.7	-11.0	19.7
(6) Asian-Pacific American-owned	3	$97	$97	0.0	1.4	-1.4	0.7
(7) Subcontinent Asian American-owned	14	$713	$713	0.1	0.5	-0.5	13.6
(8) Hispanic American-owned	27	$8,988	$8,988	0.9	0.5	0.4	180.7
(9) Native American-owned	6	$277	$277	0.0	0.1	-0.1	35.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	662	$88,604	$88,604	9.0			
(12) Woman-owned DBE	415	$55,448	$55,448	5.7			
(13) Minority-owned DBE	247	$33,155	$33,155	3.4			
(14) African American-owned DBE	200	$25,899	$25,899	2.6			
(15) Asian-Pacific American-owned DBE	3	$97	$97	0.0			
(16) Subcontinent Asian American-owned DBE	14	$713	$713	0.1			
(17) Hispanic American-owned DBE	24	$6,170	$6,170	0.6			
(18) Native American-owned DBE	6	$277	$277	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-34.
Agency: GDOT
Funding: State
Type: Construction and Engineering
Time Period: Jan 1, 2010 - Jun 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	256	$82,325	$82,325				
(2) MBE/WBE	51	$3,215	$3,215	3.9	25.3	-21.4	15.4
(3) WBE	48	$2,229	$2,229	2.7	7.1	-4.4	38.1
(4) MBE	3	$986	$986	1.2	18.2	-17.0	6.6
(5) African American-owned	1	$404	$404	0.5	15.4	-14.9	3.2
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.4	-1.4	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(8) Hispanic American-owned	2	$582	$582	0.7	1.1	-0.4	61.9
(9) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	27	$1,945	$1,945	2.4			
(12) Woman-owned DBE	24	$959	$959	1.2			
(13) Minority-owned DBE	3	$986	$986	1.2			
(14) African American-owned DBE	1	$404	$404	0.5			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	2	$582	$582	0.7			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-35.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: North

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	1,004	$309,111	$309,111				
(2) MBE/WBE	352	$39,156	$39,156	12.7	25.4	-12.8	49.8
(3) WBE	251	$30,462	$30,462	9.9	6.5	3.3	150.9
(4) MBE	101	$8,694	$8,694	2.8	18.9	-16.1	14.9
(5) African American-owned	74	$5,486	$5,486	1.8	16.0	-14.2	11.1
(6) Asian-Pacific American-owned	1	$44	$44	0.0	1.5	-1.5	1.0
(7) Subcontinent Asian American-owned	7	$176	$176	0.1	0.5	-0.5	10.4
(8) Hispanic American-owned	19	$2,988	$2,988	1.0	0.8	0.2	127.1
(9) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	271	$23,246	$23,246	7.5			
(12) Woman-owned DBE	175	$15,591	$15,591	5.0			
(13) Minority-owned DBE	96	$7,654	$7,654	2.5			
(14) African American-owned DBE	73	$5,479	$5,479	1.8			
(15) Asian-Pacific American-owned DBE	1	$44	$44	0.0			
(16) Subcontinent Asian American-owned DBE	7	$176	$176	0.1			
(17) Hispanic American-owned DBE	15	$1,955	$1,955	0.6			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-36.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Atlanta Metro Area

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	832	$393,377	$393,377				
(2) MBE/WBE	330	$32,244	$32,244	8.2	22.3	-14.1	36.8
(3) WBE	179	$13,462	$13,462	3.4	3.3	0.1	104.0
(4) MBE	151	$18,782	$18,782	4.8	19.0	-14.2	25.2
(5) African American-owned	118	$10,164	$10,164	2.6	16.5	-13.9	15.7
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.3	-1.3	0.0
(7) Subcontinent Asian American-owned	10	$4,936	$4,936	1.3	0.5	0.7	200+
(8) Hispanic American-owned	23	$3,682	$3,682	0.9	0.5	0.4	174.9
(9) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	276	$28,380	$28,380	7.2			
(12) Woman-owned DBE	130	$10,042	$10,042	2.6			
(13) Minority-owned DBE	146	$18,337	$18,337	4.7			
(14) African American-owned DBE	113	$9,719	$9,719	2.5			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	10	$4,936	$4,936	1.3			
(17) Hispanic American-owned DBE	23	$3,682	$3,682	0.9			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-37.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Middle

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	1,478	$662,573	$662,573				
(2) MBE/WBE	648	$95,077	$95,077	14.3	20.3	-5.9	70.7
(3) WBE	487	$63,910	$63,910	9.6	5.3	4.3	181.9
(4) MBE	161	$31,167	$31,167	4.7	15.0	-10.3	31.4
(5) African American-owned	115	$16,952	$16,952	2.6	12.8	-10.2	20.1
(6) Asian-Pacific American-owned	2	$53	$53	0.0	1.6	-1.5	0.5
(7) Subcontinent Asian American-owned	9	$2,050	$2,050	0.3	0.2	0.1	176.7
(8) Hispanic American-owned	32	$9,804	$9,804	1.5	0.4	1.1	200+
(9) Native American-owned	3	$2,308	$2,308	0.3	0.1	0.2	200+
(10) Unknown MBE	0	$0					
(11) DBE-certified	511	$71,202	$71,202	10.7			
(12) Woman-owned DBE	352	$40,216	$40,216	6.1			
(13) Minority-owned DBE	159	$30,986	$30,986	4.7			
(14) African American-owned DBE	113	$16,771	$16,771	2.5			
(15) Asian-Pacific American-owned DBE	2	$53	$53	0.0			
(16) Subcontinent Asian American-owned DBE	9	$2,050	$2,050	0.3			
(17) Hispanic American-owned DBE	32	$9,804	$9,804	1.5			
(18) Native American-owned DBE	3	$2,308	$2,308	0.3			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-38.
Agency: GDOT
Funding: FHWA and State
Type: Construction and Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: South

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	1,225	$478,875	$478,875				
(2) MBE/WBE	503	$66,904	$66,904	14.0	21.1	-7.2	66.1
(3) WBE	417	$52,523	$52,523	11.0	5.7	5.3	192.3
(4) MBE	86	$14,381	$14,381	3.0	15.4	-12.4	19.5
(5) African American-owned	66	$11,639	$11,639	2.4	12.8	-10.4	19.0
(6) Asian-Pacific American-owned	1	$25	$25	0.0	1.7	-1.7	0.3
(7) Subcontinent Asian American-owned	1	$155	$155	0.0	0.3	-0.3	9.8
(8) Hispanic American-owned	3	$1,875	$1,875	0.4	0.4	0.0	90.4
(9) Native American-owned	15	$687	$687	0.1	0.1	0.0	149.8
(10) Unknown MBE	0	$0					
(11) DBE-certified	408	$61,180	$61,180	12.8			
(12) Woman-owned DBE	325	$46,830	$46,830	9.8			
(13) Minority-owned DBE	83	$14,351	$14,351	3.0			
(14) African American-owned DBE	64	$11,633	$11,633	2.4			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$155	$155	0.0			
(17) Hispanic American-owned DBE	3	$1,875	$1,875	0.4			
(18) Native American-owned DBE	15	$687	$687	0.1			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-39.
Agency: GDOT
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Small Contracts (under $2 million)

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	554	$348,913	$348,913				
(2) MBE/WBE	30	$15,328	$15,328	4.4	27.5	-23.1	16.0
(3) WBE	28	$14,318	$14,318	4.1	10.4	-6.3	39.3
(4) MBE	2	$1,010	$1,010	0.3	17.1	-16.8	1.7
(5) African American-owned	0	$0	$0	0.0	13.1	-13.1	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.9	-1.9	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.4	-0.4	0.0
(8) Hispanic American-owned	2	$1,010	$1,010	0.3	1.6	-1.3	17.7
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	16	$9,071	$9,071	2.6			
(12) Woman-owned DBE	14	$8,061	$8,061	2.3			
(13) Minority-owned DBE	2	$1,010	$1,010	0.3			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	2	$1,010	$1,010	0.3			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-40.
Agency: GDOT
Funding: FHWA and State
Type: Engineering
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Small Contracts (under $500,000)

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	307	$34,010	$34,010				
(2) MBE/WBE	13	$1,208	$1,208	3.6	25.4	-21.9	14.0
(3) WBE	13	$1,208	$1,208	3.6	8.1	-4.5	43.9
(4) MBE	0	$0	$0	0.0	17.4	-17.4	0.0
(5) African American-owned	0	$0	$0	0.0	10.2	-10.2	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.2	-2.2	0.0
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	3.3	-3.3	0.0
(8) Hispanic American-owned	0	$0	$0	0.0	0.7	-0.7	0.0
(9) Native American-owned	0	$0	$0	0.0	0.9	-0.9	0.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	5	$668	$668	2.0			
(12) Woman-owned DBE	5	$668	$668	2.0			
(13) Minority-owned DBE	0	$0	$0	0.0			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-41.
Agency: Local Agency
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors, Subcontractors and Suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	150	$59,268	$59,268				
(2) MBE/WBE	53	$4,516	$4,516	7.6	20.5	-12.9	37.2
(3) WBE	39	$2,730	$2,730	4.6	4.2	0.4	109.6
(4) MBE	14	$1,786	$1,786	3.0	16.3	-13.3	18.5
(5) African American-owned	8	$497	$497	0.8	14.2	-13.3	5.9
(6) Asian-Pacific American-owned	0	$0	$0	0.0	1.6	-1.6	0.0
(7) Subcontinent Asian American-owned	2	$952	$952	1.6	0.1	1.5	200+
(8) Hispanic American-owned	3	$120	$120	0.2	0.2	0.0	100.9
(9) Native American-owned	1	$217	$217	0.4	0.2	0.2	186.6
(10) Unknown MBE	0	$0					
(11) DBE-certified	33	$3,475	$3,475	5.9			
(12) Woman-owned DBE	23	$1,944	$1,944	3.3			
(13) Minority-owned DBE	10	$1,530	$1,530	2.6			
(14) African American-owned DBE	6	$329	$329	0.6			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	2	$952	$952	1.6			
(17) Hispanic American-owned DBE	1	$32	$32	0.1			
(18) Native American-owned DBE	1	$217	$217	0.4			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-42.
Agency: Local Agency
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Prime contractors
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	14	$33,431	$33,431				
(2) MBE/WBE	1	$794	$794	2.4	18.2	-15.9	13.0
(3) WBE	0	$0	$0	0.0	2.1	-2.1	0.0
(4) MBE	1	$794	$794	2.4	16.1	-13.7	14.7
(5) African American-owned	0	$0	$0	0.0	15.1	-15.1	0.0
(6) Asian-Pacific American-owned	0	$0	$0	0.0	0.9	-0.9	0.0
(7) Subcontinent Asian American-owned	1	$794	$794	2.4	0.0	2.4	200+
(8) Hispanic American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	100.0
(10) Unknown MBE	0	$0					
(11) DBE-certified	1	$794	$794	2.4			
(12) Woman-owned DBE	0	$0	$0	0.0			
(13) Minority-owned DBE	1	$794	$794	2.4			
(14) African American-owned DBE	0	$0	$0	0.0			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$794	$794	2.4			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-43.
Agency: Local Agency
Funding: FHWA and State
Type: Construction
Time Period: 2009 - June 30, 2011
Role: Subcontractors and suppliers
Region: Georgia

Firm Type	(a) Number of contracts (subcontracts)	(b) Total dollars (thousands)	(c) Total dollars after Unknown MBE allocation (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	136	$25,837	$25,837				
(2) MBE/WBE	52	$3,723	$3,723	14.4	23.4	-9.0	61.6
(3) WBE	39	$2,730	$2,730	10.6	6.9	3.7	153.4
(4) MBE	13	$993	$993	3.8	16.5	-12.7	23.3
(5) African American-owned	8	$497	$497	1.9	13.0	-11.0	14.8
(6) Asian-Pacific American-owned	0	$0	$0	0.0	2.5	-2.5	0.0
(7) Subcontinent Asian American-owned	1	$158	$158	0.6	0.2	0.4	200+
(8) Hispanic American-owned	3	$120	$120	0.5	0.3	0.2	148.6
(9) Native American-owned	1	$217	$217	0.8	0.5	0.4	186.6
(10) Unknown MBE	0	$0					
(11) DBE-certified	32	$2,681	$2,681	10.4			
(12) Woman-owned DBE	23	$1,944	$1,944	7.5			
(13) Minority-owned DBE	9	$737	$737	2.9			
(14) African American-owned DBE	6	$329	$329	1.3			
(15) Asian-Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	1	$158	$158	0.6			
(17) Hispanic American-owned DBE	1	$32	$32	0.1			
(18) Native American-owned DBE	1	$217	$217	0.8			
(19) Unknown DBE-MBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of African American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.