

Washington State Department of Transportation Disparity Study 2017



Washington State
Department of Transportation

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I. Executive Summary

Colette Holt & Associates (CHA) was retained by the Washington State Department of Transportation (“WSDOT”) to perform a study in conformance with 49 C.F.R Part 26 to determine its utilization of disadvantaged, minority- and women-Owned Business Enterprises (“DBEs”), the availability of DBEs in its market area, any disparities between its utilization and DBE availability, and evaluate whether the use of race-conscious measures is supported by the results of this analysis. We were also tasked with making recommendations for the DBE program. We analyzed contract data for federal fiscal years (“FFYs”) 2012 through 2015.

A. Study Methodology and Data

The methodology for this study embodies the constitutional principles of *City of Richmond v. Croson*, *Adarand V. Pena*, Ninth Circuit Court of Appeals case law, U.S. Department of Transportation (“USDOT”) guidance, and best practices for designing race- and gender-conscious and small business contracting programs. The CHA approach has been specifically upheld by the federal courts. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for designing legally defensible disparity studies.

We determined the Department’s utilization of DBEs, and the availability of DBEs in WSDOT’s geographic and industry market area. We then compared utilization to availability to calculate disparity ratios between those two measures. We further analyzed disparities in the wider economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We gathered anecdotal data on DBEs’ experiences with the agency’s DBE program. We examined race- and gender-based barriers throughout the economy through focus groups with business owners and stakeholders, and interviews with agency staff. We also evaluated WSDOT’s DBE program for its effectiveness and conformance with strict constitutional scrutiny, the DBE program regulations and national standards for DBE programs.

Based on the results of these extensive analyses, we make recommendations for the Department’s DBE program for federal-aid contracts.

B. Study Findings

WSDOT’s DBE Program

Program Overview

As a recipient of US Department of Transportation (“USDOT”) funds through the Federal Highway Administration (“FHWA”) and the Federal Transit Administration (“FTA”), the Department is required as a condition of receipt to implement a DBE program in compliance with 49 C.F.R. Part 26.¹ The Department administers a DBE Program Plan based upon the samples and guidance from USDOT. This Plan has been approved by the relevant modal administrations. As part of the Plan, WSDOT is required to submit a

¹ 49 C.F.R. §§ 26.3 and 26.21.

triennial DBE to each USDOT modal administration. For federal fiscal years (“FFY”) 2014 through 2017, WSDOT’s FHWA-approved goal is 11.6 percent. For FTA-funded contracts, its proposed goal for FFYs 2014- through 2016 was 3.26 percent.

As required by 49 C.F.R. § 26.51, WSDOT sets contract goals to meet any portion of the overall DBE goal not projected to be met through race-neutral measures. To set contract goals, WSDOT evaluates the scopes of work of the project; the estimated percentage of those scopes; historical evidence of subcontractor utilization on similar projects, and the availability of ready, willing and able DBEs to perform the type(s) of subcontractable work (If there are fewer than three certified DBEs for one scope of work, within a reasonable mobilization distance, that scope is not be considered as DBE subcontractable work); and the Department’s progress towards meeting its overall, triennial goal.

Detailed Instructions to Bidders based on the standards of 49 C.F.R. Part 26 provide the requirements for the DBE program as part of the solicitation specifications. Bidders are required to submit a Disadvantaged Business Enterprise Utilization Certification form with the bid; failure to do so may cause the bid to be rejected as non-responsive.. Bidders may only count 50 percent of the work sublet as “force account;” 60 percent of dollars to be paid to Regular Dealers; and only the fees paid to brokers.

WSDOT conducts regular reviews to ensure that DBEs are performing a “commercially useful function” (“CUF”).

WSDOT passes through money from USDOT local agencies (often referred to as subrecipients in the federal regulation guidance and tips). Subrecipients are required to either adopt WSDOT’s DBE Participation Plan, or develop an equivalent plan.² Subrecipients must designate their own DBE Liaison Officer responsible to the chief executive of the agency. The Local Programs Project Development Engineer (“Local Engineer”) is to review each project to determine if it involves work elements that are conducive to DBE participation. Once established, local agencies are to follow WSDOT’s monitoring and compliance procedures, including on-site reviews to ensure the DBEs are performing a CUF, and submit monthly reports of the amounts credited as DBE participation.

The Department has set performance metrics for employees with responsibilities for the DBE program within the Human Resources Division’s’ Performance Management System.

To address complaints of discrimination under Title VI of the Civil Rights Act of 1964 and the DBE program regulations, WSDOT publishes External Complaint Procedures.

WSDOT has entered into an Interagency Agreement with the State’s Office of Minority and Women Business Enterprises (“OMWBE”) to delegate DBE certification to OMWBE.

To meet the requirement in § 26.39, Small Business Participation, WSDOT has established a race-neutral Small Business Program. Race-neutral measures employed by WSDOT include:

- “Unbundling” contracts to assist small firms to bid as prime contractors.
- Abbreviated procedures to prequalify contractors for contracts under \$100,000.
- A Small Works Roster program for contracts under \$300,000

² No local agencies have submitted their own plans.

- A Small Business Enterprise goal of 10 percent participation by SBEs certified by OMWBE on federal-funded design-bid-build contracts without DBE contract goals.
- The Safe Harbor program for small architectural and engineering firms to forgo the requirement to present audited financials statements.
- Materials to assist firms to navigate WSDOT's business processes.
- A Community Engagement Plan to guide the agency's interactions with stakeholders about all aspects of its operations.
- Training to employees and contractors on program compliance elements and procedures.
- Information sharing and outreach activities, including Information on how to do business with WSDOT and its various divisions.
- Networking events to facilitate relationships between DBEs and prime contractors on specific projects.
- The DBE Advisory Group to provide stakeholders with information about the program, and to provide feedback to WSDOT regarding roles responsibilities and other issues.
- DBE Supportive Services in conformance with 23 C.F.R. Part 230 and 49 C.F.R. Part 26, Appendix C, Business Development Programs, including general and firm specific training and technical assistance to help DBEs to become more competitive in the heavy highway construction industry.

Experiences with WSDOT's DBE Program

To explore the impacts of the Department's DBE program, we interviewed 202 individuals about their experiences and solicited their suggestions for changes.

Contract size and complexity. Many interviewees mentioned the size and complexity of WSDOT's projects as major barriers to participation by small firms in any role.

Payment. Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to DBE status. However, small firms were more negatively impacted by delayed payments. Providing forms for small firms to use to invoice WSDOT was one possible partial solution.

Obtaining WSDOT work: DBEs reported that the program remains necessary for them to obtain work with WSDOT. However, more monitoring of contract performance was recommended. Many DBEs believed that prime contractors do as little as possible to meet goals, and that the Department and local agencies need to be more vigilant about enforcing requirements. Some DBEs stated they had received support from WSDOT.

Experience and financial requirements: Many small firm owners reported it was difficult to become prequalified to work on WSDOT jobs. The requirements to have equipment and staff in place and to have already performed that level of project often made it impossible for them to compete. These criteria advantage incumbent and large firms. Many DBEs mentioned insurance requirements much higher than the cost of the job as a WSDOT-imposed restriction. Another important example is the requirement for audited financial statements to set rates for consultants. This was described as an unnecessary

expense for small firms. Even for large sophisticated firms, WSDOT's audit process was experienced as unduly and unusually burdensome. There was near universal consensus that while well intentioned, the Safe Harbor program to permit small architectural and engineering firms to become prequalified for a set time under a predetermined indirect cost rate does not help DBEs. The rate of 110 percent is too low to be profitable. Another issue is that consultants cannot mark up the rates for subconsultants, thereby requiring the prime firm to absorb the costs for training the DBE subconsultant.

DBE certification process: Participants who had sought certification were able to navigate the system. There was a general understanding that the certification process needs to be rigorous to ensure program integrity. However, several White women felt they were held to a higher standard than other applicants. Many DBEs reported a lack of knowledge of the highway construction industry by the OMWBE certification staff. Several interviewed, including non-DBEs, suggested more outreach, especially outside the Seattle area, to broaden the pool of certified firms.

Technical assistance and supportive services: Many DBEs have taken advantage of WSDOT's numerous outreach and assistance services. There was broad agreement that new and small firms need help to enter the highway industry and to perform on Department jobs. Non-DBEs often pointed to lack of business skills as a major issue for DBEs and their ability to use them to meet goals. The DBE program's limits on the personal net worth of the owner and the size of the applicant firm keep DBEs from growing and being more competitive. DBEs often lack the systems to do WSDOT work, resulting in headaches and costs to general contractors. One approach in addition to technical assistance would be to assist with bonding and financing. Some prime firms said that DBEs should not receive targeted services because these provide a crutch.

Small business setasides: There was significant support for a race- and gender-neutral small business setaside to assist DBEs and small firms to work as prime contractors and consultants.

Mentor-protégé relationships: Several participants supported the idea of a mentor-protégé program for federal-aid contracts. Some large contractors urged caution about adopting a mentor-protégé program.

Meeting DBE contract goals: Although it was not always easy, most prime contractors and consultants reported they were able to meet DBE contract goals. A lack of capacity to do work was frequently cited by general contractors and prime consultants as a major issue with the program. Contractors in Eastern Washington repeatedly reported that the goals on projects in their area are too high. "On call" contracts, where the actual scopes of work are not fully defined at the time of award, were especially challenging. A large number of concurrent public projects compounds the problem. Some consulting firms wanted credit towards meeting DBE goals for the diversity of the staff of their businesses. Many firms, both DBEs and prime contractors, objected to WSDOT's practice of refusing to credit DBE participation despite the firm's being certified in that NAICS code, because of the Department's narrower set of work codes. When bidders cannot meet goals, they found it difficult to submit documentation of their good faith efforts to do so that will pass WSDOT's muster. Change orders can make it difficult to meet goals. That DBE subcontractors submit higher prices than non-DBEs was a common refrain. Many primes stated that DBEs often do not want to submit on non-goals jobs. At the same time, DBEs

taking on more work than they can perform creates problems for the general contractor, often resulting in goals not being met. Many general contractors expressed frustration that they are prohibited from helping DBEs on an *ad hoc* basis when a tool is needed or a piece of equipment breaks down. Performance issues impact not only costs but also safety. It was difficult to substitute a non-performing DBE. Some general contractors stated they use good DBEs on non-goals jobs. Non-DBE subcontractors reported having been passed over in favor of DBEs, despite being lower cost. Some prime firm owners believed that the program is unnecessary.

Utilization, Availability and Disparity Analyses for WSDOT

Strict constitutional scrutiny, Ninth Circuit case law and the DBE program regulations require that a recipient limit its race-based remedial program to firms doing business in its product and geographic markets. CHA therefore analyzed contract data for federal fiscal years (“FFYs”) 2012 through 2015 for WSDOT’s federal aid and state-funded contracts for Construction and Construction-Related Services contracts. We received contract records from WSDOT that contained 1,741 contracts, worth \$3,523,164,304. Because of this large volume of contracts, we created a sample file for our analysis. We then constructed all the fields necessary for our analysis where they were missing in the Department’s contract records (e.g., industry type; zip codes; NAICS codes of prime contractors and subcontractors; non-DBE subcontractor information, including payments, race, gender; etc.). The resulting Final Contract Data File for analysis contained a total award amount of \$2,328,344,423.60, representing 417 contracts to primes; of this amount, 5,475 associated subcontracts received \$983,172,968.90. The Final Contract Data File was used to determine the geographic and product markets for the analyses, to estimate the utilization of DBEs on those contracts, and to calculate DBE availability in WSDOT’s marketplace.

We analyzed data by federal modal administration funding source, *i.e.*, Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA); and state-funded contracts. This delineation was to assist the Department with meeting its obligations for goal submission under 49 C.F.R. Part 26, which requires separate analyses to FHWA- and FTA-funded contracts. We also analyzed contracts funded solely with state monies, described in Chapter IV.

We first determined the Department’s product market for each funding source. Tables A and B present the NAICS codes, the label for each NAICS code, and the industry percentage distribution of spending across NAICS codes, for contracts, respectively. Chapter IV provides tables disaggregated by dollars paid to prime contractors and dollars paid to subcontractors on contracts with subcontracting opportunities.

Table A: Industry Percentage Distribution of Contracts by Dollars Paid for FHWA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	50.4%	50.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.4%	58.8%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238910	Site Preparation Contractors	6.1%	64.9%
236220	Commercial and Institutional Building Construction	5.8%	70.8%
541330	Engineering Services	5.5%	76.3%
236210	Industrial Building Construction	3.8%	80.0%
237990	Other Heavy and Civil Engineering Construction	3.7%	83.7%
238320	Painting and Wall Covering Contractors	2.9%	86.6%
238990	All Other Specialty Trade Contractors	2.4%	89.0%
238110	Poured Concrete Foundation and Structure Contractors	1.7%	90.7%
TOTAL			100.0%³

Source: CHA analysis of WSDOT data.

Table B: Industry Percentage Distribution of Contracts by Dollars Paid for FTA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
336611	Ship Building and Repairing	58.0%	58.0%
237990	Other Heavy and Civil Engineering Construction	18.4%	76.4%
238320	Painting and Wall Covering Contractors	12.0%	88.3%
541330	Engineering Services	6.3%	94.6%
TOTAL			100.0%⁴

Source: CHA analysis of WSDOT data.

To determine the relevant geographic market area, we applied the well accepted standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.⁵ Location was determined by ZIP code and aggregated into counties as the geographic unit.

³ Agency spending across another 17 NAICS codes comprised 9.3% of all spending.

⁴ Agency spending across another 11 NAICS codes comprised 5.4% of all spending.

⁵ National Disparity Study Guidelines, p. 49.

Spending in Washington State accounted for 91.8 percent of the Department’s total FHWA-funded spend in its unconstrained product market. Therefore, Washington constituted the geographic market area from which we drew our availability data for these contracts. Table C presents data on how the contract dollars were spent across states.

Table C: Distribution of Contracts in WSDOT’s Product Market for FHWA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	91.8%	91.8%
OR	2.5%	94.4%
ID	1.3%	95.7%
OH	1.2%	96.9%
PA	1.2%	98.1%
TOTAL		100.0%⁶

Source: CHA analysis of WSDOT data.

We performed a similar analysis for FTA-funded contracts. Spending in Washington State accounted for 64.54 percent of the FTA-funded spend in its unconstrained product market. Multnomah County, Oregon accounted for 34.4 percent. Therefore, Washington state and Multnomah County constituted the geographic market area from which we drew our availability data for these contracts. Table D presents data on how the contract dollars were spent across states.

Table D: Distribution of Contracts in WSDOT’s Product Market for FTA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	64.54%	64.54%
OR	35.41%	99.94%
NJ	0.04%	99.98%
OH	0.02%	100.00%

Source: CHA analysis of WSDOT data.

⁶ Agency spending across another 15 states comprised 1.9% of all spending.

The next step was to determine the dollar value of WSDOT's utilization of DBEs in these market areas, as measured by payments to prime firms and associated subcontractors and disaggregated by race and gender. To fill in the Department's missing records for payments to all subcontractors, we contacted the prime vendors to describe in detail their contract and associated subcontracts, including race, gender and dollar amount paid to date. This was a very lengthy process. We further developed a Master DBE Directory based upon lists solicited from government agencies and private organizations. We used the results of this extensive data collection process to assign minority or woman status to the ownership of each firm in the analysis that was otherwise unclassified.

Tables E and F present the distribution of contract dollars by all industry sectors by funding source. Chapter IV provides detailed breakdowns of these results.

**Table E: Distribution of FHWA-Funded Contract Dollars
by Race and Gender**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
236220	0.0%	0.0%	1.7%	13.5%	0.1%	15.3%	84.7%	100.0%
237310	0.0%	0.6%	1.1%	2.8%	7.7%	12.2%	87.8%	100.0%
237990	0.0%	5.3%	0.0%	0.8%	0.1%	6.2%	93.8%	100.0%
238110	0.1%	20.0%	0.0%	3.0%	5.2%	28.3%	71.7%	100.0%
238140	0.0%	0.0%	32.8%	0.0%	0.1%	32.8%	67.2%	100.0%
238210	1.0%	8.6%	0.0%	1.4%	11.7%	22.6%	77.4%	100.0%
238320	0.0%	0.0%	0.1%	0.0%	38.6%	38.7%	61.3%	100.0%
238910	1.4%	1.5%	0.0%	15.1%	10.8%	28.9%	71.1%	100.0%
238990	0.0%	19.2%	0.0%	12.4%	10.3%	41.9%	58.1%	100.0%
484110	0.7%	5.3%	5.7%	5.3%	12.6%	29.5%	70.5%	100.0%
541330	0.1%	1.0%	6.4%	0.7%	1.4%	9.7%	90.3%	100.0%
561730	2.5%	1.0%	23.5%	1.0%	59.8%	87.8%	12.2%	100.0%
561990	0.0%	7.6%	17.8%	7.6%	52.7%	85.7%	14.3%	100.0%
Total	0.2%	2.5%	1.8%	4.0%	9.0%	17.6%	82.4%	100.0%

Source: CHA analysis of WSDOT data.

**Table F: Distribution of FTA-Funded Contract Dollars
by Race and Gender**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	8.6%	8.6%	91.4%	100.0%
238320	0.0%	10.5%	0.0%	0.0%	0.0%	10.5%	89.5%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.0%	1.3%	0.0%	0.0%	0.2%	1.5%	98.5%	100.0%

Source: CHA analysis of WSDOT data.

Using the “custom census” approach to estimating availability and the further assignment of race and gender using the Master Directory and other sources, we determined the aggregated availability of DBEs, weighted by WSDOT’s spending in its geographic and industry markets, to be 19.0 % for FHWA-funded contracts and 11.0% for FTA-funded contracts. Tables G and H present the weighted availability data for all product sectors combined for the racial and gender categories.

Table G: Aggregated Weighted Availability for FHWA-Funded

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	1.0%	2.6%	2.1%	3.0%	10.3%	19.0%	81.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

Table H: Aggregated Weighted Availability for FTA-Funded Contracts

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.1%	1.8%	1.7%	4.5%	11.0%	89.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.60 Aggregated Weighted Availability for State-Funded
Contracts**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.5%	2.3%	3.1%	10.0%	19.0%	81.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

To meet the Ninth Circuit’s test that all groups must have suffered discrimination in WSDOT’s markets to be eligible for credit towards meeting DBE contract goals, we next calculated disparity ratios comparing the Department’s utilization of DBEs as prime contractors and subcontractors to the availability of these firms in its market areas. Tables I and J present these results for federal-aid contracts.

Table I: Disparity Ratios by Demographic Group, FHWA-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	22.2% ^{‡***}	95.9%	87.4%	135.4% ^{**}	87.3% [*]	92.5% [*]	101.6% [*]

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

Table J: Disparity Ratios by Demographic Group, FTA-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	0.0% [‡]	62.0% [‡]	0.0% [‡]	0.0% [‡]	4.4% [‡]	13.4% ^{‡***}	110.7% ^{**}

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

To evaluate whether the results would differ on contracts without DBE goals (“unremediated markets data”), we further calculated disparity ratios on state-funded contracts upon which goals were not set during the study period. Table K presents these results.

Table K: Disparity Ratios by Demographic Group, State-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	1.3% ^{‡*}	71.1% [‡]	15.2% ^{‡*}	25.6% ^{‡***}	34.3% ^{‡***}	33.5% ^{‡***}	115.5% ^{***}

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

Analysis of Economy-Wide Race and Gender Disparities in WSDOT's Market

We explored the Census Bureau data and literature relevant to how discrimination in the Washington State highway industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the Department's prime contract and subcontract opportunities.

We analyzed the following data and literature:

- Data from the Census Bureau's Survey of Business Owners indicate very large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms.
- Data from the Census Bureau's American Community Survey ("ACS") indicate that Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men.
- The literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention. Taken together with anecdotal data, this is the type of proof that addresses whether, in the absence of DBE contract goals, WSDOT will be a passive participant in the discriminatory systems found throughout Washington. These economy-wide analyses are relevant and probative to whether the agency may continue to employ narrowly tailored race- and gender-conscious measures to ensure equal opportunities to access its contracts and associated subcontracts.

Qualitative Evidence of Race and Gender Barriers in WSDOT's Market

In addition to quantitative data, the courts and the DBE regulations look to anecdotal evidence of firms' marketplace experiences to evaluate whether the effects of current or past discrimination continue to impede opportunities for DBEs such that race-conscious measures are supportable.

To explore this type of anecdotal evidence, we interviewed 202 participants. Most reported that, while progress has been made in reducing barriers on the basis of race and gender, significant inequities remain obstacles to full and fair opportunities. Race- and gender-neutral approaches alone were described as unlikely to ensure a level playing field for WSDOT contract opportunities.

- *Stereotypes, Discriminatory attitudes and negative perceptions of competence:* Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications and capabilities. The assumption is that minority firms are less qualified. Women of all races often experienced gender bias and exclusion in the highway industry. The continuing effects of stereotypes about gender roles and sexist attitudes from male colleagues, clients and agency staff hamper their opportunities.
- *Exclusion from industry networks:* Many minorities and women reported that there still exists a “good old boys” network that makes it difficult for them to fairly obtain contract opportunities. It can difficult for DBEs to access important decision makers.
- *Obtaining work on public sector construction and consulting projects on an equal basis:* There was almost universal agreement that the DBE Program remains necessary to reduce barriers to equal contracting opportunities. Most DBEs reported that without the requirement that prime firms make good faith efforts to meet contract goals, they would receive little or no work. While minorities and women found it is easier to obtain subcontracts than prime contracts on public projects because of affirmative action goals, it is still difficult to get work, receive fair treatment, and be paid on time. Many believed that majority prime firms use them only if forced to do so. Obtaining work from local governments that receive WSDOT funds as subrecipients was especially difficult because of deeply entrenched small networks of white male-owned firms. Some participants felt the barriers were more about size and experience, and less about race and gender. Some owners reported that although their firms have been listed on the contract, they were underutilized or not utilized at all. Prime contracts were especially difficult to obtain. Many firm owners would like to perform prime work but are not afforded that opportunity.

We also conducted an electronic survey of firms in WSDOT’s market area about their experiences in obtaining work, marketplace conditions and WSDOT’s DBE program. 78 minority- and women-owned firms participated. The results were similar to those of the interviews. A significant portion of DBEs reported they still experience barriers to equal contracting opportunities; questioning of their competency because of their race or gender; less access to business networks and information; job-related sexual or racial harassment or stereotyping; and slow payment by WSDOT and/or prime contractors.

Recommendations for WSDOT’s DBE Program

The quantitative and qualitative data provide a thorough examination of the evidence of the experiences of disadvantaged, minority- and women-owned firms in WSDOT’s geographic and industry markets. These results provide the agency with the evidence necessary to narrowly tailor its DBE program for federal-aid contracts, as required by 49 C.F.R. Part 26. The statistical data and the anecdotal testimony provide a sufficient basis for the continued use of narrowly tailored remedial race- and gender-conscious measures to ensure full and fair access by all firms to WSDOT federally-funded prime contracting and associated subcontracting opportunities. Based upon these findings, USDOT guidance and national best practices for DBE programs, we make the following recommendations

- *Increase certification outreach and expertise:* Conduct additional outreach to uncertified minority- and women-owned firms, including those identified through the study process. Focus on increasing the pool of certified firms that can provide goods or services in construction subindustries where DBEs have received little work. Ensure that firms applying for DBE certification are evaluated by a highway industry expert, and that WSDOT is regularly consulted about certification issues and unusual situations.
- *Monitor prompt payment to subcontractors:* Fully implement the B2GNow electronic data collection and monitoring system and train staff, contractors and subcontractors on the compliance requirements and how to use it. Evaluate how well this approach addresses the complaint by subcontractors that prime contractors often unnecessarily withhold payment. Better educate small subcontractors about their rights;
- *Increase contract unbundling:* Continue to unbundle contracts into smaller or less complex segments to improve small firms' access to prime and subcontracting opportunities.
- *Ensure bidder non-discrimination and fairly prices subcontractor quotes:* To investigate whether prime contractors solicit DBEs on an equal basis and whether DBEs inflate their prices to prime contractors, require bidders to maintain all subcontractor quotes received on specified projects.
- *Review insurance and experience requirements:* Review surety bonding, insurance and experience criteria so they are no greater than necessary to protect the Department's interests. This might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bond from the calculation of the "as read" low bidder on appropriate solicitations.
- *Review DBE policies for consulting contracts:* Consider permitting prime consultants to mark up their costs for subconsultants. Review the Safe Harbor indirect cost rate to ensure small firms can make a profit on WSDOT contracts and provide access to construction accountants at reduced fees as part of supportive services. Evaluate whether prequalification criteria can be reduced to increase small firm opportunities and competition for WSDOT work. Reduce the threshold for setting contract goals to \$100,000 from \$250,000.
- *Provide information and training to bidders on program compliance:* Provide with the invitation for bid or request for proposal the scopes of work used by the Department to set the contract goal. Conduct training on issues such as commercially useful function determinations, documenting good faith efforts to meet goals, etc. Training could be mandated as part of the prequalification process.
- *Enhance the small business element:* Set aside some smaller or less complex contracts for bidding only by SBEs as prime contractors. Provide additional assistance if needed for these firms.
- *Enhance supportive services and business development programs:* Add a focus on Black construction and consulting firms. Enhance outreach and provide supportive services to expand the types of work performed by DBEs. Develop forms for small firms to use for invoicing and documenting other requirements. Provide a roster of experienced construction accountants and attorneys at

discounted rates. Collect data on the rates at which certified firms submit bids; their success in receiving contracts; and any barriers to their participation in the program or on Department contracts.

- *Develop a bonding and financing program for SBE:* Work with a surety and a lender to provide a bond and financing for firms that have successfully completed the program.
- *Adopt a DBE mentor-protégé program:* Develop a program in conformance with the DBE regulations and guidance. Include criteria on the parties' qualifications; a Department-approved written development plan; a long term and specific commitment between the parties; delineate the use of any equipment or equipment rental; extra credit for the mentor's use of the protégé to meet a contract goal; define any WSDOT-approved financial assistance; a fee schedule to cover the direct and indirect cost for services provided; terminations provisions; reporting requirements; and Department review procedures.
- *Provide information and training to WSDOT staff and subrecipients regarding program:* Conduct agency wide and subrecipient training for appropriate staff regarding topics such as understanding certification eligibility requirements; goal setting; evaluating good faith efforts and commercially useful function; contract performance compliance and documentation; Title VI compliance; outreach and supportive services; and USDOT reporting.
- *Increase program resources:* Create liaisons in each WSDOT District reporting to the Director of Civil Rights.
- *Use the study to set the narrowly tailored triennial DBE goal:* The availability estimates in Chapter IV should be the basis for consideration of the triennial DBE goals for FHWA- and FTA-funded contracts. We found the availability of DBEs to be 19.0 percent for FHWA-funded contracts and availability of DBEs to be 11.0 percent for FTA-funded contracts. These results can serve as the step 1 base figure under 49 C.F.R. § 26.459(c). The statistical disparities in Chapter V in the rates at which DBEs form businesses could serve as the basis for consideration of an adjustment to the step 1 figure to reflect DBE availability "but for" discrimination.
- *Use the study to set narrowly tailored DBE contract goals:* The detailed availability estimates in the study should serve as the starting point for contract goal setting. WSDOT should weigh the estimated scopes of the contract by the availability of DBEs in those scopes in the study, and then adjust the result based on current market conditions. The Department's new B2GNow electronic system goal setting module should be employed to use the study data as the baseline, ensure consistency and transparency of this critical element of narrow tailoring.

The disparity results meet the Ninth Circuit's requirement that WSDOT consider whether each racial and ethnic group and white women have suffered discrimination in its market. These results were statistically significant for spending on federally-funded jobs for all groups (other than Native Americans on FHWA contracts). Disparities were especially low for Black-owned firms, that is, Blacks-owned businesses received few dollars compared to their availability. The disparity ratio on state-funded contracts for DBEs combined was 33.5 percent, including a ratio of 34.3 percent for White women. Further, business owners provided strong anecdotal evidence of the continuing existence or race- and

gender-based barriers, including bias, stereotyping, harassment, exclusion from networks and unfair performance standards. The picture drawn by these results is of a playing field for WSDOT work that is still not level. These stark findings suggest that WSDOT may infer that the cause is the continued effects of discrimination on the basis of race and gender. Therefore, to ensure it is not a passive participant in this discriminatory market, we recommend that the Department continue to utilize race-conscious contract goals and include all groups for credit towards meeting contract goals.

- *Develop Performance Measures for Program Success:* WSDOT should develop quantitative performance measures for overall success of its programs. These could include progress towards meeting the annual DBE goals; tracking good faith efforts waivers, findings of non-responsiveness and DBE substitutions; increased bids/proposals from certified firms; increased variety of types of contracts awarded to DBE prime vendors and subcontractors; and increased “capacity” of certified firms as measured by bonding limits, size of jobs, profitability, etc.

II. Legal Standards for Disadvantaged Business Enterprise Programs

A. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based program for public contracts, regardless of the funding source, must meet the judicial test of constitutional “strict scrutiny.” Strict scrutiny is the highest level of judicial review. The test consists of two elements:

- The government must establish its “compelling interest” in remedying race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
- Any remedies adopted must be “narrowly tailored” to that discrimination, that is, the program must be directed at the types and depth of discrimination identified.⁷

The compelling interest prong has been met through two types of proof:

- Statistical evidence of the underutilization of minority firms by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area. These are disparity indices, comparable to the type of “disparate impact” analysis used in employment discrimination cases.
- Anecdotal evidence of race-based barriers to the full and fair participation of minority firms in the market area and to seeking contracts with the agency, comparable to the “disparate treatment” analysis used in employment discrimination cases.⁸ Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, etc.

The narrow tailoring requirement has been met through the satisfaction of five factors to ensure that the remedy “fits” the evidence:

- The efficacy of race-neutral remedies at overcoming identified discrimination.
- The relationship of numerical benchmarks for government spending to the availability of minority- and women-owned firms and to subcontracting goal setting procedures.
- The congruence between the remedies adopted and the beneficiaries of those remedies.
- Any adverse impact of the relief on third parties.
- The duration of the program.⁹

In *Adarand v. Peña*,¹⁰ the Supreme Court extended the analysis of strict scrutiny to race-based federal enactments such as the Disadvantaged Business Enterprise (“DBE”) program for federally-assisted transportation contracts (which applies to WSDOT).¹¹ Just

⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁸ *Id.* at 509.

⁹ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

¹⁰ *Adarand v. Peña*, 515 U.S. 200 (1995).

¹¹ 49 C.F.R. Part 26.

as in the local government context, the national legislature must have a compelling interest for the use of race and the remedies adopted must be narrowly tailored to the evidence relied upon.

In general, courts have subjected preferences for Women-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny.” Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related” to the objective.¹² However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program,¹³ or held that the results would be the same under strict scrutiny.¹⁴

Classifications not based on race, ethnicity, religion, national origin or gender are subject to the lesser standard of review of “rational basis” scrutiny, because the courts have held there are no equal protection implications under the Fourteenth Amendment for groups not subject to systemic discrimination.¹⁵ In contrast to strict scrutiny, rational basis means the governmental action must only be “rationally related” to a “legitimate” government interest. Thus, preferences for persons with disabilities, veterans, etc. may be enacted with vastly less evidence than race- or gender-based measures to combat historic discrimination.

Unlike most legal challenges, the defendant has the initial burden of producing “strong evidence” in support of its race-conscious program.¹⁶ The plaintiff must then proffer evidence to rebut the government’s case, and bears the ultimate burden of production and persuasion that the affirmative action program is unconstitutional.¹⁷ “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”¹⁸

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”¹⁹ For example, in the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet

¹² Cf. *United States v. Virginia*, 518 U.S. 515 (1996).

¹³ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007) (“*Northern Contracting III*”).

¹⁴ *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 2013 WL 1607239 at *13, fn. 6 (9th Cir. 2013).

¹⁵ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹⁶ *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

¹⁷ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), cert. granted then dismissed as improvidently granted, 532 U.S. 941 (2001) (“*Adarand VII*”); *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*, 199 F.3d 206, 219 (5th Cir. 1999).

¹⁸ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997).

¹⁹ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989, cert. denied, 540 U.S. 1027 (2003) (10th Cir. 2003) (“*Concrete Works III*”).

their ultimate burden to prove that the DBE program is unconstitutional on this ground.²⁰ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.²¹ A plaintiff cannot rest upon general criticisms of studies or other evidence; it must carry the case that the government's proof is inadequate to meet strict scrutiny, rendering the legislation or governmental program illegal.²²

To meet strict scrutiny, studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as "disparity studies" because they analyze any disparities between the opportunities and experiences of minority- and women-owned firms and their actual utilization compared to White male-owned businesses. Quality studies also examine the elements of the agency's program to determine whether it is sufficiently narrowly tailored. The following is a detailed discussion of the parameters for conducting studies leading to a defensible program for recipients in the Ninth Circuit.

B. Elements of Strict Scrutiny

The U.S. Supreme Court in the case of the *City of Richmond v. J.A. Croson Co.* established the constitutional contours of permissible race-based public contracting programs. Reversing long established law, the Court for the first time extended the highest level of judicial examination from measures designed to limit the rights and opportunities of minorities to legislation that benefits these historic victims of discrimination. Strict scrutiny requires that a government entity prove both its "compelling interest" in remedying identified discrimination based upon "strong evidence," and that the measures adopted to remedy that discrimination are "narrowly tailored" to that evidence. However benign the government's motive, race is always so suspect a classification that its use must pass the highest constitutional test of "strict scrutiny."

The Court struck down the City of Richmond's Minority Business Enterprise Plan that required prime contractors awarded City construction contracts to subcontract at least 30 percent of the project to Minority-Owned Business Enterprises ("MBEs"). A business located anywhere in the country that was at least 51 percent owned and controlled by minorities citizens was eligible to participate. The Plan was adopted after a public hearing at which no direct evidence was presented that the City had discriminated on the basis of race in awarding contracts or that its prime contractors had discriminated against minority subcontractors. The only evidence before the City Council was: (a) Richmond's population was 50 percent Black, yet less than one percent of its prime construction contracts had been awarded to minority businesses; (b) local contractors'

²⁰ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

²¹ *Coral Construction Co. v. King County*, 941 F.2d 910 921 (9th Cir. 1991); *Engineering Contractors II*, 122 F.3d at 916.

²² *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1522-1523 (10th Cir. 1994) ("*Concrete Works II*"); *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999); see also *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

associations were virtually all White; (c) the City Attorney's opinion that the Plan was constitutional; and (d) general statements describing widespread racial discrimination in the local, Virginia, and national construction industries.

In affirming the court of appeals' determination that the Plan was unconstitutional, Justice Sandra Day O'Connor's plurality opinion rejected the extreme positions that local governments either have *carte blanche* to enact race-based legislation or must prove their own active participation in discrimination:

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment... [I]f the City could show that it had essentially become a "passive participant" in a system of racial exclusion...[it] could take affirmative steps to dismantle such a system.²³

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by either notions of racial inferiority or blatant racial politics. This highest level of judicial review "smokes out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.²⁴ It further ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny seeks to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.

Richmond's evidence was found to be lacking in every respect. The City could not rely upon the disparity between its utilization of MBE prime contractors and Richmond's minority population because not all minority persons would be qualified to perform construction projects; general population representation is irrelevant. No data were presented about the availability of MBEs in either the relevant market area or their utilization as subcontractors on City projects. According to Justice O'Connor, the extremely low MBE membership in local contractors' associations could be explained by "societal" discrimination or perhaps Blacks' lack of interest in participating as business owners in the construction industry. To be relevant, the City would have to demonstrate statistical disparities between eligible MBEs and actual membership in trade or professional groups. Further, Richmond presented no evidence concerning enforcement of its own anti-discrimination ordinance. Finally, Richmond could not rely upon Congress' determination that there has been nationwide discrimination in the construction industry. Congress recognized that the scope of the problem varies from market to market, and in

²³ 488 U.S. at 491-92.

²⁴ See also *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.").

any event it was exercising its powers under Section Five of the Fourteenth Amendment, whereas a local government is further constrained by the Amendment's Equal Protection Clause.

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the City has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary."²⁵

The foregoing analysis was applied only to Blacks. The Court then emphasized that there was "absolutely no evidence" of discrimination against other minorities. "The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City's purpose was not in fact to remedy past discrimination."²⁶

Having found that Richmond had not presented evidence in support of its compelling interest in remedying discrimination—the first prong of strict scrutiny—the Court went on to make two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30 percent quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.²⁷

Apparently recognizing that the opinion might be misconstrued to categorically eliminate all race-conscious contracting efforts, Justice O'Connor closed with these admonitions:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond 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. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the City could act to dismantle the closed business system by taking appropriate measures against those

²⁵ *Id.* at 510.

²⁶ *Id.*

²⁷ See *Grutter*, 529 U.S. at 336-337 (quotas are not permitted; race must be used in a flexible, non-mechanical way).

who discriminate based on race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion... Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.²⁸

While much has been written about *Croson*, it is worth stressing what evidence was and was not before the Court. First, Richmond presented *no* evidence regarding the availability of MBEs to perform as prime contractors or subcontractors and *no* evidence of the utilization of minority-owned subcontractors on City contracts.²⁹ Nor did Richmond attempt to link the remedy it imposed to any evidence specific to the Program; it used the general population of the City rather than any measure of business availability.

Some commentators have taken this dearth of any particularized proof and argued that only the most particularized proof can suffice in all cases. They leap from the Court's rejection of Richmond's reliance on only the percentage of Blacks in the City's population to a requirement that only firms that bid or have the "capacity" or "willingness" to bid on a particular contract at a particular time can be considered in determining whether discrimination against Black businesses infects the local economy.³⁰

This contention has been rejected explicitly by some courts. For example, in denying the plaintiff's summary judgment motion to enjoin the City of New York's M/WBE construction ordinance, the court stated that:

[I]t is important to remember what the *Croson* plurality opinion did and did not decide. The Richmond program, which the *Croson* Court struck down, was insufficient because it was based on a comparison of the minority population in its entirety in Richmond, Virginia (50%) with the number of contracts awarded to minority businesses (.67%). There were no statistics presented regarding number of minority-owned contractors in the Richmond area, *Croson*, 488 U.S. at 499, and the Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program. There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.³¹

²⁸ 488 U.S. at 509 (citations omitted).

²⁹ *Id.* at 502.

³⁰ See, e.g., *Northern Contracting III*, 473 F.3d at 723.

³¹ *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785, *28-29 (E.D. N.Y. 1998); see also *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2nd Cir. 1992) ("Croson made only broad pronouncements concerning the

Further, Richmond made no attempt to narrowly tailor a goal for the procurement at issue that reflected the reality of the project. Arbitrary quotas, and the unyielding application of those quotas, did not support the stated objective of ensuring equal access to City contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible subcontracting goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In contrast, the USDOT DBE Program avoids these pitfalls. 49 C.F.R. Part 26 "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."³²

While strict scrutiny is designed to require clear articulation of the evidentiary basis for race-based decision-making and careful adoption of remedies to address discrimination, it is not, as Justice O'Connor stressed, an impossible test that no proof can meet. Strict scrutiny need not be "fatal in fact."

C. Strict Scrutiny as Applied to the DBE Program

In *Adarand v. Peña*,³³ the Supreme Court again overruled long settled law and extended the analysis of strict scrutiny under the Due Process Clause of the Fourteenth Amendment to federal enactments. Just as in the local government context, when evaluating federal legislation and regulations:

[t]he strict scrutiny test involves two questions. The first is whether the interest cited by the government as its reason for injecting the consideration of race into the application of law is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race, so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest. The strict scrutiny test is thus a recognition that while classifications based on race may be appropriate in certain limited legislative endeavors, such enactments must be carefully justified and meticulously applied so that race is determinative of the outcome in only the very narrow circumstances to which it is truly relevant.³⁴

findings necessary to support a state's affirmative action plan"); *cf. Concrete Works II*, 36 F.3d at 1528 (City may rely on "data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion").

³² *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 994 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

³³ 515 U.S. 200 (1995) (*Adarand III*).

³⁴ *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1569-1570 (D. Colo. 1997), *rev'd*, 228 F.3d 1147 (2000) ("*Adarand IV*"); *see also Adarand III*, 515 U.S. at 227.

To comply with *Adarand*, Congress reviewed and revised the Disadvantaged Business Enterprise (DBE) Program statute³⁵ and implementing regulations³⁶ for federal-aid contracts in the transportation industry. The program governs WSDOT's receipt of federal funds from the Federal Highway Administration ("FHWA"), the Federal Transit Administration ("FTA") and the Federal Aviation Administration.³⁷ To date, every court that has considered the issue has found the regulations to be constitutional on their face, including the Ninth Circuit Court of Appeals.³⁸ These cases provide important guidance to WSDOT about how to narrowly tailor its DBE program.

All courts have held that Congress had strong evidence of widespread race discrimination in the construction industry. The Ninth Circuit held that "[i]n light of the substantial body of statistical and anecdotal material considered at the time of TEA-21's enactment, Congress had a strong basis in evidence for concluding that-in at least some parts of the country-discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts."³⁹

Relevant evidence before Congress included:

- Disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms;
- Disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners;
- The large and rapid decline in minorities' participation in the construction industry when affirmative action programs were struck down or abandoned; and
- Various types of overt and institutional discrimination by prime contractors, trade unions, business networks, suppliers, and sureties against minority contractors.⁴⁰

The Eighth Circuit Court of Appeals took a "hard look" at the evidence Congress considered, and concluded that the legislature had:

[S]pent 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. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they failed to present

³⁵ Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178 (b)(1), 112 Stat. 107, 113.

³⁶ 49 C.F.R. Part 26.

³⁷ WSDOT also receives funds from the Federal Aviation Administration but those contracts were not included in this study.

³⁸ See, e.g., *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 994 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VI*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001); *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2004 U.S. Dist. LEXIS 3226 at *64 (N.D. Ill., Mar. 3, 2004) ("*Northern Contracting I*").

³⁹ See also *Western States*, 407 F.3d at 993.

⁴⁰ See *id.*, 407 F.3d at 992-93.

affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.⁴¹

Next, the regulations were facially narrowly tailored. Unlike the prior program,⁴² Part 26 provides that:

- The overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing, and able to participate on the recipient's federally assisted contracts.
- The goal may be adjusted to reflect the availability of DBEs but for the effects of the DBE Program and of discrimination.
- The recipient must meet the maximum feasible portion of the goal through race-neutral measures as well as estimate that portion of the goal it predicts will be met through such measures.
- The use of quotas and set-asides is limited to only those situations where there is no other remedy.
- The goals are to be adjusted during the year to remain narrowly tailored.
- Absent bad faith administration of the Program, a recipient cannot be penalized for not meeting its goal.
- The presumption of social disadvantage for racial and ethnic minorities and women is rebuttable, "wealthy minority owners and wealthy minority firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage."

Exemptions and waivers from any or all Program requirements are available.⁴³

These elements have led the courts to conclude that the program is narrowly tailored on its face. First, the regulations place strong emphasis on the use of race-neutral means to achieve minority and women participation. WSDOT must also estimate the portion of the goal it predicts will be met through race-neutral and race-conscious measures (*i.e.*, contract goals).⁴⁴ This requirement has been central to the holdings that the DBE regulations meet narrow tailoring.⁴⁵ Further, the recipient may terminate race-conscious contract goals if it meets its annual overall goal through race-neutral means for two consecutive years. Moreover, the authorizing legislation is subject to Congressional reauthorization that will ensure periodic public debate.

⁴¹ *Sherbrooke*, 345 F.3d. at 970; *see also Adarand VII*, 228 F.3d at 1175 (Plaintiff has not met its 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.").

⁴² 49 C.F.R. Part 23.

⁴³ *Sherbrooke*, 345 F.3d. at 973.

⁴⁴ 49 CFR § 26.45(f)(3).

⁴⁵ *See, e.g., Sherbrooke*, 345 F.3d. at 973

However, narrow tailoring does not require that every race-neutral approach must be implemented and then proven ineffective before race-conscious remedies may be utilized.⁴⁶ While an entity must give good faith consideration to race-neutral alternatives, “strict scrutiny does not require exhaustion of every possible such alternative...however irrational, costly, unreasonable, and unlikely to succeed such alternative might be... [S]ome degree of practicality is subsumed in the exhaustion requirement.”⁴⁷ Relying upon *Grutter v. Bollinger*, the Eighth Circuit held that while “[n]arrow tailoring does not require the exhaustion of every conceivable race-neutral alternative...it does require serious, good faith consideration of workable race-neutral alternatives.”⁴⁸

The DBE Program is also flexible. Eligibility is limited to small firms owned by persons whose net worth is under a certain amount.⁴⁹

Goals are to be tied to the relevant labor market. “Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*.”⁵⁰

It is imperative that remedies not operate as fixed quotas.⁵¹ A DBE program must provide for contract awards to firms who fail to meet the contract goals but make good faith efforts to do so.⁵² Further, firms that meet the goals cannot be favored over those who made good faith efforts. Part 26 contains extensive provisions regarding the standards and processes for establishing good faith efforts.⁵³ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.⁵⁴

Further, a recipient must evaluate whether the program unduly burdens non-DBEs.⁵⁵ The burden of compliance need not be placed only upon those firms directly responsible for the discrimination. “Innocent” parties can be made to share some of the burden of the

⁴⁶ *Grutter*, 529 U.S. at 339.

⁴⁷ *Coral Construction*, 941 F.2d at 923.

⁴⁸ *Id.* at 972.

⁴⁹ The personal net worth limit was \$750,000 when the DBE program regulations were amended to meet strict scrutiny in 1999. The limit was increased to \$1.32 million in 2012, and is now indexed by the Consumer Price Index. 49 C.F.R. § 26.67(b)(1).

⁵⁰ 345 F.3d.at 972.

⁵¹ See 49 C.F.R § 26.43 (quotas are not permitted and set-aside contracts may be used only in limited and extreme circumstances “when no other method could be reasonably expected to redress egregious instances of discrimination”).

⁵² In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the DBE program. 488 U.S. at 508; see also *Adarand VII*, 228 F.3d at 1181; *BAGC v. Chicago*, 298 F. Supp.2d at 740 (“Waivers are rarely or never granted...The City program is a rigid numerical quota...formulistic percentages cannot survive strict scrutiny.”).

⁵³ 49 C.F.R. § 26.53 and Appendix A.

⁵⁴ See, e.g., *Sherbrooke*, 345 F.3d at 972.

⁵⁵ See *Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County* (“*Engineering Contractors I*”), 943 F.Supp. 1546, 1581-1582 (S.D. Fla. 1996) (County chose not to change its procurement system).

remedy for eradicating racial discrimination.⁵⁶ The proper focus is whether the burden on third parties is “too intrusive” or “unacceptable.”

Burdens must be proven, and cannot constitute mere speculation by a plaintiff.⁵⁷ “Implementation of the race-conscious contracting goals for which TEA-21 provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although this places a very real burden on non-DBE firms, this fact alone does not invalidate TEA-21. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.”⁵⁸

To address this factor, the DBE regulations specifically provide that if a grantee determines that DBEs 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, you must devise appropriate measures to address this overconcentration.”⁵⁹

The courts require that race-based programs must have duration limits and “not last longer than the discriminatory effects it is designed to eliminate.”⁶⁰ The DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.⁶¹ If WSDOT determines it will exceed its goal, it must reduce or eliminate the use of contract goals to the extent necessary to ensure that their use does not result in exceeding the overall goal.⁶²

Finally, Congress has taken significant steps to minimize the race-conscious nature of the Program. “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”⁶³

49 C.F.R. Part 26 operationalizes these standards. WSDOT must use a two-step goal setting process to establish its overall triennial DBE goal for FHWA- and FTA-funded contracts. This is a distinct inquiry from that required by the Ninth Circuit that the recipient have evidence of the need to use narrowly tailored race-conscious contract goals to meet the overall, annual goal.

⁵⁶ *Concrete Works IV*, 321 F.3d at 973; *Wygant*, 476 U.S. at 280-281; *Adarand VII*, 228 F.3 at 1183 (“While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of DBE subcontractors, at the margin, some non-DBE subcontractors such as *Adarand* will be deprived of business opportunities”); *cf. Northern Contracting II*, at *5 (“Plaintiff has presented little evidence that it [sic] has suffered anything more than minimal revenue losses due to the program.”).

⁵⁷ *See, e.g., Rowe*, 615 F.3d at 254 (prime bidder had no need for additional employees to perform program compliance and need not subcontract work it can self-perform).

⁵⁸ *Western States*, 407 F.3d at 995.

⁵⁹ 49 C.F.R. § 26.33(a).

⁶⁰ *Adarand III*, 515 U.S. at 238.

⁶¹ *See Western States*, 407 F.3d at 995.

⁶² 49 C.F.R. § 26.51(f)(2).

⁶³ *Id.* at 973.

The annual goal must be based upon the relative availability of DBEs and reflect the level of DBE participation that would be expected absent the effects of discrimination.⁶⁴ Step 1 is to determine the base figure for DBE availability, and one approved method is to use data from a disparity study.⁶⁵ Step 2 is to examine evidence available in the recipient's jurisdiction to determine whether to adjust the base figure. WSDOT must consider the current capacity of DBEs as measured by the volume of work DBEs have performed in recent years.⁶⁶ The agency may consider evidence from related fields such as statistical evidence of disparities in financing, bonding and insurance and data on employment, self-employment, etc.⁶⁷ "If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought".⁶⁸ The final result is to be expressed as a percentage of all FHWA and FTA funds (exclusive of funds to be used for the purchase of transit vehicles). The "overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals."⁶⁹ Public participation and public notice are mandated.

Goal setting, however, is not an absolute science.⁷⁰ "Though the underlying estimates may be inexact, the exercise requires the state to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*."⁷¹

In addition to the overall annual goal, WSDOT must set narrowly tailored goals on specific contracts where appropriate. As recently held by the Seventh Circuit, "[t]he necessity of relief [through narrowly tailored DBE contract goals] overlaps our analysis of IDOT's and the Tollway's strong basis in evidence for believing their programs were needed to remedy lingering effects of discrimination."⁷²

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets. WSDOT must set contract goals must be based upon availability of DBEs to perform the anticipated scopes – including the work estimated to be performed by the prime firm – of the individual contract.⁷³ Not

⁶⁴ 49 C.F.R. § 26.45(b).

⁶⁵ 49 C.F.R. § 26.45(c)(3).

⁶⁶ 49 C.F.R. § 26.45(d)(1)(i).

⁶⁷ 49 C.F.R. § 26.45(d)(2).

⁶⁸ 49 C.F.R. § 26.45(d)(3).

⁶⁹ 49 C.F.R. § 26.45(h).

⁷⁰ In upholding New Jersey Transit's DBE program, the court held that "Plaintiffs have failed to provide evidence of another, more perfect, method" of goal setting. *GEOD Corp. v. New Jersey Transit Corp.*, 2009 U.S. Dist. LEXIS 74120, at *20 (D. N.J. 2009).

⁷¹ *Sherbrooke*, 345 F.3d. at 972.

⁷² *Midwest Fence*, 840 F3.at 953.

⁷³ 49 C.F.R. § 26.51(e)(2).

only is contract goal setting legally mandated,⁷⁴ but this approach also reduces the need to conduct good faith efforts reviews as well as the temptation to create “front” companies and sham participation to meet unrealistic contract goals.

One marker of the need to use contract goals to meet the annual goal is the results of solicitations without contract goals. This is excellent evidence of whether, in the absence of affirmative market intervention, DBEs would receive dollars in proportion to their availability. Courts have held that such outcomes are an excellent indicator of whether discrimination continues to impact opportunities in public contracting. Evidence of race and gender discrimination in relevant “unremediated”⁷⁵ markets provides an important indicator of what level of actual DBE participation can be expected in the absence of goals.⁷⁶ The court in the Chicago case held that the “dramatic decline in the use of M/WBEs when an affirmative action program is terminated, and the paucity of use of such firms when no affirmative action program was ever initiated,” was proof of the City’s compelling interest in employing race- and gender-conscious measures.⁷⁷

D. Narrowly Tailoring WSDOT’s Disadvantaged Business Enterprise Programs in Conformance with *Western States*

The Ninth Circuit has gone beyond this framework and added the requirement that a recipient must provide additional evidence beyond the record upon which Congress relied in enacting the DBE program in order to narrowly tailor the agency’s DBE program. In *Western States*, the court was persuaded by USDOT’s argument that race-conscious goals can only be applied by recipients in those localities where the effects of discrimination are present. “As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present.”⁷⁸ In addition, each group sought to be included in race-conscious relief must have suffered discrimination in the agency’s market area.⁷⁹

The state put on no evidence at the summary judgment stage to address the question whether “the effects of discrimination [are] present in WSDOT’s markets.”⁸⁰ The court was proffered no statistical or anecdotal data similar to that presented to the court in the *Sherbrooke* case.⁸¹ “The record is therefore devoid of any evidence suggesting that

⁷⁴ See *id*; *Coral Construction*, 941 F.2d at 924.

⁷⁵ “Unremediated market” means “markets that do not have race- or gender-conscious subcontracting goals in place to remedy discrimination.” *Northern Contracting II*, at *36.

⁷⁶ See, e.g., *Western States*, 407 F.3d at 992 (Congress properly considered evidence of the “significant drop in racial minorities’ participation in the construction industry” after state and local governments removed affirmative action provisions).

⁷⁷ *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 737 (N.D. Ill. 2003); see also *Concrete Works IV*, 321 F.3d at 987-988.

⁷⁸ 407 F.3d at 998.

⁷⁹ 407 F.3d at 999.

⁸⁰ 407 F.3d at 996.

⁸¹ Minnesota and Nebraska had conducted studies. CHA served as counsel to the Minnesota DOT report.

minorities currently suffer--or have ever suffered--discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington's application of TEA-21 conflicts with the guarantees of equal protection because the State's DBE program is not narrowly tailored to further Congress's remedial objective."⁸²

In response to this interpretation of Part 26, the General Counsel of USDOT issued Guidance in the form of "Questions and Answers Concerning Response to *Western States Paving Co. v. Washington State Department of Transportation*."⁸³ Recipients that lacked a study should conduct a "study or other appropriate evidence-gathering process to determine the existence of discrimination or its effects in the recipient's market." The Guidance specifically points to the studies in the *Sherbrooke* and *Northern Contracting* cases. Such research should include:

- Evidence for each racial and ethnic group and white women.
- An assessment of any anecdotal and complaint evidence of discrimination.
- Evidence of barriers in obtaining bonding and financing and disparities in business formation and earnings.
- Disparity analyses between DBE utilization by the agency and the availability of DBEs to perform in its markets.
- Comparison of DBE utilization on contracts with goals to utilization on contracts without goals.

As discussed in the USDOT Guidance, a disparity study is the preferred method in the Ninth Circuit to determine the availability of DBEs to perform in the recipient's market.⁸⁴ To perform Step 1—estimating the base figure of DBE availability—the study must conduct the following analyses. First, it must empirically establish the geographic and product dimensions of its contracting and procurement market area. This is a fact driven inquiry; it may or may not be the case that the market area is the government's jurisdictional boundaries.⁸⁵ A commonly accepted definition applied in this Report of geographic market area for disparity studies, and the methodology recommended in the Transportation Research Board's Disparity Study Guidelines ("National Disparity Study Guidelines") is the locations that account for at least 75 percent of the agency's contract and subcontract dollar payments.⁸⁶ Likewise, the accepted approach is to analyze those detailed industries that make up at least 75 percent of the prime contract and

⁸² 407 F.3d at 999.

⁸³ <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/western-states-paving-company-case-qa>.

⁸⁴ An availability study using a methodology similar to that of this Report was recently upheld as the basis for the Illinois Department of Transportation's DBE program, as well as the Illinois Tollway's program for non-federally-funded contracts.

⁸⁵ *Concrete Works II*, 36 F.3d at 1520 (to confine data to strict geographic boundaries would ignore "economic reality").

⁸⁶ "Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program," Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, p. 49 ("National Disparity Study Guidelines").

subcontract payments for the Study period.⁸⁷ Second, the study must calculate the availability of DBEs in WSDOT's market area.

In the Ninth Circuit, recipients must take the further step of ensuring that only those groups that have suffered discrimination in its marketplace are eligible for race-conscious relief. In practice, that means that a firm owned by a member of an otherwise presumptively socially disadvantaged group may not be credited toward meeting contract goals.⁸⁸ Further, the availability of any group found not to have experienced discrimination and that now enjoys a level playing field for WSDOT prime contracts and subcontracts cannot be part of the analysis for the purpose of setting contract goals.

Guidance on the application of this test has been provided by courts in the Ninth Circuit in the wake of *Western States*. In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, the Ninth Circuit affirmed the district court's judgment that CalTrans program was sufficiently narrowly tailored.⁸⁹ CalTrans properly relied upon a disparity study to determine whether there was evidence of discrimination in California's contracting industry. For federal-aid contracts, the study provided estimates of DBE availability; examined DBE utilization over a four-year period; and calculated disparity ratios. It further compared similar data on state-funded contracts, which did not include DBE contracts goals. The study also gathered extensive anecdotal information through public meetings and comments, and stakeholder and business owner interviews.

CalTrans decided that the record failed to establish discrimination against Hispanic-owned firms. It therefore submitted a request to USDOT for a waiver of the DBE program's regulatory requirement that all presumptively socially disadvantaged groups be included for goal credit. The request was granted.⁹⁰

The court held that the evidence presented in the study meets the criteria in *Western States*. "In contrast [to *Western States*], Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry. ... Caltrans can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry."⁹¹

As discussed in Chapter VI of this report, there is no requirement that anecdotal evidence be verified. The *CalTrans* case specifically rejects such a test. Further,

⁸⁷ *Id.* at pp. 50-51.

⁸⁸ No case has addressed whether a firm certified under the individual consideration of social and economic disadvantage criteria set out in Appendix E to Part 26 can be counted towards contract goals.

⁸⁹ 2013 WL 1607239 (9th Cir. 2013).

⁹⁰ However, a subsequent study after Hispanics were dropped for goal credit did provide sufficient proof that this group suffers discrimination in the California highway industry and all groups dollars are now eligible for credit towards meeting contract goals.

⁹¹ 2013 WL 1607239 at *7, *8.

AGC also discounts the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ole boy” network of contractors. However, federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. [citations omitted] Moreover [sic], AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. Caltrans does not claim, and the anecdotal evidence does not need to prove, that every minority-owned business is discriminated against. It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.⁹²

Even where an agency has established its right to employ race-conscious contract goals on appropriate solicitations, the recipient must use race-neutral measures to the maximum feasible extent.⁹³ There is no requirement that an agency must try all possible race-neutral approaches and prove they failed before it can implement contract goals.⁹⁴

Difficulty in accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by WSDOT without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units, providing technical support, and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.⁹⁵ Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.⁹⁶ It was precisely these types of race-neutral remedies applied by CalTrans that the Ninth Circuit pointed to in holding its program to meet strict scrutiny.⁹⁷

Programs based upon studies similar to this “custom census” methodology employed for this Report have been repeatedly upheld. This includes the availability analysis and the examination of disparities in the business formation rates and business earnings of minorities and women compared to similarly situated non-minority males. For example, the Illinois Department of Transportation’s (IDOT’s) DBE program was upheld based this

⁹² *Id.* at *9; see also *Mountain West Holding Co. v. Montana Department of Transportation*, 2014 WL 6686734 (D. Mont 2014) (study uncovered substantial anecdotal evidence of discrimination in Montana’s transportation contracting market, including evidence of a “good ole boy network.”); *H.B. Rowe v. Tippet*, 615 F3d 233, 261 (4th Circuit 2010) (“such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action.”).

⁹³ 49 C.F.R. § 26.51(a).

⁹⁴ 2013 WL 1607239 at *10.

⁹⁵ *Id.*

⁹⁶ *Crososon*, 488 U.S. at 503 n.3.

⁹⁷ 2013 WL 1607239 at *10.

approach, combined with other economy-wide and anecdotal evidence. The USDOT Guidance refers to this case approvingly. IDOT's plan was based upon sufficient proof of discrimination such that race-neutral measures alone would be inadequate to assure that DBEs operate on a "level playing field" for government contracts.

The stark disparity in DBE participation rates on goals and non-goals contracts, when combined with the statistical and anecdotal evidence of discrimination in the relevant marketplaces, indicates that IDOT's 2005 DBE goal represents a "plausible lower-bound estimate" of DBE participation in the absence of discrimination... Plaintiff presented no persuasive evidence contravening the conclusions of IDOT's studies, or explaining the disparate usage of DBEs on goals and non-goals contracts... IDOT's proffered evidence of discrimination against DBEs was not limited to alleged discrimination by prime contractors in the award of subcontracts. IDOT also presented evidence that discrimination in the bonding, insurance, and financing markets erected barriers to DBE formation and prosperity. Such discrimination inhibits the ability of DBEs to bid on prime contracts, thus allowing the discrimination to indirectly seep into the award of prime contracts, which are otherwise awarded on a race- and gender-neutral basis. This indirect discrimination is sufficient to establish a compelling governmental interest in a DBE program... Having established the existence of such discrimination, a governmental entity 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.⁹⁸

In upholding the Minnesota Department of Transportation's DBE program using the same approach, the Eighth Circuit opined that while plaintiff attacked the study's data and methods,

it failed to establish that better data was [sic] available or that Mn/DOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop in DBE participation in 1999, when no race-conscious methods were employed, supports Mn/DOT's conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that Mn/DOT failed to adjust its use of race-conscious and race-neutral

⁹⁸ *Northern Contracting II*, at *82 (internal citations omitted); see *Croson*, 488 U.S. at 492.

methods as the year progressed, as the DOT regulations require.⁹⁹

Most recently, the Seventh Circuit affirmed the district court and upheld the Illinois Tollway's DBE program for non-federal-aid contracts based upon a CHA study applying this methodology.¹⁰⁰ Plaintiff's main objection to the defendant's evidence was that it failed to account for "capacity" when measuring DBE availability and underutilization. However, as is well established, "Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. [citation omitted] Midwest fails to make this showing here."¹⁰¹ Midwest offered only conjecture about how the defendants' studies' supposed failure to account for capacity may or may not have impacted the studies' results. Plaintiff "fail[ed] to provide any independent statistical analysis or other evidence demonstrating actual bias."¹⁰²

⁹⁹ *Id.*

¹⁰⁰ *Midwest Fence, Corp. v. USDOT et al.*, 2015 WL 1396376, *22-23 (N. D. Ill. March 24, 2015) ("the Tollway Defendants have provided persuasive evidence of discrimination in the Illinois road construction industry").

¹⁰¹ *Id.* at *17.

¹⁰² *Id.* at *18.

III. Washington Department of Transportation’s Disadvantaged Business Enterprise Program

This Chapter describes the Department’s Disadvantaged Business Enterprise (“DBE”) program for federal-aid contracts. We first provide an overview of the elements of the program. The second section presents the results of our interviews with businesses and stakeholders about the implementation of the program.

A. Overview of WSDOT’s Disadvantaged Business Enterprise Program

As a recipient of US Department of Transportation (“USDOT”) funds through the Federal Highway Administration (“FHWA”) and the Federal Transit Administration (“FTA”), the Department is required as a condition of receipt to implement a DBE program in compliance with 49 C.F.R. Part 26.¹⁰³ In brief summary, WSDOT must:

- Keep and report various data to USDOT, including the utilization of DBEs on its federal-aid contracts and create a bidders list of all firms bidding to WSDOT as prime contractors and firms bidding to those prime contractors as subcontractors.¹⁰⁴
- Adopt a non-discrimination policy statement.¹⁰⁵
- Appoint a DBE Liaison Officer (“DBELO”), with substantial responsibilities and direct reporting to the chief executive office of the agency.¹⁰⁶
- Make efforts to utilize DBE financial institutions.¹⁰⁷
- Adopt a prompt payment mechanism for its prime contractors and for the prompt payment of subcontractors by prime contractors.¹⁰⁸
- Create and maintain a DBE directory. WSDOT is a member of the Washington Unified Certification Program (“UCP”) and conducts DBE certifications.¹⁰⁹
- Address possible overconcentration of DBEs in certain types of work.¹¹⁰
- Include elements to assist small businesses, such as unbundling contracts.¹¹¹

¹⁰³ 49 C.F.R. §§ 26.3 and 26.21.

¹⁰⁴ 49 C.F.R. § 26.11.

¹⁰⁵ 49 C.F.R. § 26.23.

¹⁰⁶ 49 C.F.R. § 26.25.

¹⁰⁷ 49 C.F.R. § 26.27.

¹⁰⁸ 49 C.F.R. § 26.29.

¹⁰⁹ 49 C.F.R. § 26.31.

¹¹⁰ 49 C.F.R. § 26.33.

The Secretary of Transportation has issued Executive Order E 1009.02, which affirms the Department's commitment to promoting equity in contracting. It states WSDOT's policy regarding disadvantaged and other small firms, and includes provisions on accountability; external inclusion and outreach; program administration; stakeholder engagement; and contact information. It was last modified in 2015.

The Department administers a DBE Program Plan based upon the samples and guidance from USDOT. This Plan has been approved by the relevant modal administrations. As part of the Plan, WSDOT is required to submit a triennial DBE goal to each USDOT modal administration. For federal fiscal years ("FFY") 2014 through 2017, WSDOT's FHWA-approved goal is 11.6 percent. For FTA-funded contracts, its proposed goal for FFYs 2014- through 2016 was 3.26 percent.

WSDOT conducts "goal attainment forecasting" to predict DBE utilization towards meeting the goal for the current and future years. This performance measure takes into account participation levels on contract and predicts the year the project will be completed. The forecast addresses the regulatory requirement that a recipient provide its modal administration with a "shortfall analysis" if it fails to meet its annual goal.

As required by 49 C.F.R. § 26.51, WSDOT sets contract goals to meet any portion of the overall DBE goal not projected to be met through race-neutral measures. Projects with an engineer's estimate of less than \$250,000 may be excused as not appropriate for a Condition of Award ("COA") or Consultant Contract goal. Projects with a dollar value over \$100,000,000 will be evaluated to determine if a separate overall goal should be set for the project.

To set contract goals, WSDOT evaluates the scopes of work of the project; the estimated percentage of those scopes; historical evidence of subcontractor utilization on similar projects, and the availability of ready, willing and able DBEs to perform the type(s) of subcontractable work (If there are fewer than three certified DBEs for one scope of work, within a reasonable mobilization distance, that scope is not to be considered as DBE subcontractable work); and the Department's progress towards meeting its overall, triennial goal.

Detailed Instructions to Bidders based on the standards of 49 C.F.R. Part 26 provide the requirements for the DBE program as part of the solicitation specifications. The Instructions describe definitions, the COA goal; how to find eligible DBEs; the standards for crediting DBE participation; the various forms to be submitted; how to document the bidder's Good Faith Efforts ("GFES") to meet the goal if the goal was not met; administrative reconsideration of GFE documentation; procedures between contract award and execution; criteria for determining whether the DBE is performing a "commercially useful function" ("CUF"); using joint checks; prompt payment requirements; reporting; changes to COA work committed to DBEs; and the consequences of non-compliance.

¹¹¹ 49 C.R.F. § 26.39.

Bidders are required to submit a Disadvantaged Business Enterprise Utilization Certification form with the bid; failure to do so may cause the bid to be rejected as non-responsive. The form details the name of the DBE; its role in the project; a description of the work to be performed; the amount subcontracted to the DBE; and the amount to be applied to the DBE contract goal. Bidders may only count 50 percent of the work sublet as “force account;” 60 percent of dollars to be paid to Regular Dealers; and only the fees paid to brokers. Bidders must submit the Disadvantaged Business Enterprise (“DBE” Written Confirmation Document that certifies that the DBE will enter into an agreement with the bidder if the latter is awarded the contract. DBE utilization can only be counted in those North American Industry Classification System (“NAICS”) codes in which it is certified, with the further restriction that the DBE must perform in one of WSDOT’s narrower work codes. Successful awardees currently report DBE utilization on a quarterly basis.¹¹²

WSDOT conducts regular reviews to ensure that DBEs are performing a “commercially useful function” (“CUF”). Part 26 provides extensive provisions defining a CUF and how to evaluate a subcontractor’s or subconsultant’s performance. The Department has developed forms to evaluate and track on-site reviews for DBE subcontractors, regular dealers, manufacturers, architects and engineers. These reviews are tracked in an electronic system. To further enforce the requirement that DBEs remain independent of the prime firm, the issuance of joint checks must be approved by WSDOT using the DBE Joint Check Request Form.

WSDOT passes through money from USDOT to local agencies (often referred to as subrecipients in the DBE program guidance and tips). Subrecipients are required to either adopt WSDOT’s DBE Participation Plan, or develop an equivalent plan.¹¹³ Subrecipients must designate their own DBE Liaison Officer responsible to the chief executive of the agency. The Local Programs Project Development Engineer (“Local Engineer”) is to review each project to determine if it involves work elements that are conducive to DBE participation. No construction funding will be obligated prior to the project review for DBE goals. The Local Engineer will then establish a DBE goal for the project, applying the same methodology as WSDOT uses for its direct contracts. If a local agency feels the project goal set by the Local Engineer is inappropriate, they may submit a request to have it changed. Once established, local agencies are to follow WSDOT’s monitoring and compliance procedures, including on-site reviews to ensure the DBEs are performing a CUF, and submit monthly reports of the amounts credited as DBE participation.

The Department has set performance metrics for employees with responsibilities for the DBE program within the Human Resources Division’s Performance Management System.

¹¹² WSDOT has recently purchased an electronic system whereby contractors will report DBE utilization monthly.

¹¹³ No local agencies have submitted their own plans.

To address complaints of discrimination under Title VI of the Civil Rights Act of 1964 and the DBE program regulations, WSDOT publishes External Complaint Procedures. Instructions on how to file a complaint are on the website, and the complainant is to complete an External Complaint Questionnaire. The case is then assigned to a Lead Investigator.

The DBE function reports to the Deputy Director. The Policy and Reporting Manager supervises staff delivering data analysis, communications and community engagement. The DBE Program Managers supervise the compliance staff.

WSDOT has entered into an Interagency Agreement with the State's Office of Minority and Women Business Enterprises ("OMWBE") to delegate DBE certification to OMWBE. WSDOT pays OMWBE to conduct the certification process. WSDOT reviews OMWBE's compliance with the Agreement and all federal DBE certification requirement bi-annually; attends OMWBE's management meetings; investigates complaints against OMWBE related to DBE certification; and works with OMWBE to investigate certification complaints. This arrangement has been approved by USDOT as in compliance with the Unified Certification Program under Part 26.

To meet the requirement in § 26.39, Small Business Participation, WSDOT has established a race-neutral Small Business Program. Elements of its approved DBE Program Plan include:

- Encouraging DBE Participation on emergency service projects;
- Unbundling of large/mega-project prime and subcontracts;
- Ensuring small business technical assistance in understanding WSDOT's Small Business Program;
- Identifying alternative acquisition strategies;
- Small Works Roster;
- Setting race-neutral goals on projects which are strictly state-funded; and
- Other measures as determined.

The Department has taken steps to unbundle contracts and assist small firms to bid as prime contractors. WSDOT has an abbreviated procedure to prequalify contractors for contracts under \$100,000. This one page form does not require financial statements. The Department has also implemented a Small Works Roster program for contracts under \$300,000. There is a streamlined prequalification process for firms not already prequalified to perform larger jobs. Firms on the Roster receive solicitations of their interest, and can then request the bid documents if they will bid the work.

Another race-neutral measure is a Small Business Enterprise goal of 10 percent participation by SBEs certified by OMWBE on federal-funded design-bid-build contracts without DBE contract goals. The requirement to submit a SBE Plan prior to starting work

is mandatory; the achievement of the SBE goal is not. The Plan should contain a statement from the owner of its commitment to foster and grow SBEs; a mission statement; personnel charged with the authority and responsibility to implement and monitor the Plan; the approaches and methodology that will be employed to ensure the maximum participation by SBEs; staff training to implement the Plan; how prompt payment of all subcontractors will be ensured; how disputes will be handled, etc.

Small architectural and engineering firms seeking to do business with the Department as prime vendors or subconsultants may forgo the requirement to present audited financial statements by participating in the Safe Harbor Program. WSDOT was one of the ten states selected to participate in this FHWA pilot program. The Safe Harbor indirect cost rate option is 110% of direct labor with a field rate, when applicable, of 80% of direct labor. The pilot expired on July 31, 2017, but WSDOT has elected to remain in the Program indefinitely.

WSDOT has created materials to assist firms to navigate its business processes. These include:

- An instruction handout on “Subcontracting On WSDOT Projects from Prior to Bid to Payment.”
- A form to document joint venture arrangements.
- Instructions and tips on vendor registration.
- Construction Contract Opportunities and Contractor Bulletins.
- A web page with links to Contractor Resources.
- Information on how to become prequalified to bid as a prime contractor on WSDOT highway construction projects.

A Community Engagement Plan has been developed to guide the agency’s interactions with stakeholders about all aspects of its operations. The recently updated Plan covers the legal and policy requirements for community engagement; a resident’s guide to engaging in WSDOT’s “practical solutions approach to decision-making”; guidance for WSDOT staff; assessment of engagement effectiveness, including “culturally sensitive outreach”; and case studies to highlight different successful methods for community engagement.

WSDOT provides video training to employees and contractors on program compliance elements and procedures. Areas of focus include cultural competency; diversity issues such as identifying discrimination and sexual harassment, and sensitivity to persons with disabilities; and unconscious bias.

WSDOT engages in several information sharing and outreach activities. The Department creates a quarterly DBE Program Newsletter; it provides information on topics such as “What is Race- and Gender-Neutral DBE Participation,” and sections on outstanding contractors and new hires. It provides information on upcoming events, DBE utilization, program reforms and supportive services. An email is sent weekly to DBEs that lists

contracting information, upcoming seminars and events, and other items of interest to the DBE community.

Information on how to do business with WSDOT and its various divisions (e.g., Ferries, Highway Maintenance, etc.), as well as upcoming projects, is provided on the Department's website. Contractors and potential bidders can review the Department's Standard Specifications for Road Bridge, and Municipal Construction, as well as other bid and contract documents, on the website.

OEO and district staff conduct networking events to facilitate relationships between DBEs and prime contractors on specific projects. OEO works with other Washington governments on networking events of interest to the broader DBE community. For example, WSDOT participates in "Business After Hours" networking receptions to give DBEs the opportunity to network with prime contractors, and recognize a prime contractor for supporting the DBE program through inclusionary efforts.

WSDOT provides DBE Supportive Services in conformance with 23 C.F.R. Part 230 and 49 C.F.R. Part 26, Appendix C, Business Development Programs. The programs are designed to develop and implement a multi-phased framework to provide new and emerging DBEs with general and firm specific training and technical assistance to help them to become more competitive in the heavy highway construction industry. The Department has contracted with outside providers to deliver these services. Services are tracked in SharePoint and against the milestones in Part 26 using a combination of counselor record forms, reports, evaluations (by program participants), interviews, site visits and program reviews.

To deliver some of the DBE Supportive Services offering, OEO contracts with outside consultants to provide training to DBEs on the following topics: 1) An Overview of Project Labor Agreements, 2) Administrative Considerations for Bidding, 3) General Estimating, and 4) Scheduling and Workflow.

DBEs are selected for each phase or element of the program through targeted recruitment and a detailed application and selection process, with enumerated criteria, based upon the applicant's business plan.

WSDOT also has Long Term Business Development Program. Assistance includes business assessments; management and organizational development; proposal preparation; strategic growth business plans; accounting and financing; human relations and labor relations; marketing, customer services and communications; bidding, estimating and scheduling; and guidelines and laws important to the DBE program.

To ensure its services remain targeted towards the needs of DBEs and small firms, the Department has surveyed its firms about how it can best help to support their growth and development. The most recent survey was conducted in 2016. WSDOT also seeks feedback by survey about the effectiveness and utility of its assistance programs.

OEO further works with the Procurement Technical Assistance Centers (PTACs), Native PTAC, the Small Business Transportation Resource Center (SBTRC), the Small

Business Development Centers (SBDC), the National Association of Minority Contractors (NAMC), Tabor 100, and others.

To assist with the administration of the DBE program, the Secretary of WSDOT appoints the DBE Advisory Group. This committee provides stakeholders with information about the program, and the Group provides feedback to WSDOT regarding roles responsibilities and other issues.

B. Experiences with WSDOT's DBE Program

To explore the impacts of race- and gender-neutral contracting policies and procedures and the implementation of WSDOT's DBE program, we interviewed 202 individuals about their experiences and solicited their suggestions for changes. The following are summaries of the topics discussed. Quotations are indented, and have been edited for readability. They are representative of the views expressed during the group interviews.

Contract Size and Complexity

Many interviewees mentioned the size and complexity of WSDOT's projects as major barriers to participation by small firms in any role.

[WSDOT needs] to actually have a mechanism for DBEs consultants or contractors to get in on 1 million dollar jobs and half a million dollar jobs.

What we see too much of with WSDOT in particular is these huge bundlings. They're passing through the contracting or the work with small firms to mega primes. They're not taking any responsibility for trying to figure out what work they can contract for with small firms directly. That's where you'll build better quality of firms, I think, is to have those opportunities where you're managing your own tasks.

If you could just do it as baby steps, if they would help people with baby steps. ... Unbundling. ... Do they have \$50,000 jobs around the state? That's something that some small companies could probably do.

Payments

Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to DBE status.

I don't personally think [slow payments] got anything to do with the DBE program. [WSDOT is] just slow.

Nobody is getting paid promptly.

Part of it is perception because minority businesses may feel that if they're slow paying them they don't have any recourse or nobody paid as much attention to it. It may not actually be happening like she says. Some of that may be they just don't pay anybody.

No business should be required to deliver services and not get paid for it. I don't care how big you are or how small you are.

Inconsistency between their project managers and what they are looking for [for invoicing], and how they will accept things. If you have inconsistency, if it was fine for this person but this person doesn't like it, it becomes a personal preference thing that there is no way for us to predict.

However, small firms were more negatively impacted by delayed payments.

[The large construction supply houses] are huge national chains that have extraordinary deep pockets, which allows them to carry credit balances 90-120 days without a problem. As a small independent, we don't have that luxury. ... My price is competitive, our delivery, the project management, everything else is competitive. In some cases better, but we don't have the luxury of extending that kind of time frame.

One DBE stated he was able to get help getting paid.

I've been able to use that [DBE] status to get payment in advance of some of the other firms, which has been very helpful in that I've actually encountered that it is helpful to still have these programs because they recognize they have to treat us a little bit differently as a small business or as a minority woman business.

Providing forms for small firms to use to invoice WSDOT was one possible partial solution.

If WSDOT has an invoice that they want, then just give us a form-based invoice for my smaller subs that they can fill out and we can stop horsing around with, "Are the invoices right or not."

One participant painted a different picture.

When you come down to the payment issues, WSDOT is very, very regular and consistent. WSDOT has already said, and they do on a frequent basis, that they'll even do two two-week payments. ... They will give pay estimates on a weekly basis if you request it in some cases. If you're moving money that fast.

Obtaining WSDOT Work

DBEs reported that the program remains necessary for them to obtain work with WSDOT. However, more monitoring of contract performance was recommended.

As a result of that lack of monitoring, I believe we are treated in a way other than we would be if the monitoring was there.

What sanction is imposed or what's the penalty if you don't?
Other than, "Well, we tried, and, well, we'll get it next time.

We had a signed agreement [on a major WSDOT project] for civil, structural, environmental construction management and we got zero work out of it. ... It's kind of this careful walk you walk because you don't know you are going to be blacklisted [if you complain to the Department]. You don't know if you'll get future work.

We've gotten a percentage of the contract. Then the big firms renege.

Local agencies what they're really lacking off they don't understand what CUF is. They don't understand the program and they don't want to know, it seems like it. Prime does whatever they like.

Many DBEs believed that prime contractors do as little as possible to meet goals, and that the Department and local agencies need to be more vigilant about enforcing requirements.

There's a resentment having to go away from what they normally use or do [with large, non-DBE suppliers] in order to fulfill their goals when they come to us. ... The job was not over, I get a call saying, "How much did we spend with you?" He actually had me do the counting and he says, "Great, well we've made our goal, bye." Never bought another bit of material from me on that project.

The email com[es] out with the bid due tomorrow morning. ... [The general contractor is] just trying to check a box, and you can go to the owner and say, "But I tried really hard, and I sent it to all these people." They're sending out on Friday night. The bid's due Monday. ... How hard are they trying to meet those goals when they're sending out bid solicitations the day before the bid is due to MWESB subcontractors? Only the owner can help fix that.

In contrast, some DBEs stated they had received support from WSDOT.

I did have support from local programs and WSDOT OEO [in a dispute with a local subrecipient] and I knew my rights and I knew the law. We had all had a vested interest to work out the job, it all worked out well.

That was important to [the prime consultant] in meeting their goals. Yes. It helped with their proposal, but they stuck with it afterwards. I actually did get to perform in a leading role.

Experience and Financial Requirements

Many small firm owners reported it was difficult to become prequalified to work on WSDOT jobs. The requirements to have equipment and staff in place and to have already performed that level of project often made it impossible for them to compete. These criteria advantage incumbent and large firms.

I said, "We're small but, if you just give us the opportunity, we'll buy the equipment. If we have a contract, we'll buy the equipment. We can't buy equipment without a contract."

I don't know if it's WSDOT or OMWB or whoever, said, "Well, you have to own the equipment before you can bid." I'm like, "Why can't I lease a truck and pup?" They do it all the time on projects when people have big projects and stuff, we have to go out and lease a piece of equipment. You should be able to lease equipment and do the job.

It was very clear to me what [the agencies] were doing [in drafting experience requirements]. It was the same larger companies that keep getting the business.

When you are competing with [while male-owned consulting firms], [the agency staff] look at the 15 projects they've given them before. They've given you zero. They say well, he has 15 projects. Well, you empowered him to get that 15 projects. Meanwhile, you are not getting projects as a minority.

Qualifications means size. How many people do you have? How many of these large projects have you done before? How many PhDs do you have on staff? You have 1,000 employees? Most of our work requires a team of two or three, but it doesn't matter. They select the firm that has 500 people.

I should be able to legitimately compete for these contracts.... In some ways, for some of the work like the [type of] work that we do, we are much more experienced. That subjective information about have you done a project with us of this size, it's definitely

selected so that particular consulting companies can file for that. The people who have worked with them before can continue.

[For example,] the skills that they were asking for, they were asking for that this employee had MicroStation, which is a CAD-based program, experience. WSDOT's the only one that uses MicroStation. It's too expensive and none of the local agencies or any of the local firms use it just because it's for mega-type projects and very costly and complicated to run.

[The Department's] experience requirements often read that you have to provide five projects of a similar scale done as a prime contractor in the last three years. As small businesses, we can show one, perhaps. We could show five if we go back far enough, but small businesses don't do the volume of work on a regular basis as the larger firms do. Those kinds of requirements just inherently lead towards larger firms that do lots of projects as primes over and over, and over again.

Many DBEs mentioned insurance requirements much higher than the cost of the job as a WSDOT-imposed restriction.

A lot of the firms do not have that high of insurances so, they actually would have to go out and spend additional money to be on a WSDOT project. The insurance, the liability coverage, very high.

Another important example is the requirement for audited financial statements to set rates for consultants. This was described as an unnecessary expense for small firms. Even for large sophisticated firms, WSDOT's audit process was experienced as unduly and unusually burdensome.

We've got some small business subs that are really good firms that actually have good accounting systems in place, but they won't work for WSDOT, because the burden that they face, and the hassle of getting their rates approved is so high.

I hear WSDOT say, "We want to help small businesses, disadvantaged businesses," but structurally you can't do it. You need an army of staff to deal with the WSDOT audit. You've got to have audit advances, you need two million dollars in liability insurance. ... You talk to [DBEs], they say, "Sure I'd love to help you but are you kidding? I don't have audited financials right now, or I'm not going to submit to an audit. I'm just not going to do it." I feel like, if they're committed to trying to do this, they've got to do something else with the system because when you hear firms

like [large, international consulting firm] saying, "This is too difficult." I mean, that's insane.

This has been a brutal issue for six, seven, eight years, and it didn't always been that way. WSDOT's auditing branch ... [is] very nitpicky on items that are included in the overhead. I think this particularly hurts small businesses, but it's been an industry-wide problem for a while. I think it has discouraged a number of small firms from even participating.

There was near universal consensus that while well intentioned, the Safe Harbor program to permit small architectural and engineering firms to become prequalified for a set time under a predetermined indirect cost rate does not help DBEs. The rate of 110 percent is too low to be profitable.

They want you to have a really high overhead and hardly any profit. ... They try to help you with that, but, unfortunately, it's just a pain. We just say no state work. I don't even want to bother with it.

We [as a large prime firm] are happy to work with DBE's and do a lot. I've worked with an amazing number of firms throughout my career and I enjoy it but if they can't make a living, they can't come to the table.

The overhead rate [is] a big issue. We've actually had teams where a sub said, "I can't live with 1.1," and we dropped off.

[WSDOT] could find themselves really stuck with trying to deliver a program because they don't have people who are willing to sign up.

What I'd advocate is for a reasonable acceptance of fully-loaded, already-burdened rates instead of having it on my shoulders, an extra weight to conform to ultimately an audited system, intending to remain small. King County does that.

Now we do have our audited rate. We did graduate from the safe harbor rate, but we had to lose money at the safe harbor rate to do that. ... Train, [provide] free training for [small] firms [to develop financial statements].

We need to go back to the old very simplistic system. Here is our best rate. Take it. That's good enough.

It's really a barrier to entry for these small firms. ... I [should be able to] certify this is my best rate that I offer. Look at that in comparison with industry standard and say, "Yes. You're okay."

It's absolutely a barrier to entry and it was a much easier world back when the letter was available.

We're always treated really hostilely [in the Safe Harbor program], like we're the ones that are really expensive and spent all this money.

Another issue is that consultants cannot mark up the rates for subconsultants, thereby requiring the prime firm to absorb the costs for training the DBE subconsultant.

The fact that you can't mark up on your sub-consultants can be a killer because I'm often priming projects and I put a lot of people on my team, but we eat that cost. If you multiply that into millions, that can be millions of dollars lost in a company.

If the state doesn't recognize that there's a business expense in being equitable, then they're just talking from the wrong side of the mouth because there is a cost in being equitable and in managing larger teams. There should be way that prime consultants are able to either get more money or do a mark up or do something where that makes it monetarily interesting for them to have people as subs.

Mak[ing] it a reasonable markup on DBEs would be a big step forward because there is no incentive whatsoever for them to sub any work out and, particularly, no incentive to a minority or a DBE woman-owned business.

When you're mentoring some of the smaller subs— like getting three invoices— and then the invoices aren't right, and all of that work that goes with that, there is a lot of responsibility and ultimately as prime, you are responsible for that. Nobody's getting rich off of that, but they should be compensated to bring those firms along, which is ultimately I think the goal of the program.

DBE Certification Process

In the main, participants who had sought certification were able to navigate the system. There was a general understanding that the certification process needs to be rigorous to ensure program integrity.

I have my negatives [about WSDOT], but I have my positives too. Is that they do watch for the fraud, they do make sure that you do that NAICS code.

However, several White women felt they were held to a higher standard than other applicants.

The feeling is that [OMWBE is] out to get you. They are out to not certify you, to make it as difficult as possible.

It takes them 60 days to look at it, and then when they do look at it, they won't work with you at all on it. ... They don't want to certify you. It's just plain and simple.

Calling [OMWBE] for issues, or complaints, or anything, it's like, "I just want to fly under the radar," because I don't trust them. ... I don't feel supported.

Many DBEs reported a lack of knowledge of the highway construction industry by the OMWBE certification staff.

You're trying to explain things to someone that has no concept of highway work whatsoever. I think there's a huge disconnect there with understanding the line of work we do, and what that entails and involves.

[OMWBE needs a] person who is familiar with the [construction] industry, at least, that is our go to person, then at least they would start five miles ahead of what we're dealing with now.

There is no support between OMWBE or communication between OMWBE and WSDOT. If WSDOT wants to continue down this road, they need to own it and they need to own their program, they need to own what they need to do, and they need to own what certification there is.

Several interviewed, including non-DBEs, suggested more outreach, especially outside the Seattle area, to broaden the pool of certified firms.

[OMWBE] should be doing more outreach in this area.

OMWB needs to do is get more people certified.

The outreach is lacking [to get new DBEs certified].

[Certification resources are] all focused in Seattle.

Technical Assistance and Supportive Services

Many DBEs have taken advantage of WSDOT's numerous outreach and assistance services. There was broad agreement that new and small firms need help to enter the highway industry and to perform on Department jobs. Non-DBEs often pointed to lack of business skills as a major issue for DBES and their ability to use them to meet goals.

This industry isn't an easy industry to be in. You look at the generations [of White-owned firms] that are in here that are working and there's a reason for that is because it is so difficult

for a new contractor. ... They need to be taught in what they're supposed to do and how they're supposed to interpret things.

[DBEs] need to understand basic contracting and specifications.

We'd like to see better educated subcontractors. We'd like to see a larger pool of subcontractors that we can draw from, because it does become very limited into what we're doing and how we're doing it.

There's plenty of DBEs out there that are capable of doing the work. The problem is the process of doing the work. They're not sophisticated enough to do the administrative [work].

I don't see us growing that pool of small businesses because they're not capable of competing successfully at this higher level, that they need to, because they're doing small [subcontracts], don't have [administrative] tools.

Maybe there's an intermediate pool of contractors that aren't quite new but have enough knowledge that can be trained. I wouldn't recommend somebody starting a business to go look for DOT work.

We need to know what WSDOT's goal is. Is it just to meet a goal, or is it to grow, to allow small business the opportunity to grow and create more economic opportunity at that level.

I think the whole way they're going about it is the wrong way. I think they need to refocus their efforts on helping these people get started and maybe not worry so much about a number that they hit of contracting dollars. Maybe they measure their success by how many companies they started that are successful and how long they stay in business.

The DBE program's limits on the personal net worth of the owner and the size of the applicant firm keep DBEs from growing and being more competitive.

[It is impossible for a minority or women to pave roads and remain under the size and personal net worth tests in the DBE program] because it takes so much capital and revenue to do what we [large prime contractors] do. It's the same thing with the concrete paving. It just takes so much investment to do this stuff, so at the end of the day you look at the rest of the project and you say where's the crumbs? The crumbs are the traffic control, maybe crack sealing, some striping.

DBEs often lack the systems to do WSDOT work, resulting in headaches and costs to general contractors.

[We] had to go back and do all the work at the end to make it right. The client is not happy and [the DBE is] not happy and we're not happy. It really requires a lot of handholding and follow-ups between all the parties to work through it, because it gets complicated.

We actually had to create all of the templates for all of the subconsultants to use as well for everything, and none of that was really factored into the rates.

[DBEs] need to be able to carry the same terms and conditions that we have, right down to [the insurance requirements]. I found over the years that many of the small businesses simply do not have the talent or capacity or systems in place to comply with the documentation and the whole process of invoicing. They even get paid. We have to take care of all of that for them to make sure that they have the tools in place. It's very complicated for us, from a management stand point to help facilitate that and make sure that it gets done correctly, so that we can get paid because we have a mixed up invoice by a sub consultant, we're out another 30 days.

Make the owners be more responsible for contractor success. They've taken all of that risk, and they put it to the contractor, and then you want us to take on more risk by using people that we have to use rather than who we want to use, who we know are capable of doing the project

We can't find enough contractors to bid the sub-work for us. It's a win, win situation, if they're nurtured a little bit rather than just throwing them to the wolves.

There just is a level of detail that's required to do this kind of work. We are doing a lot of that mentoring with a lot of our folks.

This contractors who's given the ability to charge up to a hundred percent more than the next guy, isn't following the rules, as far as contracting being a proper business. That's what's frustrating to us. ... If we feel like the state offers more and more programs through the DBE, and enables them to act in a manner that's not professional. They don't train them how to be a business, a lot of them are good tradesmen, no doubt about it, now all of a sudden they're able to do these jobs that they really aren't ready to do, technically within the paperwork side of it.

We're paying them an exorbitant amount to do the work and they don't behave that way, and I don't see where the state's helping these people be a better contractor.

OEO, they ought to help these firms figure out how to become better at paperwork, or be able to hire an estimator, be able to hire a business manager, be able to basically build up their capacity.

One approach in addition to technical assistance would be to assist with bonding and financing.

One thing we could consider is having the DOT OMWBE office to set up a bond pool. If you're a certified contractor, you're eligible to participate in the bond pool. Require that all the DBEs, if requested by the general contractor, provide bonds. Which should limit them so they don't get over extended and over committed.

The small businesses need some guidance in a lot of times and some access to bonding and short-term finance.

Five years from now, 10 years from now, 20 years from now, to have a different story instead of just this same story again 20 years from now, they should start a bonding program to incentivize people. Let's get this in the pipeline. Let's ensure some success. Give ourselves more chance to succeed than just let's keep doing the same thing over again, definition of insanity.

Some prime firms said that DBEs should not receive targeted services because these provide a crutch.

I don't think that helping them out with bonding is the issue. I think that's something that they have to grow into. You will never respect what it takes to have a balance sheet if you haven't built that balance sheet yourself.

When we started businesses, we figured it out ourselves, we didn't have to model all this paperwork to teach us how to run a business. Why should the DBE be any different than the rest of us?

I'm actually mentoring a smaller firm, closer office, and this firm wants to do more work but they don't want to hire anybody, they don't want to quote every bid. There's a lot of things they don't want to do because it costs money, they just want the work to show up.

If you're going to give them something, make them earn it!

Small Business Set-asides

There was significant support for a race- and gender-neutral small business setaside to assist DBES and small firms to work as prime contractors and consultants.

We don't want those mega projects, and nor does the mega teams want the small tasks. My suggestion is that DOT just separates these ones, two separate categories. Put set-asides for small businesses.

You don't have a relation with the client [as a subconsultant]. You need to. What I've seen progressive agencies do is actually set up a pool of projects for smaller firms that then go after them so they can develop a relationship with a client themselves as opposed to these bigger firms because whether you're a minority or a small firm, they want to get all the money for themselves. The answer is not being a sub.

A \$250,000 contract should be given to a small firm, not the large, large firms.

If you open it by having these small competitions like the Port has where three small firms get to compete for something that's in their wheel box, then you're going to get excellence at a local level and you're going to build excellence in your local community. You're not going to get the guy who couldn't find work in Georgia get shipped over to Seattle for a few months because that's where they can keep him billed. I don't see any path forward that doesn't involve breaking out accessible contracts and requiring managers to let small firms prime those.

Mentor-Protégé Relationships

Several participants supported the idea of a mentor-protégé program for federal-aid contracts.

We're working with our SBA rep in Spokane and we got to [be a] protégé with a large company and won a big contract with them. They have helped us grow. I went through their Emerging Leaders program and, just a lot of tools and things that they've used. OMWB has just been nothing.

There just aren't that many [women in transportation]. For us, it's been hard. It has not been an easy road to hoe, but we did find a mentor who's been a wonderful person.

Somebody that would actually not just mentor you but say hey, I want to take you under our wing and help you navigate this and become a successful business in the state.

WSDOT doesn't have a participatory dollar amount that's participating with it. It's back to the contractor to burden this cost.

The only way I see it that it's going to happen is if the contractors are the ones helping them along. The state can't go out and train people how to pay you. I see that's the way to forward.

We just sat with the firm and asked them kind of, where they wanted to get to, what type of work they wanted to do. ... We developed an outline and how, we actually proposed them as a deputy project manager for the project. Kind of outlined some of the things that we would help him with. That was the pretty easy part. They also had some concerns on the CAD type work, DOT requires one system, everybody else in the world requires something else. ... We agreed to provide training to their staff on the other programs as well. Because we said we sometimes work, we work with every system out there, but there's WSDOT and then everybody else. ... We sat down with the firm and proposed them. Then we submitted it as a part of our package that we would have a mentorship program [for a state-funded contract to meet the 26 percent goal].

ACEC and AGC have made it real clear that you've got to compensate for the extra activity that needs to occur in relation to being a mentor.

[Our firm's mentoring of DBEs] helped those firms to establish whatever their weakness, whatever they perceived their weakness was, to be a more viable business, to continue to do work. That's a good thing.

The [prime contractors] I've talked to on mentor protégé really like it. They think it's more successful.

Some large contractors urged caution about adopting a mentor-protégé program.

If you go to mentor-protégé, then you've chosen winners from the very start. If you didn't get to be a protégé of [name], then you're out of luck.

One of the concerns I have is that I think we are fairly sophisticated and knowledgeable as a group, but there's some

contractors out there that don't. It's not intentioned, but they could get themselves into real [trouble].

Meeting DBE Contract Goals

Although it was not always easy, most prime contractors and consultants reported they were able to meet DBE contract goals.

We're not against these programs in essence. ... At the same time, we understand that we have to do work this way. As much as we don't like to do it necessarily and we don't like to give our work away.

A lack of capacity to do work was frequently cited by general contractors and prime consultants as a major issue with the program.

There is simply not enough DBE capacity to meet the state goal [of 26 percent].

No one in this room will tell you we're against the program. We're just against the way that it's run

WSDOT or OMWBE needs to make a better, in my opinion, concerted effort on how they evaluate those goals, and they should be adjusted in accordance.

The biggest problem ... is the capacity and availability versus the goals on specific projects. When we bid a job that's got 15% or 25% DBE goals on it, and there's hardly anybody to do the work, two things happen. Either we can't do it, or we end up paying a subcontractor immense amounts of money to do it, and the taxpayer pays. ... My problem with taking the female owned businesses off the table is you just made it harder for me to meet the goal. We have problems every single day meeting those goals.

Until you guys have figured out how you correlate capacity with availability, you're not going to arrive at a number that we find an acceptable number because you're not using the factors that we have to use when we go out and secure the contract. ... You can't determine their capacity from a resource standpoint, and resources aren't just people. It's their ability to manage and organize work and comply with all of the other rules and regulations and requirements of a contract. That's where we get in trouble when you come up with a number. ... It's not because no one here in this room doesn't support the DBE participation. It's that we have to arrive at a number that is accurate or at least more accurate when you take into the fact that they have to

perform in the field. ... Capacity doesn't necessarily equate to competency either.

If you do end up having unattainable goals the challenge you will have is we will have no choice and all of us will become pros, and we'll hire another person and we'll all be doing good faith efforts. We're going to grumble, but then in the end it will be an administrative move by contractors to meet good faith efforts instead of actually the social equity component that really helps everybody.

Contractors in Eastern Washington repeatedly reported that the goals on projects in their area are too high.

When you apply those same goals to a different geographic region, a different project site for a large firm to meet those goals, is difficult because there's not necessarily the expertise in parts of the project that we're submitting on.

There's very few DBE's over here [in Eastern Washington]. Next year there's going to be even more work over here. What are we going to do with all these goals? We always meet the goals, like I said you've got three, four DBE's over here to do all the work and then they can't perform.

[WSDOT] take[s] the sheer volume of DBEs that are on the west side and figure[s], well, all of those contractors are going to come over to the east side. Well, no, they're not. That's the biggest problem.

The problem is that you have people saying that they are capable to do this job when they have no idea. They don't have the capabilities to financially do it. You got this office that says, "No, they said they could do it. We certified them, what are you doing against them? How come you're beating up on them? They're minority, they need some help." You pull money out of your pocket, you put people on their payroll, you buy them the class B signs and pray to God you get done with the job before somebody gets killed.

There is none in our industry other than maybe one or two in all of eastern Washington that meet it outside of women-owned businesses, white women-owned businesses. There are just no [minority-owned] DBEs available in eastern Washington.

The reason why we're meeting the goals is because nobody listens. We pull money out of our pocket, we put our employees

on their payroll. ... I pull money out of my pocket, I am doing a job right now. I have my people doing their work so I can actually pay. I'm not getting compensated for it, everybody's got big smiles, and I'm going to meet my goal! That's reality. They don't want to hear it.

[The OMWBE office is] are not cooperative. They don't help us [identify certified firms]. We've made calls before bids, where we say, "Do you say it's good or not?" We get a voicemail and we don't get a call back, and it's an hour before bid time.

I hate to say this, but at some point it almost feels like we almost need to get to the point to where none of us collectively can meet the goal, or just then we get in to good faith efforts. Then it's going to become really apparent just how dysfunctional the whole system is. That's why I keep coming back to, there's no point in debating DBEs, I think we all understand why there is a DBE system and goals.

"On call" contracts, where the actual scopes of work are not fully defined at the time of award, were especially challenging.

If it's defined project, it makes it much easier. Defined project and the goals are stated at the beginning. It's when, it's an on call [contract], it's a three year on call, it's not really defined, generally that's when we start having problems.

We similarly just picked up a program management contract, which in many ways is like an on call [contract]. Their work will be issued on a task order basis, we have a large team, and we don't necessarily know how their work will come out, but we're going to have to track how we're doing against that [DBE contract] goal, and are we doing the things that we need to do to achieve it.

A large number of concurrent public projects compounds the problem.

A lot of these DBE subs are overcapacity. That's because every jurisdiction, every public agency has these requirements. Everybody is vying for the same pool of people, and there aren't that many people in that pool.

There's this huge Sound Transit project with goals, so there are companies that will just basically be removed from our potential because they're going to go work on the Sound Transit project for the next three to five years. Yet our goals won't change, but our contracting pool just keeps getting smaller and smaller.

Some consulting firms wanted credit towards meeting DBE goals for the diversity of the staff of their businesses.

Consider ... the make up of the team that's presenting on the project.

[WSDOT] should be providing opportunities for diverse groups of people, regardless of what they want to do.

Many firms, both DBEs and prime contractors, objected to WSDOT's practice of refusing to credit DBE participation despite the firm's being certified in that NAICS code, because of the Department's narrower set of work codes.

Be more liberal with their work descriptions.

[WSDOT] keep[s] saying you're not meeting your goals and you want to reduce your goal. You're not even trying to help us as a small business. You are the biggest hindrance that I have as a small business. ... I've never seen a government agency when I'm certified with this NAICS code and this NAICS code and I've performed this work. All you have to do, just prove that you've performed work within that NAICS code.

Took me over a year and a half to get the additional NAICS codes that I asked for and I ended up losing the contract that I wanted to get.

If you as a DBE contractor want to say, "I want to do fence. There's no reason I can't. I put up signs, posting all this stuff all the time." Nope. ... They must be God because all the DBEs rely on that when they ask for expansion of their work, so they can become more well rounded contractors or develop their business or they can go into a completely different industry that they seem to like and want to gravitate to, God says no.

When bidders cannot meet goals, they found it difficult to submit documentation of their good faith efforts to do so that will pass WSDOT's muster.

[WSDOT] won't tell us specifically what they will accept [as evidence of sufficient good faith efforts]. They're only talking generalities.

We have actually submitted a good faith effort and have followed the seven or eight steps specifically, we did it once and we were successful. We said we'd never do it again. ... Our profit was lost quickly in the cost that it was to go and get the job.

The good faith effort program does not work if someone can show that they can get to the goal. They are awarded the job.

Good faith effort is not considered because you've proven by the fact that somebody can do it.

It's impossible to meet the good faith effort as part of the bidding process. ... There's no defining facts or clear cut, black and white definition of what meets GFE inside our specification There's no way you would know for sure if you're going to get awarded the project.

You're meeting the goal because you're crucified if you don't. You have to meet it.

They need to quit calling it goals, and call it a quota. ... A goal is something that you try to achieve, a quota is something that if you do not meet you don't get the contract. ... I have had bids thrown out because I did not do the DBE process correctly. ... There has never been one contract that has ever been awarded on a good faith effort, ever.

We have not attempted to make a good faith effort because our understanding is you either meet the expectation, or you don't get awarded a contract.

We did submit a good faith effort in and it got awarded probably due to lack of anybody else bidding on the job.

We obviously all need to be better doing these good faith efforts, which I have no idea how to do one. I've spent a long time trying to find someone to say, "Hey, I need to know how to do these." I want to do them right, I want to be able to do them because I think this is part of the process to feed back to say, "We don't have it over here! We know that this time of the year, every year, we have to pay." There's going to be problems with something, the DBEs are over committed, and we're the primes, it's our problem. ... We actually have a project manager here in our office that has [documented good faith efforts to meet a DBE contract goal]. He says they're very time consuming.... Some of us [prime contractors] feel like they don't care, just, you're the prime, get it done. It can't really work like that, I mean we have to be a team. We need the project to be good, the project needs to be good for everybody.

Change orders can make it difficult to meet goals.

We had to meet those goals, and as they pull work back, they don't reduce the goal, right? A lot of the work they pull back is work that you give out to subs.

That DBE subcontractors submit higher prices than non-DBEs was a common refrain.

[DBEs] put a premium for the COA work.

It cost us so much more money than it does to work for somebody outside of the program, or if we're working for WSDOT on a state funded job as opposed to a federal job.

You have unrealistic goals so we end up paying more money.

We'll pay an astronomical amount of pricing to those subs to be able to get to that goal price that we need to get to.

I had to call the [DBE] over the phone and said yeah you weren't high enough [to meet the goal].

What we try to understand is, what is the threshold to where the increase in costs that you put into your bid to get to the goal, because we are adding money to our bids, basically to get to that goal. Not all the time, more often than not we are adding money to get to that goal because that's the expectation to get the job awarded.

You can always meet the goal, [but] how much money do you want to add to the price of the contract?

Private, they've got a price, DBE they got another price. To us it's just not right.

We as an industry are meeting the goal by adding money to our bids.

Many primes stated that DBEs often do not want to submit on non-goals jobs.

Why would you want to go out into an ultra competitive market when you have less of a competitive market in the COA? ... They can't go out and bid other things because it's not available to them or you have some that are even a little smarter than others that understand what they can do for total volumes. They remain underneath of that so they're not overburdened.

Some of these people we call now or whatever, they're like, "If we're not going to be part of your C[ondition] O[f] A[ward] team [to meet a DBE contract goal], then I don't think we want [to give] our prices because we want to leave capacity for future COA opportunities." ... I would think that if they're in our industry and we're asking them to work in their geographic area that they would be interested in pricing and see how things go around.

Guess where the DBEs in the state bid? They don't bid to the jobs that don't have the DBE goals. They bid on the other ones because they know have a break.

At the same time, DBEs taking on more work than they can perform, thereby creating problems for the general contractor, was often the reason goals were not met.

There's some that are a little bit more intelligent about how they go about it. There are others that aren't, and they bid everything that's out there. They don't quite understand how to work their market. Then they get themselves in trouble. ... It's very, very difficult no matter who you're working for, to replace those contractors with somebody else because they've been written in as a condition of award, and you are in a lot of trouble in potential liquidated damages, potential reputations. ... We've been docked many times, recently as a matter of fact, because of the fact that a subcontractor condition of award could not complete their portion of work and it delayed our project.

One of the major strategies that we have to deploy [in Eastern Washington] is we do have dependable DBE's on this side of the state and they perform on almost all of our jobs. ... They do good work and they're great. We can depend on them all the time and they're there on all of our jobs, all the time. ... What happens, is they fill up and we stretch them and we stretch them and we stretch them [to the breaking point].

The [DBE] contractors are very few and far between. They name their price, they over schedule. I feel for them, they're bidding a lot of work in the spring, they don't know when this stuffs going to land, I get all that, but it doesn't work. Not that we're victims, but we are paying the price this time of year. We're all trying to pave, we got to put whatever we've got to put in, in. It's not getting done.

Many general contractors expressed frustration that they are prohibited from helping DBEs on an *ad hoc* basis when a tool is needed or a piece of equipment breaks down.

It's got to be upfront, market rate, they're in complete control of the equipment, and they could do it. For a one day deal, is that stuff worth it?

You're afraid of what the consequences potentially are.

We had a DBE that lost money because they had to end up working Saturday, Sunday, just to get the job done because they were so buried in work, and that's not right. ... We can't just sit

there and finish their work for them, even though we want to finish it so we quit losing money, but hands off.

Performance issues impact not only costs but also safety.

We're forced to use contractors that either are not safe or know less of what they're doing or can't bond, so we take more risk with them because now we have to cover all of that. The solution to this is not for the disparity study to be able to evaluate the adequacy of a DBE. That's our job. We look at who we want to hire as a subcontractor. We want to hire a qualified subcontractor. We had to use a DBE traffic control sub, and every night, it didn't matter what we told them. We met with them every day prior to the contract, every day after the shift, and I mean it was dangerous. ... The situation has been exacerbated by commercial useful function the last few years where we can't help guide that work. We can't help expedite that work. We can't provide cones even on an emergency basis if we infringe across that commercial useful function line.

It was difficult to substitute a non-performing DBE.

If you get into a situation where that person cannot perform, number one, now you have to try and find somebody that's capable of doing that work and at the same price. ... We have no methodology to go back to that agency and say, "Hey, this is costing us more money." Even if we do, they said, "Well, that's your problem." You need to fix that somehow and the only way to fix it is to pay them to do the work, which comes out of our pockets, out of our profits.

WSDOT tells us you have to make every effort to replace this DBE work with another DBE. Instead of going down \$10,000, \$20,000 and hiring a non DBE to do the work, we had to hire somebody for \$200,000, pay \$50,000 out of pocket to get that work done by another DBE.

The question is how do you make the system where it's workable or when you have a non performing contractor, you have the ability to terminate for cause and replace them, and do it in a manner that you would for any other non COA subcontractor which it happens.

It's the exception when a DBE contractor is even going to indicate to the general that he has performance issues because of capacity. They're not going to just tell you. They're going to have all kinds of stall tactics and excuses. ... You find a way to

assist, you find a way to help and you try to get it work thoroughly.

You end up doing their work for them, and then you pay them anyway.

The only reason they're in business, the only reason they can survive, is because of the DBE program.

We'll list [a DBE from Western Washington], we'll use them, and then they won't be able to come here and do the work at the same time because we're outside of their normal realm. That happens on a large scale. Usually we beg, plead, and sometimes have to substitute during the process of the contract to be able to find another way or get the DBE. Through that, we find ourselves being hit over the head with a hammer from the Department trying to find a way to use another sub, to substitute with that DBE, or to find another way to meet the goal to be able to get to what we bid it at. Or we'll get marked down on our performance evaluation by the prime contractor of the project if we don't meet those goals.

You have to fail before you even consider substitution so you're running late, they're not showing up, your job is starting to suffer. Then they'll consider substituting but you're already in trouble. You're already into 14 Saturday's and you've lost your schedule and you can't ever get that back. It's huge.

You do not switch out DBE firms otherwise you are opening a big can of worms here. This came right on the heels of the whole Bertha tunnel debacle and that contractor not meeting their goals, we as prime contractors have to be very careful switching out subcontractors.

As far as the municipalities [that are WSDOT subrecipients], they act like the DBE is an endangered species. Anytime that we will go to the municipality and talk to them, and try dealing with these issues of [DBEs] not showing up, whatever it may be, they don't want to talk about it. ... We're now trying to educate ourselves as far as what paperwork that we need to go through to push back on it.

Why should we have to navigate through all this bullshit paperwork, when it's not our problem?

Some general contractors stated they use good DBEs on non-goals jobs.

We use both of those [women-owned] companies on DBE work, non DBE work, because they do a good job. Competitive numbers. And the fact that they are DBE is a great bonus, it really is. ... We didn't have a goal because they do a good job because they're good businessmen.

Non-DBE subcontractors reported having been passed over in favor of DBEs, despite being lower cost.

[Prime contractors] just flat out tell me, "We can't use you, because in your field," because of my skin color, they can't use my lower numbers, so they would go with higher numbers just to satisfy that goal.

In Spokane, [DBEs] pad their numbers, because they know they can [because of a small pool].

There'll be somebody lower that could get you the job, and that could save the state money, but you can't use them, because you've got to have that goal.

The only place for non-DBE specialty contractors to bid is on state only projects.

Some prime firm owners believed that the program is unnecessary.

I don't think there's any discrimination of any race, or color, or sex as far as the construction industry because there are quite a few females in this business.

It's not like anybody's racist here [in the Spokane area], it's just that there's not that availability here.

C. Conclusion

WSDOT implements a program that complies with the DBE program regulations. However, as discussed in the business owner and stakeholder interviews, there are issues that need to be addressed, including contract size and complexity; slow payments; overly restrictive experience and financial standards; the provision of additional technical assistance including bonding and financing support; increasing opportunities for DBEs to perform as prime firms, and meeting contract goals.

IV. UTILIZATION, AVAILABILITY AND DISPARITY ANALYSES FOR WSDOT

Contract Data Sources

We analyzed contract data for federal fiscal years (“FFYs”) 2012 through 2015 for WSDOT’s federal aid and state-funded contracts for Construction and Construction-Related Services contracts. We received contract records from WSDOT that contained 1,741 contracts, worth \$3,523,164,304. Because of this large volume of contracts, we created a sample file for our analysis. We then constructed all the fields necessary for our analysis where they were missing in the Department’s contract records (e.g., industry type; zip codes; NAICS codes of prime contractors and subcontractors; non-DBE subcontractor information, including payments, race, gender; etc.). The resulting Final Contract Data File for analysis contained a total award amount of \$2,328,344,423.60, representing 417 contracts to primes; of this amount, 5,475 associated subcontracts received \$983,172,968.90. The Final Contract Data File was used to determine the geographic and product markets for the analyses, to estimate the utilization of DBEs on those contracts, and to calculate DBE availability in WSOT’s marketplace.

We present data delineated by funding source: federal-aid contracts by modal administration, *i.e.*, Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA); and state-funded contracts.

A. WSDOT’s Product and Geographic Markets

As discussed in Chapter II, a defensible disparity study must determine empirically the industries that comprise the Department’s product or industry market. This is also a requirement under the DBE program regulations official Guidance.¹¹⁴ The accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry, Classification System (“NAICS”) codes¹¹⁵ that make up at least 75 percent of the prime contract and subcontract payments for the study period.¹¹⁶ However, for this study, we went further, and applied a “90/90/90” rule, whereby we analyzed NAICS codes for federally-funded contracts and state funded-contracts that cover over 90 percent of the total contract dollars; over 90 percent of the prime contract dollars; and over 90 percent of the subcontract dollars. We took this approach to assure a comprehensive analysis of WSDOT’s activities.

To assist the Department with meeting its obligations for goal submission under 49 C.F.R. Part 26, which requires separate analyses to FHWA and FTA, we present our findings disaggregated by funding source.

¹¹⁴ https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf; see also 49 C.F.R § 26.45.

¹¹⁵ www.census.gov/eos/www/naics.

¹¹⁶ “*Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*,” Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, pp. 50-51 (“National Disparity Study Guidelines”).

1. WSDOT's Unconstrained Product Markets

Tables 4.1 through 4.9 present the NAICS codes used to define the product market for WSDOT's federal-aid contracts and state-funded contracts, when examining contracts disaggregated by level of contract (*i.e.*, was the firm receiving the contract as a prime vendor or a subcontractor), the label for each NAICS code, and the industry percentage distribution of the number of contracts and spending across NAICS codes and funding source. These tables present the Department's *unconstrained* product market for each mode and for state-funded contracts, which was later constrained by the geographic market area, discussed below.

Table 4.1 Industry Percentage Distribution of Contracts by Dollars Paid for FHWA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	50.4%	50.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.4%	58.8%
238910	Site Preparation Contractors	6.1%	64.9%
236220	Commercial and Institutional Building Construction	5.8%	70.8%
541330	Engineering Services	5.5%	76.3%
236210	Industrial Building Construction	3.8%	80.0%
237990	Other Heavy and Civil Engineering Construction	3.7%	83.7%
238320	Painting and Wall Covering Contractors	2.9%	86.6%
238990	All Other Specialty Trade Contractors	2.4%	89.0%
238110	Poured Concrete Foundation and Structure Contractors	1.7%	90.7%
TOTAL			100.0% ¹¹⁷

Source: CHA analysis of WSDOT data.

¹¹⁷ Agency spending across another 17 NAICS codes comprised 9.3% of all spending.

**Table 4.2 Industry Percentage Distribution of Contracts by Dollars
Paid for FHWA Contracts
Prime Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	62.0%	62.0%
236220	Commercial and Institutional Building Construction	9.5%	71.6%
236210	Industrial Building Construction	6.1%	77.6%
541330	Engineering Services	5.7%	83.3%
238910	Site Preparation Contractors	4.5%	87.8%
237990	Other Heavy and Civil Engineering Construction	3.1%	90.9%
TOTAL			100.0% ¹¹⁸

Source: CHA analysis of WSDOT data

**Table 4.3 Industry Percentage Distribution of Contracts by Dollars
Paid for FHWA Contracts
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	33.3%	33.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	18.9%	52.2%
238910	Site Preparation Contractors	8.6%	60.8%
541330	Engineering Services	5.2%	66.0%
237990	Other Heavy and Civil Engineering Construction	4.6%	70.6%
238990	All Other Specialty Trade Contractors	4.2%	74.8%
238110	Poured Concrete Foundation and Structure Contractors	4.2%	79.0%
561990	All Other Support Services	3.2%	82.2%
561730	Landscaping Services	2.8%	85.0%

¹¹⁸ Agency spending across another 8 NAICS codes comprised 9.1% of all spending.

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238320	Painting and Wall Covering Contractors	2.5%	87.6%
484110	General Freight Trucking, Local	2.1%	89.7%
238140	Masonry Contractors	1.3%	91.0%
TOTAL			100.0% ¹¹⁹

Source: CHA analysis of WSDOT data

Table 4.4 Industry Percentage Distribution of Contracts by Dollars Paid for FTA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
336611	Ship Building and Repairing	58.0%	58.0%
237990	Other Heavy and Civil Engineering Construction	18.4%	76.4%
238320	Painting and Wall Covering Contractors	12.0%	88.3%
541330	Engineering Services	6.3%	94.6%
TOTAL			100.0% ¹²⁰

Source: CHA analysis of WSDOT data.

Table 4.5 Industry Percentage Distribution of Contracts by Dollars Paid for FTA Contracts Prime Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
336611	Ship Building and Repairing	72.6%	72.6%
237990	Other Heavy and Civil Engineering Construction	27.4%	100.0%

Source: CHA analysis of WSDOT data

¹¹⁹ Agency spending across another 15 NAICS codes comprised 9.0% of all spending.

¹²⁰ Agency spending across another 11 NAICS codes comprised 5.4% of all spending.

**Table 4.6 Industry Percentage Distribution of Contracts by Dollars
Paid for FTA Contracts
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238320	Painting and Wall Covering Contractors	36.4%	36.4%
336611	Ship Building and Repairing	28.0%	64.5%
541330	Engineering Services	19.1%	83.5%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.7%	90.2%
TOTAL			100.0% ¹²¹

Source: CHA analysis of WSDOT data.

**Table 4.7 Industry Percentage Distribution of Contracts by Dollars
Paid for State-Funded Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	51.6%	51.6%
236220	Commercial and Institutional Building Construction	13.2%	64.7%
238910	Site Preparation Contractors	9.5%	74.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.0%	80.2%
237110	Water and Sewer Line and Related Structures Construction	3.9%	84.1%
541330	Engineering Services	3.0%	87.1%
238110	Poured Concrete Foundation and Structure Contractors	2.3%	89.3%
336611	Ship Building and Repairing	1.9%	91.3%
TOTAL			100.0% ¹²²

Source: CHA analysis of WSDOT data.

¹²¹ Agency spending across another 10 NAICS codes comprised 9.8% of all spending.

¹²² Agency spending across another 17 NAICS codes comprised 8.7% of all spending.

**Table 4.8 Industry Percentage Distribution of Contracts by Dollars
Paid for State-Funded Contracts
Prime Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	63.0%	63.0%
236220	Commercial and Institutional Building Construction	22.2%	85.1%
237110	Water and Sewer Line and Related Structures Construction	6.6%	91.7%
TOTAL			100.0% ¹²³

Source: CHA analysis of WSDOT data

**Table 4.9 Industry Percentage Distribution of Contracts by Dollars
Paid for State-Funded Contracts
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	35.8%	35.8%
238910	Site Preparation Contractors	21.2%	57.0%
238210	Electrical Contractors and Other Wiring Installation Contractors	14.2%	71.2%
238110	Poured Concrete Foundation and Structure Contractors	5.4%	76.6%
238990	All Other Specialty Trade Contractors	3.6%	80.2%
541330	Engineering Services	2.7%	82.9%
541320	Landscape Architectural Services	2.6%	85.5%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	2.5%	88.0%
561730	Landscaping Services	1.7%	89.7%
238320	Painting and Wall Covering Contractors	1.2%	90.9%

¹²³ Agency spending across another 7 NAICS codes comprised 8.3% of all spending.

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
TOTAL			100.0% ¹²⁴

Source: CHA analysis of WSDOT data

2. WSDOT's Geographic Market

The courts and the DBE regulations¹²⁵ require that a local government limit the reach of its race- and gender-conscious contracting program to its geographic market area.¹²⁶ While it may be that the state's jurisdictional boundaries comprise WSDOT's market area, this element of the analysis must be empirically established.¹²⁷

To determine the relevant geographic market area, we applied the standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.¹²⁸ Location was determined by ZIP code and aggregated into counties as the geographic unit.

As presented in Table 4.10, spending in Washington accounted for 91.8% of all contract dollars paid in WSDOT's unconstrained product market for FHWA-funded contracts. Therefore, Washington State constituted the geographic market area from which we drew our availability data for FHWA-funded contracts.

Table 4.10 Distribution of Contracts in WSDOT's Product Market for FHWA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	91.8%	91.8%
OR	2.5%	94.4%
ID	1.3%	95.7%
OH	1.2%	96.9%

¹²⁴ Agency spending across another 15 NAICS codes comprised 9.1% of all spending.

¹²⁵ https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf; see also 49 C.F.R § 26.45.

¹²⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program).

¹²⁷ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore "economic reality").

¹²⁸ National Disparity Study Guidelines, p. 49.

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
PA	1.2%	98.1%
TOTAL		100.0% ¹²⁹

Source: CHA analysis of WSDOT data.

Table 4.11 presents spending in Washington, which accounted for 65.5% of all contract dollars paid in WSDOT's unconstrained product market for FTA-funded contracts. In addition, Oregon accounted for another 35.4% of all contract dollars paid and these dollars were all in one county: Multnomah County. Therefore, the state of Washington and Multnomah County in Oregon constituted the geographic market area from which we drew our availability data for FTA-funded contracts.

Table 4.11 Distribution of Contracts in WSDOT's Product Market for FTA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	64.54%	64.54%
OR	35.41%	99.94%
NJ	0.04%	99.98%
OH	0.02%	100.00%

Source: CHA analysis of WSDOT data.

Table 4.12 presents spending in Washington, which accounted for 83.5%% of all contract dollars paid in WSDOT's unconstrained product market for state-funded contracts. Therefore, Washington State constituted the geographic market area from which we drew our availability data for state-funded contracts.

Table 4.12 Distribution of Contracts in WSDOT's Product Market for State-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	83.49%	83.49%
OR	15.02%	98.50%

¹²⁹ Agency spending across another 15 states comprised 1.9% of all spending.

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
CA	1.46%	99.96%
CO	0.04%	100.00%

B. WSDOT's Utilization of DBEs

Having determined the Department's product and geographic market areas for federal-aid and state-funded contracts, the next essential step was to determine the dollar value of WSDOT's utilization of DBEs as measured by payments to prime firms and subcontractors and disaggregated by race and gender in its constrained markets. The Department and its subrecipients did not collect data for most non-DBE subcontractors, as well as other records critical for the study. We therefore had to obtain missing data from prime vendors, a lengthy process, as well as reconstruct other contract records, including researching the race and gender ownership of subcontractors and assigning NAICS codes to those firms.

The following Tables present data on the total contract dollars paid by the Department for the three funding sources for each NAICS code in the **constrained** product market and the share the contract dollars comprise of all industries. It is important to note the contract dollar shares of each NAICS code are equivalent to the dollar weight of spending in each NAICS code. These weights were used to transform data from unweighted availability to weighted availability, discussed below.

1. WSDOT's Utilization of DBEs on Federal-Aid Contracts

Tables 4.13 through 4.39 present WSDOT's utilization by contract dollars paid for FHWA-, FTA- and state-funded contracts. The sub-tables also present the paid contract dollars (total dollars and share of total dollars) by NAICS codes for all industries by funding source, this time disaggregated by race and gender for Construction and Construction-Related Services combined and disaggregated.

**Table 4.13 NAICS Code Distribution of FHWA-Funded Contract Dollars
Construction and Construction-Related Services Sectors**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$795,932,104.00	53.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$131,894,741.00	8.8%
238910	Site Preparation Contractors	\$96,925,855.00	6.5%
236220	Commercial and Institutional Building Construction	\$91,927,733.00	6.2%
541330	Engineering Services	\$86,743,488.00	5.8%
236210	Industrial Building Construction	\$59,376,301.00	4.0%
237990	Other Heavy and Civil Engineering Construction	\$58,031,595.00	3.9%
238320	Painting and Wall Covering Contractors	\$45,141,809.00	3.0%
238990	All Other Specialty Trade Contractors	\$38,615,834.00	2.6%
238110	Poured Concrete Foundation and Structure Contractors	\$26,653,508.00	1.8%
561990	All Other Support Services	\$20,468,235.00	1.4%
561730	Landscaping Services	\$18,064,243.00	1.2%
484110	General Freight Trucking, Local	\$13,285,752.00	0.9%
238140	Masonry Contractors	\$8,337,272.00	0.6%
Total		\$1,491,398,469.00	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.14 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$59,376,301.00	\$59,376,301.00
236220	\$0.00	\$0.00	\$1,577,762.00	\$12,366,257.00	\$83,699.00	\$14,027,718.00	\$77,900,015.00	\$91,927,733.00
237310	\$0.00	\$4,826,222.00	\$8,706,796.00	\$22,210,445.00	\$61,333,547.00	\$97,077,010.00	\$698,855,094.00	\$795,932,104.00
237990	\$0.00	\$3,101,613.00	\$0.00	\$468,637.00	\$38,903.00	\$3,609,152.00	\$54,422,443.00	\$58,031,595.00
238110	\$34,822.00	\$5,343,751.00	\$0.00	\$802,122.00	\$1,374,450.00	\$7,555,145.00	\$19,098,363.00	\$26,653,508.00
238140	\$0.00	\$0.00	\$2,733,445.00	\$0.00	\$5,319.00	\$2,738,764.00	\$5,598,508.00	\$8,337,272.00
238210	\$1,313,386.00	\$11,317,062.00	\$0.00	\$1,794,638.00	\$15,394,611.00	\$29,819,697.00	\$102,075,044.00	\$131,894,741.00
238320	\$0.00	\$0.00	\$26,478.00	\$0.00	\$17,432,802.00	\$17,459,280.00	\$27,682,529.00	\$45,141,809.00
238910	\$1,397,667.00	\$1,479,760.00	\$750.00	\$14,606,795.00	\$10,503,734.00	\$27,988,706.00	\$68,937,149.00	\$96,925,855.00
238990	\$0.00	\$7,418,725.00	\$0.00	\$4,776,409.00	\$3,988,616.00	\$16,183,749.00	\$22,432,085.00	\$38,615,834.00
484110	\$87,625.00	\$704,539.00	\$752,770.00	\$703,142.00	\$1,669,725.00	\$3,917,801.00	\$9,367,951.00	\$13,285,752.00
541330	\$108,820.00	\$872,987.00	\$5,568,156.00	\$637,345.00	\$1,252,643.00	\$8,439,950.00	\$78,303,538.00	\$86,743,488.00
561730	\$449,493.00	\$183,246.00	\$4,241,863.00	\$186,870.00	\$10,805,244.00	\$15,866,714.00	\$2,197,529.00	\$18,064,243.00
561990	\$0.00	\$1,559,542.00	\$3,640,778.00	\$1,553,967.00	\$10,788,583.00	\$17,542,869.00	\$2,925,366.00	\$20,468,235.00
Total	\$3,391,812.00	\$36,807,446.00	\$27,248,799.00	\$60,106,626.00	\$134,671,873.00	\$262,226,556.00	\$1,229,171,913.00	\$1,491,398,469.00

**Table 4.15 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
Sectors
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
236220	0.0%	0.0%	1.7%	13.5%	0.1%	15.3%	84.7%	100.0%
237310	0.0%	0.6%	1.1%	2.8%	7.7%	12.2%	87.8%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	0.0%	5.3%	0.0%	0.8%	0.1%	6.2%	93.8%	100.0%
238110	0.1%	20.0%	0.0%	3.0%	5.2%	28.3%	71.7%	100.0%
238140	0.0%	0.0%	32.8%	0.0%	0.1%	32.8%	67.2%	100.0%
238210	1.0%	8.6%	0.0%	1.4%	11.7%	22.6%	77.4%	100.0%
238320	0.0%	0.0%	0.1%	0.0%	38.6%	38.7%	61.3%	100.0%
238910	1.4%	1.5%	0.0%	15.1%	10.8%	28.9%	71.1%	100.0%
238990	0.0%	19.2%	0.0%	12.4%	10.3%	41.9%	58.1%	100.0%
484110	0.7%	5.3%	5.7%	5.3%	12.6%	29.5%	70.5%	100.0%
541330	0.1%	1.0%	6.4%	0.7%	1.4%	9.7%	90.3%	100.0%
561730	2.5%	1.0%	23.5%	1.0%	59.8%	87.8%	12.2%	100.0%
561990	0.0%	7.6%	17.8%	7.6%	52.7%	85.7%	14.3%	100.0%
Total	0.2%	2.5%	1.8%	4.0%	9.0%	17.6%	82.4%	100.0%

Source: CHA analysis of WSDOT data.

Table 4.16 NAICS Code Distribution of FHWA-Funded Contract Dollars Construction

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$795,932,104.00	53.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$131,894,741.00	8.8%
238910	Site Preparation Contractors	\$96,925,855.00	6.5%
236220	Commercial and Institutional Building Construction	\$91,927,733.00	6.2%
541330	Engineering Services	\$86,743,488.00	5.8%
236210	Industrial Building Construction	\$59,376,301.00	4.0%
237990	Other Heavy and Civil Engineering Construction	\$58,031,595.00	3.9%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238320	Painting and Wall Covering Contractors	\$45,141,809.00	3.0%
238990	All Other Specialty Trade Contractors	\$38,615,834.00	2.6%
238110	Poured Concrete Foundation and Structure Contractors	\$26,653,508.00	1.8%
561990	All Other Support Services	\$20,468,235.00	1.4%
561730	Landscaping Services	\$18,064,243.00	1.2%
Total		\$1,491,398,469.00	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.17 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$59,376,301.00	\$59,376,301.00
236220	\$0.00	\$0.00	\$1,577,762.00	\$12,366,257.00	\$83,699.00	\$14,027,718.00	\$77,900,015.00	\$91,927,733.00
237310	\$0.00	\$4,826,222.00	\$8,706,796.00	\$22,210,445.00	\$61,333,547.00	\$97,077,010.00	\$698,855,094.00	\$795,932,104.00
237990	\$0.00	\$3,101,613.00	\$0.00	\$468,637.00	\$38,903.00	\$3,609,152.00	\$54,422,443.00	\$58,031,595.00
238110	\$34,822.00	\$5,343,751.00	\$0.00	\$802,122.00	\$1,374,450.00	\$7,555,145.00	\$19,098,363.00	\$26,653,508.00
238140	\$0.00	\$0.00	\$2,733,445.00	\$0.00	\$5,319.00	\$2,738,764.00	\$5,598,508.00	\$8,337,272.00
238210	\$1,313,386.00	\$11,317,062.00	\$0.00	\$1,794,638.00	\$15,394,611.00	\$29,819,697.00	\$102,075,044.00	\$131,894,741.00
238320	\$0.00	\$0.00	\$26,478.00	\$0.00	\$17,432,802.00	\$17,459,280.00	\$27,682,529.00	\$45,141,809.00
238910	\$1,397,667.00	\$1,479,760.00	\$750.00	\$14,606,795.00	\$10,503,734.00	\$27,988,706.00	\$68,937,149.00	\$96,925,855.00
238990	\$0.00	\$7,418,725.00	\$0.00	\$4,776,409.00	\$3,988,616.00	\$16,183,749.00	\$22,432,085.00	\$38,615,834.00
484110	\$87,625.00	\$704,539.00	\$752,770.00	\$703,142.00	\$1,669,725.00	\$3,917,801.00	\$9,367,951.00	\$13,285,752.00
561730	\$449,493.00	\$183,246.00	\$4,241,863.00	\$186,870.00	\$10,805,244.00	\$15,866,714.00	\$2,197,529.00	\$18,064,243.00
Total	\$3,282,992.00	\$34,374,918.00	\$18,039,865.00	\$57,915,314.00	\$122,630,648.00	\$236,243,736.00	\$1,147,943,010.00	\$1,384,186,746.00

Source: CHA analysis of WSDOT data.

**Table 4.18 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
236220	0.0%	0.0%	1.7%	13.5%	0.1%	15.3%	84.7%	100.0%
237310	0.0%	0.6%	1.1%	2.8%	7.7%	12.2%	87.8%	100.0%
237990	0.0%	5.3%	0.0%	0.8%	0.1%	6.2%	93.8%	100.0%
238110	0.1%	20.0%	0.0%	3.0%	5.2%	28.3%	71.7%	100.0%
238140	0.0%	0.0%	32.8%	0.0%	0.1%	32.8%	67.2%	100.0%
238210	1.0%	8.6%	0.0%	1.4%	11.7%	22.6%	77.4%	100.0%
238320	0.0%	0.0%	0.1%	0.0%	38.6%	38.7%	61.3%	100.0%
238910	1.4%	1.5%	0.0%	15.1%	10.8%	28.9%	71.1%	100.0%
238990	0.0%	19.2%	0.0%	12.4%	10.3%	41.9%	58.1%	100.0%
484110	0.7%	5.3%	5.7%	5.3%	12.6%	29.5%	70.5%	100.0%
561730	2.5%	1.0%	23.5%	1.0%	59.8%	87.8%	12.2%	100.0%
Total	0.2%	2.5%	1.3%	4.2%	8.9%	17.1%	82.9%	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.19 NAICS Code Distribution of FHWA-Funded Contract Dollars
Construction-Related Services**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541330	Engineering Services	\$86,743,488	80.9%
561990	All Other Support Services	\$20,468,235	19.1%
Total		\$107,211,723	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.20 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	\$108,820	\$872,987	\$5,568,156	\$637,345	\$1,252,643	\$8,439,950	\$78,303,538	\$86,743,488
561990	\$0	\$1,559,542	\$3,640,778	\$1,553,967	\$10,788,583	\$17,542,869	\$2,925,366	\$20,468,235
Total	\$108,820	\$2,432,529	\$9,208,934	\$2,191,312	\$12,041,225	\$25,982,819	\$81,228,904	\$107,211,723

Source: CHA analysis of WSDOT data.

**Table 4.21 Distribution of FHWA-Funded Contract Dollars
by Race and Gender
Construction-Related Services
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	0.1%	1.0%	6.4%	0.7%	1.4%	9.7%	90.3%	100.0%
561990	0.0%	7.6%	17.8%	7.6%	52.7%	85.7%	14.3%	100.0%
Total	0.1%	2.3%	8.6%	2.0%	11.2%	24.2%	75.8%	100.0%

Source: CHA analysis of WSDOT data

**Table 4.22 NAICS Code Distribution of FTA-Funded Contract Dollars
Construction and Construction-Related Services
Sectors**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
336611	Ship Building and Repairing	\$23,884,313.00	59.90%
237990	Other Heavy and Civil Engineering Construction	\$7,580,981.00	19.00%
238320	Painting and Wall Covering Contractors	\$4,936,366.00	12.40%
541330	Engineering Services	\$2,584,536.00	6.50%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$905,036.00	2.30%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
Total		\$39,891,232.00	100.00%

Source: CHA analysis of WSDOT data

**Table 4.23 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
Sectors
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$7,580,981.00	\$7,580,981.00
238210	\$0.00	\$0.00	\$0.00	\$0.00	\$78,000.00	\$78,000.00	\$827,036.00	\$905,036.00
238320	\$0.00	\$516,396.00	\$0.00	\$0.00	\$0.00	\$516,396.00	\$4,419,970.00	\$4,936,366.00
336611	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$23,884,313.00	\$23,884,313.00
541330	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,584,536.00	\$2,584,536.00
Total	\$0.00	\$516,396.00	\$0.00	\$0.00	\$78,000.00	\$594,396.00	\$39,296,836.00	\$39,891,232.00

Source: CHA analysis of WSDOT data.

**Table 4.24 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
Sectors
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	8.6%	8.6%	91.4%	100.0%
238320	0.0%	10.5%	0.0%	0.0%	0.0%	10.5%	89.5%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	0.0%	1.3%	0.0%	0.0%	0.2%	1.5%	98.5%	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.25 NAICS Code Distribution of FTA-Funded Contract Dollars
Construction**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
336611	Ship Building and Repairing	\$23,884,313.00	64.00%
237990	Other Heavy and Civil Engineering Construction	\$7,580,981.00	20.30%
238320	Painting and Wall Covering Contractors	\$4,936,366.00	13.20%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$905,036.00	2.40%
Total		\$37,306,696.00	100.00%

Source: CHA analysis of WSDOT data.

**Table 4.26 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$7,580,981.00	\$7,580,981.00
238210	\$0.00	\$0.00	\$0.00	\$0.00	\$78,000.00	\$78,000.00	\$827,036.00	\$905,036.00
238320	\$0.00	\$516,396.00	\$0.00	\$0.00	\$0.00	\$516,396.00	\$4,419,970.00	\$4,936,366.00
336611	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$23,884,313.00	\$23,884,313.00
Total	\$0.00	\$516,396.00	\$0.00	\$0.00	\$78,000.00	\$594,396.00	\$36,712,300.00	\$37,306,696.00

Source: CHA analysis of WSDOT data.

**Table 4.27 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	8.6%	8.6%	91.4%	100.0%
238320	0.0%	10.5%	0.0%	0.0%	0.0%	10.5%	89.5%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.0%	1.4%	0.0%	0.0%	0.2%	1.6%	98.4%	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.28 NAICS Code Distribution of FTA-Funded Contract Dollars
Construction-Related Services**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541330	Engineering Services	\$2,584,536.00	100.0%
Total		\$2,584,536.00	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.29 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,584,536.00	\$2,584,536.00
Total	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,584,536.00	\$2,584,536.00

Source: CHA analysis of WSDOT data.

**Table 4.30 Distribution of FTA-Funded Contract Dollars
by Race and Gender
Construction- Related Services
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%

Source: CHA analysis of WSDOT data.

2. WSDOT's Utilization of DBEs on State-Funded Contracts

**Table 4.31 NAICS Code Distribution of State-Funded Contract Dollars
Construction and Construction-Related Services
Sectors**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$221,249,086.00	46.8%
236220	Commercial and Institutional Building Construction	\$77,092,018.00	16.3%
238910	Site Preparation Contractors	\$46,084,248.00	9.8%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$34,908,543.00	7.4%
237110	Water and Sewer Line and Related Structures Construction	\$22,700,373.00	4.8%
541330	Engineering Services	\$17,151,135.00	3.6%
238110	Poured Concrete Foundation and Structure Contractors	\$12,210,125.00	2.6%
336611	Ship Building and Repairing	\$10,525,235.00	2.2%
238990	All Other Specialty Trade Contractors	\$9,779,293.00	2.1%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	\$6,081,230.00	1.3%
541320	Landscape Architectural Services	\$6,007,914.00	1.3%
238320	Painting and Wall Covering Contractors	\$4,765,799.00	1.0%
561730	Landscaping Services	\$4,041,621.00	0.9%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
Total		\$472,596,621.00	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.32 Distribution of State-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
Sectors
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$0.00	\$0.00	\$1,262,641.00	\$0.00	\$373,353.00	\$1,635,994.00	\$75,456,024.00	\$77,092,018.00
237110	\$0.00	\$0.00	\$0.00	\$1,899,718.00	\$3,500.00	\$1,903,218.00	\$20,797,155.00	\$22,700,373.00
237310	\$67,994.00	\$435,332.00	\$0.00	\$862,407.00	\$2,576,261.00	\$3,941,994.00	\$217,307,092.00	\$221,249,086.00
238110	\$0.00	\$4,271,682.00	\$0.00	\$449,576.00	\$17,770.00	\$4,739,028.00	\$7,471,097.00	\$12,210,125.00
238210	\$0.00	\$0.00	\$0.00	\$0.00	\$356,017.00	\$356,017.00	\$34,552,526.00	\$34,908,543.00
238320	\$0.00	\$0.00	\$116,306.00	\$0.00	\$78,896.00	\$195,202.00	\$4,570,597.00	\$4,765,799.00
238910	\$0.00	\$1,474,302.00	\$12,585.00	\$344,914.00	\$466,730.00	\$2,298,530.00	\$43,785,718.00	\$46,084,248.00
238990	\$0.00	\$2,311,413.00	\$0.00	\$25,641.00	\$2,561,854.00	\$4,898,909.00	\$4,880,384.00	\$9,779,293.00
331110	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$6,081,230.00	\$6,081,230.00
336611	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$10,525,235.00	\$10,525,235.00
541320	\$0.00	\$0.00	\$0.00	\$0.00	\$6,007,914.00	\$6,007,914.00	\$0.00	\$6,007,914.00
541330	\$0.00	\$30,265.00	\$176,798.00	\$0.00	\$28,843.00	\$235,906.00	\$16,915,229.00	\$17,151,135.00
561730	\$0.00	\$0.00	\$83,666.00	\$220,528.00	\$3,673,914.00	\$3,978,107.00	\$63,514.00	\$4,041,621.00
Total	\$67,994.00	\$8,522,994.00	\$1,651,997.00	\$3,802,784.00	\$16,145,051.00	\$30,190,820.00	\$442,405,801.00	\$472,596,621.00

Source: CHA analysis of WSDOT data.

**Table 4.33 Distribution of State-Funded Contract Dollars
by Race and Gender
Construction and Construction-Related Services
Sectors
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.0%	0.0%	1.6%	0.0%	0.5%	2.1%	97.9%	100.0%
237110	0.0%	0.0%	0.0%	8.4%	0.0%	8.4%	91.6%	100.0%
237310	0.0%	0.2%	0.0%	0.4%	1.2%	1.8%	98.2%	100.0%
238110	0.0%	35.0%	0.0%	3.7%	0.1%	38.8%	61.2%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	1.0%	1.0%	99.0%	100.0%
238320	0.0%	0.0%	2.4%	0.0%	1.7%	4.1%	95.9%	100.0%
238910	0.0%	3.2%	0.0%	0.7%	1.0%	5.0%	95.0%	100.0%
238990	0.0%	23.6%	0.0%	0.3%	26.2%	50.1%	49.9%	100.0%
331110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541320	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541330	0.0%	0.2%	1.0%	0.0%	0.2%	1.4%	98.6%	100.0%
561730	0.0%	0.0%	2.1%	5.5%	90.9%	98.4%	1.6%	100.0%
Total	0.0%	1.8%	0.3%	0.8%	3.4%	6.4%	93.6%	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.34 NAICS Code Distribution of State-Funded Contract Dollars
Construction**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$221,249,086.00	49.2%
236220	Commercial and Institutional Building Construction	\$77,092,018.00	17.2%
238910	Site Preparation Contractors	\$46,084,248.00	10.3%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238210	Electrical Contractors and Other Wiring Installation Contractors	\$34,908,543.00	7.8%
237110	Water and Sewer Line and Related Structures Construction	\$22,700,373.00	5.1%
238110	Poured Concrete Foundation and Structure Contractors	\$12,210,125.00	2.7%
336611	Ship Building and Repairing	\$10,525,235.00	2.3%
238990	All Other Specialty Trade Contractors	\$9,779,293.00	2.2%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	\$6,081,230.00	1.4%
238320	Painting and Wall Covering Contractors	\$4,765,799.00	1.1%
561730	Landscaping Services	\$4,041,621.00	0.9%
Total		\$449,437,572.00	100.0%

Source: CHA analysis of WSDOT data.

**Table 4.35 Distribution of State-Funded Contract Dollars
by Race and Gender
Construction
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$0.00	\$0.00	\$1,262,641.00	\$0.00	\$373,353.00	\$1,635,994.00	\$75,456,024.00	\$77,092,018.00
237110	\$0.00	\$0.00	\$0.00	\$1,899,718.00	\$3,500.00	\$1,903,218.00	\$20,797,155.00	\$22,700,373.00
237310	\$67,994.00	\$435,332.00	\$0.00	\$862,407.00	\$2,576,261.00	\$3,941,994.00	\$217,307,092.00	\$221,249,086.00
238110	\$0.00	\$4,271,682.00	\$0.00	\$449,576.00	\$17,770.00	\$4,739,028.00	\$7,471,097.00	\$12,210,125.00
238210	\$0.00	\$0.00	\$0.00	\$0.00	\$356,017.00	\$356,017.00	\$34,552,526.00	\$34,908,543.00
238320	\$0.00	\$0.00	\$116,306.00	\$0.00	\$78,896.00	\$195,202.00	\$4,570,597.00	\$4,765,799.00
238910	\$0.00	\$1,474,302.00	\$12,585.00	\$344,914.00	\$466,730.00	\$2,298,530.00	\$43,785,718.00	\$46,084,248.00
238990	\$0.00	\$2,311,413.00	\$0.00	\$25,641.00	\$2,561,854.00	\$4,898,909.00	\$4,880,384.00	\$9,779,293.00
331110	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$6,081,230.00	\$6,081,230.00
336611	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$10,525,235.00	\$10,525,235.00

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
561730	\$0.00	\$0.00	\$83,666.00	\$220,528.00	\$3,673,914.00	\$3,978,107.00	\$63,514.00	\$4,041,621.00
Total	\$67,994.00	\$8,492,729.00	\$1,475,199.00	\$3,802,784.00	\$10,108,294.00	\$23,947,000.00	\$425,490,572.00	\$449,437,572.00

Source: CHA analysis of WSDOT data.

Table 4.36 Distribution of State-Funded Contract Dollars by Race and Gender Construction (share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.0%	0.0%	1.6%	0.0%	0.5%	2.1%	97.9%	100.0%
237110	0.0%	0.0%	0.0%	8.4%	0.0%	8.4%	91.6%	100.0%
237310	0.0%	0.2%	0.0%	0.4%	1.2%	1.8%	98.2%	100.0%
238110	0.0%	35.0%	0.0%	3.7%	0.1%	38.8%	61.2%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	1.0%	1.0%	99.0%	100.0%
238320	0.0%	0.0%	2.4%	0.0%	1.7%	4.1%	95.9%	100.0%
238910	0.0%	3.2%	0.0%	0.7%	1.0%	5.0%	95.0%	100.0%
238990	0.0%	23.6%	0.0%	0.3%	26.2%	50.1%	49.9%	100.0%
331110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
561730	0.0%	0.0%	2.1%	5.5%	90.9%	98.4%	1.6%	100.0%
Total	0.0%	1.9%	0.3%	0.8%	2.2%	5.3%	94.7%	100.0%

Source: CHA analysis of WSDOT data.

Table 4.37 NAICS Code Distribution of State-Funded Contract Dollars Construction-Related Services

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541330	Engineering Services	\$17,151,135.00	74.1%
541320	Landscape Architectural Services	\$6,007,914.00	25.9%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
Total		\$23,159,049.00	100.0%

Source: CHA analysis of WSDOT data.

Table 4.38 Distribution of State-Funded Contract Dollars by Race and Gender Construction-Related Services (total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541320	\$0.00	\$0.00	\$0.00	\$0.00	\$6,007,914.00	\$6,007,914.00	\$0.00	\$6,007,914.00
541330	\$0.00	\$30,265.00	\$176,798.00	\$0.00	\$28,843.00	\$235,906.00	\$16,915,229.00	\$17,151,135.00
Total	\$0.00	\$30,265.00	\$176,798.00	\$0.00	\$6,036,757.00	\$6,243,820.00	\$16,915,229.00	\$23,159,049.00

Source: CHA analysis of WSDOT data.

Table 4.39 Distribution of State-Funded Contract Dollars by Race and Gender Construction-Related Services (share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
541320	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541330	0.0%	0.2%	1.0%	0.0%	0.2%	1.4%	98.6%	100.0%
Total	0.0%	0.1%	0.8%	0.0%	26.1%	27.0%	73.0%	100.0%

Source: CHA analysis of WSDOT data

C. Availability of DBEs in WSDOT's Markets

1. Methodological Framework

Estimates of the availability of disadvantaged, minority- and female-owned firms (collectively, DBEs) in the Department's market area are a critical component of the analysis of possible barriers to equal opportunities to participate in the agency's contracting activities. These availability estimates are compared to the utilization percentage of dollars received by DBEs to examine whether minority- and women-

owned firms receive parity.¹³⁰ Availability estimates are also crucial for WSDOT to set narrowly tailored annual and contract goals on its federally-funded contracts.

We applied the “custom census” approach with refinements to estimating availability. As recognized by the courts and the National Model Disparity Study Guidelines,¹³¹ this methodology in general is superior to the other methods for at least four reasons.

First, it provides an internally consistent and rigorous “apples to apples” comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (e.g., certified DBEs) and the denominator (e.g., registered vendors or the Census Bureau’s County Business Patterns data).

Next, by examining a comprehensive group of firms, it “casts a broader net” beyond those known to the agency. As recognized by the courts, this comports with the remedial nature of contracting affirmative action programs by seeking to bring in businesses that have historically been excluded. A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency’s market areas that have not been able to access its opportunities.

Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. Most courts have held that the results of discrimination – which impact factors affecting capacity – should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and women firms may be smaller, newer, and otherwise less competitive than non-M/WBEs because of the very discrimination sought to be remedied by race-conscious contracting programs. Racial and gender differences in these “capacity” factors are the *outcomes* of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.¹³²

¹³⁰ For our analysis, the term “DBE” includes firms that are certified by government agencies and minority- and women-owned firms that are not certified. As discussed in Chapter II, the inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts and recommend by USDOT that supports the remedial nature of the programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The “remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.”); https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf.

¹³¹ National Disparity Study Guidelines, pp.57-58.

¹³² For a detailed discussion of the role of capacity in disparity studies, see the National Disparity Study Guidelines, Appendix B, “Understanding Capacity.”

Fourth, it has been upheld by every court that has reviewed it, including most recently in the successful defense of the Illinois State Toll Highway's DBE program, for which we served as testifying experts.¹³³

To conduct the Custom Census for this study, CHA utilized three different databases:

1. The WSDOT Final Contract Data File (described in Section A of this Chapter).
2. A Master D/M/WBE Directory compiled by CHA.
3. Dun & Bradstreet/Hoovers Database downloaded from the companies' website.

The Master D/M/WBE Directory combined the results of an exhaustive search for directories and other lists containing information about minority and women-owned businesses. The resulting list of minority and women businesses is comprehensive.

We took the following steps to develop the Dun & Bradstreet/Hoovers Database. After compiling the Master D/M/WBE Directory, we limited the firms we used in this Custom Census analysis to those firms operating within WSDOT's constrained product market. We purchased the firm information from Hoovers for the firms in the NAICS codes located in the Department's market area in order to form the Dun & Bradstreet/Hoovers Database. Hoovers, a Dun & Bradstreet company, maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest publicly available data source for firm information. In the initial download, the data from Hoovers simply identify a firm as being minority-owned.¹³⁴ However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers.¹³⁵

We merged these three databases to form an accurate estimate of firm availability to the agency. The following tables present data on:

- The *unweighted* availability by race and gender and by NAICS codes for each mode and for state-funded contracts in WSDOT's constrained product markets for Construction and Construction and Construction-Related Services combined, Construction, and Construction-Related services;
- The weights used to adjust the unweighted numbers¹³⁶; and
- The final estimates of the weighted averages of the individual 6-digit level availability estimates in WSDOT's market areas.

¹³³ *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 840 F.3d 932 (2016); see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *cert. denied* 15-1827, June 26, 2017.

¹³⁴ The variable is labeled: "Is Minority Owned" and values for the variable can be either "yes" or "no".

¹³⁵ Hoovers was able to provide the detailed information for 75% of the firms. We used the available information to estimate the detailed information for the firms where the data was not provided.

¹³⁶ These weights are equivalent to the share of contract dollars presented in the previous section.

These weighted availability estimates can be used by WSDOT to set its DBE goals for FHWA- and FTA-funded projects.

2. Estimation of DBE Availability in WSDOT's Markets¹³⁷

**Table 4.40 Unweighted Availability for FHWA-Funded Contracts
Construction and Construction-Related Services**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	1.2%	1.9%	2.3%	1.9%	5.5%	12.7%	87.3%	100.0%
236220	2.2%	2.9%	4.8%	3.6%	6.8%	20.2%	79.8%	100.0%
237310	0.8%	2.6%	2.0%	3.7%	13.9%	23.1%	76.9%	100.0%
237990	2.5%	5.8%	3.1%	3.7%	7.0%	22.1%	77.9%	100.0%
238110	0.7%	3.2%	1.0%	1.9%	4.6%	11.3%	88.7%	100.0%
238140	0.4%	1.2%	2.5%	0.9%	4.5%	9.5%	90.5%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
238910	1.4%	3.4%	1.5%	2.9%	7.3%	16.6%	83.4%	100.0%
238990	0.8%	2.7%	1.1%	1.5%	6.6%	12.7%	87.3%	100.0%
484110	0.6%	0.8%	0.9%	1.0%	4.6%	7.9%	92.1%	100.0%
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
561730	0.8%	1.1%	1.8%	1.0%	8.3%	13.1%	86.9%	100.0%
561990	0.3%	0.4%	0.5%	0.5%	4.1%	5.8%	94.2%	100.0%
TOTAL	0.6%	1.2%	1.2%	1.1%	5.4%	9.4%	90.6%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

¹³⁷ The totals for availability may not sum to 100 percent because of rounding rules.

**Table 4.41 Share of WSDOT Spending on FHWA-Funded Contracts
by NAICS Code
Construction and Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236210	Industrial Building Construction	4.0%
236220	Commercial and Institutional Building Construction	6.2%
237310	Highway, Street, and Bridge Construction	53.4%
237990	Other Heavy and Civil Engineering Construction	3.9%
238110	Poured Concrete Foundation and Structure Contractors	1.8%
238140	Masonry Contractors	0.6%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.8%
238320	Painting and Wall Covering Contractors	3.0%
238910	Site Preparation Contractors	6.5%
238990	All Other Specialty Trade Contractors	2.6%
484110	General Freight Trucking, Local	0.9%
541330	Engineering Services	5.8%
561730	Landscaping Services	1.2%
561990	All Other Support Services	1.4%
Total		100.0%

Source: CHA analysis of WSDOT data.

**Table 4.42 Aggregated Weighted Availability for FHWA-Funded
Contracts
Construction and Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	1.0%	2.6%	2.1%	3.0%	10.3%	19.0%	81.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.43 Unweighted Availability for FHWA-Funded Contracts
Construction**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	1.2%	1.9%	2.3%	1.9%	5.5%	12.7%	87.3%	100.0%
236220	2.2%	2.9%	4.8%	3.6%	6.8%	20.2%	79.8%	100.0%
237310	0.8%	2.6%	2.0%	3.7%	13.9%	23.1%	76.9%	100.0%
237990	2.5%	5.8%	3.1%	3.7%	7.0%	22.1%	77.9%	100.0%
238110	0.7%	3.2%	1.0%	1.9%	4.6%	11.3%	88.7%	100.0%
238140	0.4%	1.2%	2.5%	0.9%	4.5%	9.5%	90.5%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
238910	1.4%	3.4%	1.5%	2.9%	7.3%	16.6%	83.4%	100.0%
238990	0.8%	2.7%	1.1%	1.5%	6.6%	12.7%	87.3%	100.0%
484110	0.6%	0.8%	0.9%	1.0%	4.6%	7.9%	92.1%	100.0%
561730	0.8%	1.1%	1.8%	1.0%	8.3%	13.1%	86.9%	100.0%
TOTAL	0.9%	2.0%	1.5%	1.7%	6.7%	12.9%	87.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.44 Share of WSDOT Spending on FHWA-Funded Contracts
by NAICS Code
Construction**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236210	Industrial Building Construction	4.3%
236220	Commercial and Institutional Building Construction	6.6%
237310	Highway, Street, and Bridge Construction	57.5%
237990	Other Heavy and Civil Engineering Construction	4.2%
238110	Poured Concrete Foundation and Structure Contractors	1.9%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
238140	Masonry Contractors	0.6%
238210	Electrical Contractors and Other Wiring Installation Contractors	9.5%
238320	Painting and Wall Covering Contractors	3.3%
238910	Site Preparation Contractors	7.0%
238990	All Other Specialty Trade Contractors	2.8%
484110	General Freight Trucking, Local	1.0%
561730	Landscaping Services	1.3%
Total		100.0%

Source: CHA analysis of WSDOT data.

Table 4.45 Aggregated Weighted Availability for FHWA-Funded Contracts Construction (total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	1.0%	2.6%	2.0%	3.1%	10.7%	19.4%	80.6%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

Table 4.46 Unweighted Availability for FHWA-Funded Contracts Construction-Related Services

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
561990	0.3%	0.4%	0.5%	0.5%	4.1%	5.8%	94.2%	100.0%
TOTAL	0.4%	0.6%	0.9%	0.6%	4.3%	6.8%	93.2%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.47 Share of WSDOT Spending on FHWA-Funded Contracts
by NAICS Code
Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541330	Engineering Services	80.9%
561990	All Other Support Services	19.1%
Total		100.0%

Source: CHA analysis of WSDOT data.

**Table 4.48 Aggregated Weighted Availability for FHWA-Funded
Contracts
Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	1.9%	3.0%	1.8%	6.2%	14.0%	86.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.49 Unweighted Availability for FTA-Funded Contracts
Construction and Construction-Related Services**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	2.5%	5.8%	3.1%	3.7%	7.0%	22.1%	77.9%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
336611	0.8%	1.2%	1.5%	1.2%	3.3%	7.9%	92.1%	100.0%
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
TOTAL	0.9%	1.8%	1.9%	1.4%	5.9%	11.9%	88.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.50 Share of WSDOT Spending on FTA-Funded Contracts
by NAICS Code
Construction and Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
237990	Other Heavy and Civil Engineering Construction	19.0%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.3%
238320	Painting and Wall Covering Contractors	12.4%
336611	Ship Building and Repairing	59.9%
541330	Engineering Services	6.5%
Total		100.0%

Source: CHA analysis of WSDOT data.

**Table 4.51 Aggregated Weighted Availability for FTA-Funded
Contracts
Construction and Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.1%	1.8%	1.7%	4.5%	11.0%	89.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.52 Unweighted Availability for FTA-Funded Contracts
Construction**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	2.5%	5.8%	3.1%	3.7%	7.0%	22.1%	77.9%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
336611	0.8%	1.2%	1.5%	1.2%	3.3%	7.9%	92.1%	100.0%
TOTAL	0.7%	1.6%	1.1%	1.1%	5.5%	9.9%	90.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.53 Share of WSDOT Spending on FTA-Funded Contracts
by NAICS Code
Construction**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
237990	Other Heavy and Civil Engineering Construction	20.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.4%
238320	Painting and Wall Covering Contractors	13.2%
336611	Ship Building and Repairing	64.0%
Total		100.0%

Source: CHA analysis of WSDOT data.

**Table 4.54 Aggregated Weighted Availability for FTA-Funded
Contracts
Construction
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.1%	1.7%	1.6%	4.3%	10.8%	89.2%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.55 Unweighted Availability for FTA-Funded Contracts
Construction-Related Services**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
TOTAL	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.56 Share of WSDOT Spending on FTA-Funded Contracts
by NAICS Code
Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541330	Engineering Services	100.0%
Total		100.0%

Source: CHA analysis of WSDOT data.

**Table 4.57 Aggregated Weighted Availability for FTA-Funded
Contracts
Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.1%	1.7%	1.6%	4.3%	10.8%	89.2%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.58 Unweighted Availability for State-Funded Contracts
Construction and Construction-Related Services
(total dollars)**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	2.2%	2.9%	4.8%	3.6%	6.8%	20.2%	79.8%	100.0%
237110	1.5%	1.9%	2.6%	4.6%	6.5%	17.0%	83.0%	100.0%
237310	0.8%	2.6%	2.0%	3.7%	13.9%	23.1%	76.9%	100.0%
238110	0.7%	3.2%	1.0%	1.9%	4.6%	11.3%	88.7%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
238910	1.4%	3.4%	1.5%	2.9%	7.3%	16.6%	83.4%	100.0%
238990	0.8%	2.7%	1.1%	1.5%	6.6%	12.7%	87.3%	100.0%
331110	0.3%	0.4%	0.5%	0.4%	6.2%	7.7%	92.3%	100.0%
336611	0.8%	1.2%	1.5%	1.2%	3.3%	7.9%	92.1%	100.0%

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
541320	0.3%	0.6%	0.7%	0.6%	8.6%	10.9%	89.1%	100.0%
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
561730	0.8%	1.1%	1.8%	1.0%	8.3%	13.1%	86.9%	100.0%
TOTAL	0.9%	2.0%	1.8%	1.8%	7.2%	13.8%	86.2%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.59 Share of WSDOT Spending on State-Funded Contracts
by NAICS Code
Construction and Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	16.30%
237110	Water and Sewer Line and Related Structures Construction	4.80%
237310	Highway, Street, and Bridge Construction	46.80%
238110	Poured Concrete Foundation and Structure Contractors	2.60%
238210	Electrical Contractors and Other Wiring Installation Contractors	7.40%
238320	Painting and Wall Covering Contractors	1.00%
238910	Site Preparation Contractors	9.80%
238990	All Other Specialty Trade Contractors	2.10%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	1.30%
336611	Ship Building and Repairing	2.20%
541320	Landscape Architectural Services	1.30%
541330	Engineering Services	3.60%
561730	Landscaping Services	0.90%
Total		100.00%

Source: CHA analysis of WSDOT data.

**Table 4.60 Aggregated Weighted Availability for State-Funded Contracts
Construction and Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.5%	2.3%	3.1%	10.0%	19.0%	81.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.61 Unweighted Availability for State-Funded Contracts
Construction
(total dollars)**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	2.2%	2.9%	4.8%	3.6%	6.8%	20.2%	79.8%	100.0%
237110	1.5%	1.9%	2.6%	4.6%	6.5%	17.0%	83.0%	100.0%
237310	0.8%	2.6%	2.0%	3.7%	13.9%	23.1%	76.9%	100.0%
238110	0.7%	3.2%	1.0%	1.9%	4.6%	11.3%	88.7%	100.0%
238210	0.7%	1.8%	1.0%	1.1%	6.0%	10.5%	89.5%	100.0%
238320	0.4%	0.7%	0.9%	0.6%	4.7%	7.3%	92.7%	100.0%
238910	1.4%	3.4%	1.5%	2.9%	7.3%	16.6%	83.4%	100.0%
238990	0.8%	2.7%	1.1%	1.5%	6.6%	12.7%	87.3%	100.0%
331110	0.3%	0.4%	0.5%	0.4%	6.2%	7.7%	92.3%	100.0%
336611	0.8%	1.2%	1.5%	1.2%	3.3%	7.9%	92.1%	100.0%
561730	0.8%	1.1%	1.8%	1.0%	8.3%	13.1%	86.9%	100.0%
TOTAL	0.9%	2.1%	1.6%	1.9%	7.1%	13.7%	86.3%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.62 Share of WSDOT Spending on State-Funded Contracts
by NAICS Code
Construction**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	17.20%
237110	Water and Sewer Line and Related Structures Construction	5.10%
237310	Highway, Street, and Bridge Construction	49.20%
238110	Poured Concrete Foundation and Structure Contractors	2.70%
238210	Electrical Contractors and Other Wiring Installation Contractors	7.80%
238320	Painting and Wall Covering Contractors	1.10%
238910	Site Preparation Contractors	10.30%
238990	All Other Specialty Trade Contractors	2.20%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	1.40%
336611	Ship Building and Repairing	2.30%
561730	Landscaping Services	0.90%
Total		100.00%

Source: CHA analysis of WSDOT data.

**Table 4.63 Aggregated Weighted Availability for State-Funded
Contracts
Construction
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.6%	2.3%	3.2%	10.1%	19.3%	80.7%	100.2%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.64 Unweighted Availability for State-Funded Contracts
Construction-Related Services
(total dollars)**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
541320	0.3%	0.6%	0.7%	0.6%	8.6%	10.9%	89.1%	100.0%
541330	1.3%	2.2%	3.6%	2.1%	6.7%	16.0%	84.0%	100.0%
TOTAL	0.9%	1.6%	2.5%	1.5%	7.5%	13.9%	86.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.65 Share of WSDOT Spending on State-Funded Contracts
by NAICS Code
Construction-Related Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541320	Landscape Architectural Services	25.90%
541330	Engineering Services	74.10%
Total		100.00%

Source: CHA analysis of WSDOT data.

**Table 4.66 Aggregated Weighted Availability for State-Funded
Contracts
Construction-Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.0%	1.8%	2.9%	1.7%	7.2%	14.7%	85.3%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

D. Analysis of Race and Gender Disparities in WSDOT's Utilization of DBEs

To meet the Ninth Circuit's opinion in the *Western States* case that a USDOT- recipient must establish that discrimination operates in its market area, and the strict scrutiny requirement applicable to state-funded contracts that the Department consider evidence of disparities to establish its compelling interest in remedying discrimination in its market area, we next calculated disparity ratios for total DBE utilization compared to the total weighted availability of DBEs (described above), measured in dollars paid.

A “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.¹³⁸ A statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone. A more in depth discussion of statistical significance is provided in Appendix C.

Tables 4.67 through 4.69 present the results of this disparity analysis by demographic group for all combined data set by funding source.

**Table 4.67 Disparity Ratios by Demographic Group,
FHWA-Funded Contracts
Construction and Construction-Related Services**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	22.2%‡***	95.9%	87.4%	135.4%**	87.3%*	92.5%*	101.6%*

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

**Table 4.68 Disparity Ratios by Demographic Group,
FTA-Funded Contracts
Construction and Construction-Related Services**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	0.0%‡	62.0%‡	0.0%‡	0.0%‡	4.4%‡	13.4%‡***	110.7%**

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

**Indicates statistical significance at the 0.01 level

¹³⁸ See U.S. Equal Opportunity Employment Commission regulation, 29 C.F.R. § 1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

**Table 4.69: Disparity Ratios by Demographic Group,
State-Funded Contracts
Construction and Construction-Related Services**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	1.3%†*	71.1%‡	15.2%†*	25.6%†**	34.3%†***	33.5%†**	115.5%†***

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

V. Analyses of Disparities in WSDOT's Economy

Introduction

The late Nobel Prize Laureate Kenneth Arrow, in his seminal paper on the economic analysis of discrimination, observed:

Racial discrimination pervades every aspect of a society in which it is found. It is found above all in attitudes of both races, but also in social relations, in intermarriage, in residential location, and frequently in legal barriers. It is also found in levels of economic accomplishment; this is income, wages, prices paid and credit extended.¹³⁹

This Chapter explores the data and literature relevant to how discrimination in the Washington State Department of Transportation's (WSDOT) market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in Department contract opportunities. First, we analyzed the rates at which M/WBEs in Washington form firms and their earnings from those firms. Next, we summarize the literature on barriers to equal access to commercial credit. Finally, we summarize the literature on barriers to equal access to human capital. All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in discrimination without some types of affirmative interventions.

A key element to determine the need for government intervention through contract goals in the sectors of the economy where the County procures goods and services is an analysis of the extent of disparities in those sectors independent of the agency's intervention through its contracting affirmative action programs.

The courts have repeatedly held that analysis of disparities in the rates at which M/WBEs in the government's markets form businesses compared to similar non-M/WBEs, their earnings from such businesses, and their access to capital markets are highly relevant to the determination of whether the market functions properly for all firms regardless of the race or gender of their ownership.¹⁴⁰ These analyses contributed most recently to the successful defense of the Illinois Tollway's Disadvantaged Business Enterprise (DBE) Program.¹⁴¹ As explained by the Tenth Circuit in upholding the U.S. Department of Transportation's DBE program, this type of evidence

¹³⁹Arrow, Kenneth J., "What Has Economics to say about racial discrimination?" *Journal of Economic Perspectives*, (1998), 12(2), pp. 91-100.

¹⁴⁰ See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs.

¹⁴¹ *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7th Cir. 2016) (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony, including about disparities in the overall Illinois construction industry); see also *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) (holding that City of Chicago's M/WBE program for local construction contracts met compelling interest using this framework).

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs... The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.¹⁴²

Business discrimination studies and lending studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. "Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts."¹⁴³ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as "quality of education," "culture" and "religion."

For example, in unanimously upholding the USDOT DBE Program, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.¹⁴⁴ The Eighth Circuit Court of Appeals took a "hard look" at the evidence Congress considered, and concluded that the legislature had

¹⁴² *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1169 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941 (2001) ("*Adarand VII*").

¹⁴³ *Id.*

¹⁴⁴ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at *64 (Sept. 8, 2005).

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. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.¹⁴⁵

Likewise, in holding that the DBE program regulations meet strict scrutiny, the court in the *Western States* opinion relied on the “substantial body of statistical and anecdotal materials” considered by Congress, including studies based on Census data that provide “ample” evidence of barriers to the formation of minority-owned firms in the transportation contracting industry.¹⁴⁶

This type of court-approved analysis is especially important for an agency such as WSDOT, which has been implementing a program in conformance with 49 CF.R. Part 26 for many years. WSDOT’s remedial market interventions through the use of contract DBE contract goals may ameliorate the disparate impacts of marketplace discrimination in the agency’s own contracting activities. Put another way, the program’s success in moving towards parity for minority and women firms may be “masking” the effects of discrimination that otherwise would result in disparities in DBE utilization that mirrors that of the overall economy.

To explore the question whether firms owned by non-Whites and White women face disparate treatment in the Department’s marketplace outside of WSDOT contracts, we examined the U.S. Bureau of the Census’ *American Community Survey* which allows us to examine disparities using individual entrepreneurs as the basic unit of analysis.¹⁴⁷ We used the state of Washington as the geographic unit of analysis.

We found disparities in wages, business earnings and business formation rates for minorities and women across the construction and construction-related services industry sectors in WSDOT’s marketplace.

¹⁴⁵ *Sherbrooke*, 345 F.3d. at 970; see also *Adarand VII*, 228 F.3d at 1175 (plaintiff has not met its 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.”).

¹⁴⁶ *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

¹⁴⁷ Data from 2010 - 2014 American Community Survey are the most recent for a five-year period.

A. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2011 - 2015 American Community Survey

As discussed in the beginning of this Chapter, the key question is whether firms owned by non-Whites and White women face disparate treatment in the marketplace without the intervention of WSDOT's DBE program. In this section, we explore this question using the Census Bureau's *American Community Survey* data to address other aspects of this question. One element asks if there exist demographic differences in the wage and salary income received by private sector workers. Beyond the issue of bias in the incomes generated in the private sector, this exploration is important for the issue of possible variations in the rate of business formation by different demographic groups. One of the determinants of business formation is the pool of financial capital at the disposal of the prospective entrepreneur. The size of this pool is related to the income level of the individual either because the income level impacts the amount of personal savings that can be used for start-up capital or the income level affects one's ability to borrow funds. If particular demographic groups receive lower wages and salaries then they would have access to a smaller pool of financial capital, and thus reduce the likelihood of business formation.

The *American Community Survey* ("ACS") *Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. The ACS is an annual survey of 1 percent of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we use the file that combines data for 2011 through 2015, the most recent available.¹⁴⁸ With this rich data set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

Often, the general public sees clear associations between race, gender, and economic outcomes and assumes this association reflects a tight causal connection. However, economic outcomes are determined by a broad set of factors, including, but extending beyond, race and gender. To provide a simple example, two people who differ by race or gender may receive different wages. This difference may simply reflect that the individuals work in different industries. If this underlying difference is not known, one might assert the wage differential is the result of the race or gender difference. To better understand the impact of race or gender on wages, it is important to compare individuals of different races or genders who work in the same industry. Of course, wages are determined by a broad set of factors beyond race, gender, and industry. With the ACS PUMS, we have the ability to include a wide range of additional variables such as age, education, occupation, and state of residence.

We employ a multiple regression statistical technique to process this data. This methodology allows us to perform two analyses: an estimation of how variations in certain characteristics (called independent variables) will impact the level of some particular outcome (called a dependent variable), and a determination of how confident we are that the estimated variation is statistically different from zero. We have provided more detail on this technique in Appendix A.

¹⁴⁸ For more information about the ACS PUMS, see <http://www.census.gov/acs/>.

With respect to the first result of regression analysis, we will examine how variations in the race, gender, and industry of individuals impact the wages and other economic outcomes received by individuals. The technique allows us to determine the effect of changes in one variable, assuming that the other determining variables are the same. That is, we compare individuals of different races, but of the same gender and in the same industry; or we compare individuals of different genders, but of the same race and the same industry; or we compare individuals in different industries, but of the same race and gender. We are determining the impact of changes in one variable (e.g., race, gender or industry) on another variable (wages), “controlling for” the movement of any other independent variables.

With respect to the second result of regression analysis, this technique also allows us to determine the statistical significance of the relationship between the dependent variable and independent variable. For example, the relationship between gender and wages might exist but we find that it is not statistically different from zero. In this case, we are not confident that there is not any relationship between the two variables. If the relationship is not statistically different from zero, then a variation in the independent variable has no impact on the dependent variable. The regression analysis allows us to say with varying degrees of statistical confidence that a relationship is different from zero. If the estimated relationship is statistically significant at the 0.05 level, that indicates we are 95% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.01 level, that indicates we are 99% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.001 level, that indicates we are 99.9% confident that the relationship is different from zero.¹⁴⁹

In the balance of this section, we report data on the Construction and the Construction-Related Services sectors combined; for the Construction sector; and for the Construction-Related Services sector.

Each sub-section first reports data on the share of a demographic group that forms a business (business formation rates); the probabilities that a demographic group will form a business relative to White men (business formation probabilities); the differences in wages received by a demographic group relative to White men (wage differentials); and the differences in business earnings received by a demographic group relative to White men (business earnings differentials).

1. Construction and Construction-Related Services Industries Combined in Washington

a. Business Formation Rates

One method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. We developed these business formation rates using data from the U.S. Bureau of the Census' American Community Survey. Table 5.1 presents these results. The Table indicates that White men have higher business formation rates compared to non-Whites and White women. Table 5.2

¹⁴⁹ Most social scientists do not endorse utilizing a confidence level of less than 95%. Appendix C explains more about statistical significance.

utilizes probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender. This table indicates that non-Whites and White women are less likely to form businesses compared to similarly situated White men. For instance, Blacks are 5.9% less likely to form a business compared to White men after other key explanatory variables are controlled. These tables reinforce the conclusion that there are significant differences in the rate of non-Whites and White women to form business compared to the rate of White men. Not only are business formation rates for non-Whites and White women lower than that of White men but also their probability of forming a business is less than White men after controlling for a variety of factors. These differences support the inference that minority- and women-owned business enterprises (“M/WBEs”) suffer major barriers to equal access to entrepreneurial opportunities in the overall Washington economy.

**Table 5.1 Business Formation Rates
Construction and Construction-Related Services
American Community Survey, 2011 - 2015**

Demographic Group	Business Formation Rates
Black	2.5%
Latino	4.4%
Native American	4.8%
Asian/Pacific Islander	5.9%
Other	1.2%
Non-White	4.4%
White Women	8.2%
Non-White Male	5.8%
White Male	11.2%

Source: CHA calculations from the American Community Survey

**Table 5.2 Business Formation Probabilities Relative to White Males
Construction and Construction-Related Services,
American Community Survey, 2011 - 2015**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-5.9%***
Latino	-3.9%***

Demographic Group	Probability of Forming a Business Relative to White Men
Native American	-4.5%**
Asian/Pacific Islander	-4.5%***
Other	-5.8%
White Women	-1.7%**

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

b. Differences in Wages and Salary Incomes

Another way to measure equity is to examine how the wage and salary incomes and business earnings of particular demographic groups compares to White men. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcome while controlling for other factors, such as education, that might impact outcomes.¹⁵⁰ Using these techniques and data from the Census Bureau's American Community Survey, we found that Blacks, Latinos, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men: controlling for other factors relevant to business success, wages and business earnings were lower for these groups compared to White men. We report wages and business earnings because disparities in wages and business earnings can lead to disparities in business outcomes. The findings on wages and salary incomes are presented in Table 5.3. Parity would exist if the figures in Table 5.3 were 0.0%; in other words, non-Whites and White women would be utilized identical to White men. When the table indicates that the wage differential between Blacks and White men is -41.1%, for example, this means that wages received by Blacks are 41.1% less than wages received by similar White men.

**Table 5.3 Wage Differentials
for Selected Groups Relative to White Men
Construction and Construction-Related Services,
American Community Survey, 2011 - 2015**

Demographic Group	Wages Relative to White Men (% Change)
Black	-41.1%***
Latino	-14.2%***
Native American	-52.2%***

¹⁵⁰ See Appendix A for more information on multiple regression statistical analysis.

Demographic Group	Wages Relative to White Men (% Change)
Asian/Pacific Islander	-7.2%
Other	-48.4%***
White Women	-43.4%***

Source: CHA calculations from the American Community Survey
 *** Indicates statistical significance at the 0.001 level

Holding constant education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Washington earn less than White men in the overall economy. Estimates of the coefficients for Black, Latino, Native American, Asian/Pacific Islander and White Women are statistically significant at the 0.001 level. For example, we are 99.9% confident that wages for Blacks in Washington (after controlling for numerous other factors) are 41.1% less than those received by White men.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-Whites and White women entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.4 presents these findings.

**Table 5.4 Business Earnings Differentials
 for Selected Groups Relative to White Men
 Construction and Construction-Related Services
 Sectors, 2011-2015**

Demographic Group	Earnings Relative to White Men (% Change)
Black	--- ¹⁵¹
Latino	-50.3%
Native American	-386.0%* ¹⁵²
Asian/Pacific Islander	-8.7%
Other	---
White Women	-112.0%*

¹⁵¹ Many times, there were not sufficient observations in the data to conduct a reliable statistical analysis. In these instances, the tables will contain the symbol “---”.

¹⁵² The best way to interpret this coefficient is to say that the business earnings of White men are 3.86 times the business earnings are Native Americans.

Source: CHA calculations from the American Community Survey
 * Indicates statistical significance at the 0.05 level

Two of the estimates of the coefficients for these variables were found to be statistically significant at the 0.05 level.

d. Conclusion

Using descriptive analysis, Table 5.1 shows that differentials exist between the business formation rates by non-Whites and White women and White males across industry sectors. Table 5.2 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 5.3 and 5.4 present data indicating differentials in wages and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

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2. The Construction Industry in Washington

a. Business Formation Rates

Table 5.5 presents business formation rates in the Washington construction industry for selected demographic groups.

Table 5.5 Business Formation Rates, Construction, 2011 – 2015

Demographic Group	Business Formation Rates
Black	2.6%
Latino	4.5%
Native American	4.1%
Asian/Pacific Islander	7.5%
Other	0.0%
Non-White	4.6%
White Women	9.5%
Non-White Male	6.1%
White Male	11.5%

Source: CHA calculations from the American Community Survey

¹⁵³ Various appendices to this Report contain additional data and methodological explanations. Appendix A provides a “Further Explanation of the Multiple Regression Analysis.” Appendix B provides a “Further Explanation of Probit Regression Analysis.” Appendix C discusses the meaning and role of “Significance Levels.” Appendix D provides detailed “Additional Data from the Analysis of the Survey of Business Owners.” Appendix E provides “Additional Data from the Analysis of American Community Survey.”

Table 5.6 presents the results of the probit analysis for the construction industry in Washington.

**Table 5.6 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction, 2011 – 2015**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-11.0%**
Latino	-7.1%***
Native American	-9.9%**
Asian/Pacific Islander	-5.1%*
Other	---
White Women	-2.9%*

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

- Indicates statistical significance at the 0.05 level

The analysis indicates that non-Whites and White women in Washington are less likely to form construction businesses compared to White men even after controlling for key factors. The reduction in probability ranges from 2.9% to 11.0%.

b. Differences in Wage and Salary Incomes

Table 5.7 presents the findings from the wage and salary income regression analysis examining the construction industry in Washington. This indicates the wage differential for selected demographic groups in Washington relative to White men.

**Table 5.7 Wage Differentials
for Selected Groups Relative to White Men
Construction, 2011 – 2015**

Demographic Group	Wages Relative to White Men (% Change)
Black	-44.6%***
Latino	-14.8%***
Native American	52.7%***
Asian/Pacific Islander	-4.1%

Demographic Group	Wages Relative to White Men (% Change)
Other	-45.9%**
White Women	-45.6%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Washington earn less than White men in the construction industry. The differential ranges between 4.1% less and 45.9% less. Estimates of the coefficients for Black, Latino, and White Women are statistically significant at the 0.001 level. The coefficient for Other is statistically significant at the 0.05 level and the coefficient for Asian/Pacific Islander is not statistically significant.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.8 presents these findings.

Table 5.8 Business Earnings Differentials for Selected Groups Relative to White Men Construction, 2011 – 2015

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	-45.7%
Native American	---
Asian/Pacific Islander	-14.8%
Other	---
White Women	13.3%

Source: CHA calculations from the American Community Survey

There were insufficient observations to conduct the analysis for Black, Native American and Other. None of the remaining coefficients are significantly statistically different from zero.

d. Conclusion

Using descriptive analysis, Table 5.5 shows that differentials exist between the business formation rates by non-White males and White males. Table 5.6 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Table 5.7 presents data indicating wage differentials and Table 5.8 indicates no statistically significant differences in business earnings.

3. The Construction-Related Services Industry in Washington

a. Business Formation Rates

Table 5.9 presents business formation rates in the construction-related services industry in Washington for selected demographic groups.

**Table 5.9 Business Formation Rates,
Construction-Related Services, 2011 – 2015**

Demographic Group	Business Formation Rates
Black	1.6%
Latino	2.4%
Native American	14.8%
Asian/Pacific Islander	2.9%
Other	8.8%
Non-White	3.1%
White Women	5.3%
Non-White Male	4.5%
White Male	9.4%

Source: CHA calculations from the American Community Survey

- Indicates statistical significance at the 0.05 level

White males have a higher rate of business formation except for Native Americans. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.10 presents the results of the probit analysis for the construction-related services industry in Washington.

**Table 5.10 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction-related Services, 2010 – 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-6.2%
Latino	-4.8%
Native American	13.2%
Asian/Pacific Islander	-7.5%*
Other	9.1%
White Women	0.2%

Source: CHA calculations from the American Community Survey

- Indicates statistical significance at the 0.05 level

Here, Asian/Pacific Islanders were 7.5% less likely to form a business relative to White Men. This estimate was statistically significant at the 95.0 level.

- Differences in Wage and Salary Incomes

Table 5.11 presents the findings from the wage and salary income regression analysis examining the construction-related services industry in Washington. This indicates the wage differential for selected demographic groups in Washington relative to White men.

**Table 5.11 Wage Differentials
for Selected Groups Relative to White Men
Construction-Related Services, 2011 – 2015**

Demographic Group	Wages Relative to White Men (% Change)
Black	-14.2%
Latino	-6.1%
Native American	-10.6%
Asian/Pacific Islander	-11.6%
Other	-66.5%*
White Women	-35.0%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

- Indicates statistical significance at the 0.05 level

The coefficients for Other and White Women was statistically significant at the 95 and 991 level respectively and both groups earned less than White Men.

b. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.12 presents these findings.

Table 5.12 Business Earnings Differentials for Selected Groups Relative to White Men Construction-related Services, 2011 - 2015

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	---
Native American	-334.0%
Asian/Pacific Islander	116.0%
Other	---
White Women	-74.2%

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the analysis could not be conducted for Black, Latino, and Other. For the other groups, the results were not statistically significant.

c. Conclusion

Because of the limited number of observations in this sector and subsequent sample size concerns, the estimates are not as robust as the other sectors analyzed in this chapter.

VI. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN WSDOT’S MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities and the Department’s program. This evidence is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes, as well as the likely efficacy of any race- and gender-neutral remedies employed by the Department. As discussed in Chapter II, this type of anecdotal data has been held by the courts to be relevant and probative of whether the Department continues to have a need to use narrowly tailored DBE contract goals to remedy the effects of past and current discrimination, and create a level playing field for contract opportunities for all firms.

The Supreme Court has held that anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”¹⁵⁴ Evidence about discriminatory practices engaged in by prime contractors, agency personnel, and other actors relevant to business opportunities has been found relevant regarding barriers both to minority firms’ business formation and to their success on governmental projects.¹⁵⁵ While anecdotal evidence is insufficient standing alone, “[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government’s] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative.”¹⁵⁶ “[W]e do not set out a categorical rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases; indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”¹⁵⁷

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making, as opposed to judicial proceedings. “Plaintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not— 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’ perception.”¹⁵⁸ Likewise, the Tenth Circuit held that “Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to

¹⁵⁴ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

¹⁵⁵ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1172 (10th Cir. 2000), *cert. granted*, 532 U.S. 941, *then dismissed as improvidently granted*, 534 U.S. 103 (2001).

¹⁵⁶ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1120, 1530 (10th Cir. 1994).

¹⁵⁷ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 926 (11th Cir. 1997).

¹⁵⁸ *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 249 (4th Cir. 2010).

either refute the incidents described by Denver's witnesses or to relate their own perceptions on discrimination in the Denver construction industry."¹⁵⁹

To explore this type of anecdotal evidence of possible discrimination against minorities and women in WSDOT's geographic and industry markets and the effectiveness of its current race-conscious and race-neutral measures, we conducted business owner and stakeholder interviews, totaling 202 participants. We met with a broad cross-section of business owners from WSDOT's geographic and industry markets. Firms ranged in size from large national businesses to established family-owned firms to new start-ups. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts with WSDOT, other government agencies, and in the private sector. We also elicited recommendations for improvements to the Disadvantaged Business Enterprise Program ("DBE") program, as discussed in Chapter III.

Many minority and women owners reported that while some progress has been made in integrating their firms into public and private sector transportation contracting activities through race- and gender-conscious contracting programs, significant barriers remain. Race- and gender-neutral approaches alone were described as unlikely to ensure a level playing field for WSDOT contract opportunities.

We also conducted an electronic survey of firms in WSDOT's market area about their experiences in obtaining work, marketplace conditions and WSDOT's DBE program. The results were similar to those of the interviews. A significant portion of DBEs reported they still experience barriers to equal contracting opportunities; questioning of their competency because of their race or gender; less access to business networks and information; job-related sexual or racial harassment or stereotyping; and slow payment by WSDOT and/or prime contractors.

The following are summaries of the issues discussed. Quotations are indented, and have been edited for readability. They are representative of the views expressed by participants over the many sessions.

A. Business Owner Interviews

The following are summaries of the issues discussed that are relevant to DBE goal setting and DBE program implementation. Quotations are indented, and are representative of the views expressed over the many sessions by many participants.

Stereotypes, Discriminatory Attitudes and Negative Perceptions of Competence

Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications and capabilities. While sometimes subtle,¹⁶⁰ these biases about minorities' and women's lack

¹⁵⁹ *Concrete Works*, 321 F.3d at 989.

¹⁶⁰ See, e.g., <http://www.sciencedirect.com/science/article/pii/S0191308509000239>.

of competence infect all aspects of their attempts to obtain contracts and to be treated equally in performing contract work. Minorities and women repeatedly discussed their struggles with negative perceptions and attitudes of their capabilities in the business world.

[Prime firms] don't respect you.

I get really tired of the concept that when you bring in the small firms or the minority, women-owned business firms, you're getting a lesser product. ... Again and again and again, when you hire the big box firm, you get a middle level manager who's wandered along for whatever and may or may not be any good, but the firm makes their 10% profit a year off him. As long as they can bill him to you and you don't get upset, they're getting billed. I had to survive. I had to be the best at my work. I had to outperform all my peers to get my jobs, and I have to do it for lower cost.

When I show up for projects, people see an ethnic minority, therefore incompetency.

Until there's a head shift and they start to see the benefit of the program, the benefit of diversity, the benefit of having different values and different backgrounds and how that can actually make their project more efficient and better, this is going to continue to be a conversation.

Being certified can create its own stigma.

Primes that don't believe in the program. They don't believe in the DBEs. It's historic, it's been there forever. If they don't know I'm DBE, it's amazing the work I get. As soon as they find out, it's just all "I need this, I need that." ... I can compete against multinational corporations and get work in the private sector as soon as these program managers find out that I'm a DBE, all of a sudden there's a problem.

Women of all races often experienced gender bias and exclusion in the highway industry. The continuing effects of stereotypes about gender roles and sexist attitudes from male colleagues, clients and agency staff hamper their opportunities.

It's hard for women. It really, truly is hard when they walk in.

Every day when I go out and deal with male counterparts, I feel that they look at me as less.

If I'm being assertive, or trying to get paid for something, I'm considered a bitch, but if it's a guy, it's, "Oh, you know so and so. You've just got to deal with him. That's just the way he is." ...

There's just a different perception when it comes to women in this industry, and I very much think that it's an issue. ... The unions, they would all call other males that worked in the office. ... I would just pick up that phone, and I'm like, "That is not who you deal with. You deal with me." They would automatically, and it still happens all the time, go to somebody else. Just that undertone of they need to deal with the guy, or whoever, to get something done.

I believe that there are barriers, absolutely. In a heartbeat. All it takes is a phone call to a male. Barrier. You don't know what you're talking about. "Oh, are you the little secretary? Well, let me talk to somebody that actually knows what they're doing. ... [Younger white males often think DBEs] have all these special privileges, but they really don't know anything. ... It is my duty in life to put them straight, and I do. You still deal with it on a day-to-day basis.

[Women don't] drive semis. They thought we were office staff.

"Oh, there's no way a white female can do it by herself," is what I'm gathering. It's like, "Really? You have not met me."

Most of the primes I deal with are male, most of the DOT people I deal with are males. There's no one out there for me to go to that I feel is looking out for my interest, because I'm a female.

I'm always questioning [WSDOT staff], and they are insulted that I'm questioning them. The prime contractor's insulted that I'm questioning them.

[Customers and agency staff] have a tendency to call the guys in the office, they don't call us. I have a real hard time trying to break those barriers, as a woman in transportation, even though it's our contract and we're the owners. I don't know how many times people walk in, selling tires or whatever [go] right to my son, who was working at the office. ... They go right to him or they'll say to me, "Hey, when the owners get here could you please tell them I stopped [in]."

[A state transportation inspector responded to a woman owner's query about why her firm had been found in violation with] "Who are you to come down here and question us, as a woman?"

I went to wait to wait on a contractor on the counter and I was told, "I'll wait for one of the boys."

Because of [my son's sur]name, they do talk to him thinking that he's the owner, or my husband, and things like that. Now, eventually, they just start realizing that they're talking to the wrong person.

Usually the older school generation has a harder time working with the females. I know that, so I play off my brother. My brother takes control of that job.

You do have to prove yourself constantly. ... They assume my brother is the big guy at the company.

You do have to constantly prove your value, and step out of your comfort zone. ... It's like it doesn't even matter what man you get, they think, "Well, I can talk to him, and we'll be able to get this done." I had to finally call the guy and say, "Look, do you want to do this deal or not? If you don't, I'm sure I can find somebody else that will work with me. I'm making the decision, so let's meet." We got past it, but it was a real barrier, and we struggle with those all the time.

I couldn't even get a \$15,000 line of credit. You know what the bank said? We don't believe a woman can run a paving company. That was a long time ago.

My experience as a woman is I get treated with disrespect. ... A man is treated different than a woman. ... "I'm now talking to a man. He understands what I'm talking about. This woman doesn't know."

[Male contractors are] doing all their physical posturing and doing this and doing that and I'm like an idiot going clueless because it wouldn't work on me. I'd actually disarm them and get what I want. What I'm saying is, women can turn it around and use it. ... I was actually chased and followed on a job site [in the 1980s].

We keep a spreadsheet of offensive comments and we get 10 or 12 entries a day. In April [2016], I had a construction engineer on a \$130 million project say to me, "Can't you just send me a man? ... A month ago, I ended up coming out onto the job site for a quick site visit and getting into an argument with another construction engineer, sorry a project manager, who was obviously frustrated and angry before I got there. His first comment to me included cuss words. Then he was yelling in my ear. ... That's how it will be for the next two years with this guy.

He doesn't do this with any of the men who are engaged in the project.

All day long are the same comments. "Well, we don't want to let you drive the equipment," or other references to women being substandard at this or that. "Well, she must have brought a good lunch, she's a woman." These are comments that we're dealing with every single day.

When I go to the State, I'm in a room of really diverse people. I'm in a room of men, and women, and people of color, and White people. When I go to a consulting firm it's a roomful of gray haired White guys. You know about the thick skin. Generally, there is a blond comment. There is a female comment. It's stuff that's an undercurrent that I don't experience when I'm with the State force, but when I'm in the consulting firms there is definitely the old boys network. I try and break into it. There is sort of that thought that maybe I don't know that much about construction or maybe I'm blond and not that smart.

I received a letter in the mail that said women did not belong in transportation and that I was taking away a job from a man who was supporting his family. It's only about four years ago. I wrote him a letter back. "Dear angry man, of course women belong in transportation. At least we stop and ask for directions."

Women who complained could suffer retaliation.

[Other DBEs counseled] "You're dealing with big boys. You'll never get a contract out here. They'll put you under. They'll make sure you go under. Don't do it. Don't do it. We know it's happening, but we just don't say anything." ... They said learn to play the game. ... [A large non-DBE said] "You don't play by the big boys' rules, and you start bucking the system that we have established out here, we'll take you behind the woodshed and teach you a lesson." ... All the threats just made me angry. It didn't make me cower.

It's kind of this careful walk you walk because you don't know you are going to be blacklisted [if you complain to the Department]. You don't know if you'll get future work.

[The prime contractor] did not come to me. I knew nothing about [being substituted with another DBE] until the job was done. I let it go, because I'm still trying to fit in in this business, and I don't want to be that one that doesn't get the work.

Exclusion from Industry Networks

Relationships are key to obtaining work from the Department and local subrecipients, as well as from prime vendors as subcontractors, subconsultants or suppliers. Many minorities and women reported that there still exists a “good old boys” network that makes it difficult for them to fairly obtain contract opportunities. They are often excluded from the industry networks necessary for success.

I want to be able to compete legitimately with [entrenched consultants] or at least get my foot in the door so I can ask to bid on a particular project. [An agency staffer] said “Well, I don't really know. You just have to talk to people who you know.”

Mostly, it's not being respected in the room, and it's body language. It's relationship, which I heard over and over again here, as a side word for experience. It's really do I have experience with you, do I have a relationship with you. If I had to choose between you and somebody I'm more comfortable with because they look like me, I'm going to choose the person I'm more comfortable with because they look like me.

It can difficult for DBEs to access important decision makers.

You need to know who to contact. Who the decision-maker's going to be when it comes to putting together your team, or putting together the ultimate proposal. You need to know who that lead is, who that project manager is, who that decision-maker is, because if you're talking to anybody else, you're wasting your time.

Obtaining Work on Public Sector Construction and Consulting Projects on An Equal Basis

There was almost universal agreement that the DBE Program remains necessary to reduce barriers to equal contracting opportunities. Most DBEs reported that without the requirement that prime firms make good faith efforts to meet contract goals, they would receive little or no work. While minorities and women found it is easier to obtain subcontracts than prime contracts on public projects because of affirmative action goals, it is still difficult to get work, receive fair treatment, and be paid on time. Many believed that majority prime firms use them only if forced to do so.

Without goals there wouldn't be these businesses in the room.

I get calls from firms if there's a goal but I certainly don't hear from them if there's not.

Probably 80% of [firm] business is on contracts where primes need to meet a goal, and the same case where if there's not a

goal, they don't call and when there's a goal they call. It's every major contractor that operates in this region.

They never would have called [without a goal].

Goals is the key.

The only chance we have here in this room is if there's a goal, they'll call you. Otherwise they'll never call you.

If I didn't have the DBE, where they had to use me, to initially see me and how my performance is, it would be much different for me.

I've seen it from the side of a municipal engineer to a consultant with a minority firm that actually went out of business after I-200 because they were getting a lot of large tasks from the big prime firms and then when I-200 came in, that no longer happened.

We're not going to ever compete with a person that's buying baseball tickets and dinners and all that kind of stuff for this work. To couple that, then they will hire WSDOT employees for example to come in and who know all the inside workings. They want to work with their friends. You're never going to get around that unless you do have goals.

If there is not a DBE goal on that contract, I have found that the prime contractor will self perform that work. They use us because they have to.

Private projects without goals is the hardest thing to break into because your firms do the same firms over and over again and until a firm completely screws up they have no incentive to branch out and use newer firms or minority women-owned firms unless they've already been using them forever. We get far more calls from a larger diversity of primes on the transportation projects that require those goals and, well, goals or requirements, federal or state than we do on the private side.

Obtaining work from local governments that receive WSDOT funds as subrecipients was especially difficult because of deeply entrenched small networks of white male-owned firms.

They say well, you don't have the experience. Bullshit. I have experience, but they just have their little teams. ...

Some participants felt the barriers were more about size and experience, and less about race and gender.

The big challenge is I don't think anything to do with race, it has to do with what he said, whether you're a small fish or a large fish.

There is a real barrier to business for any small business owner or anyone who's starting out regardless of race or gender, depending on how much cash he's got in the bank.

While acknowledging that is difficult for small or new firms to compete, other DBEs reported they face greater or additional barriers because of their race or gender.

There are some additional access to barriers that we [as minorities and women] have that we're still trying to climb over a little bit more than some other small businesses.

Some owners reported that although their firms have been listed on the contract, they were underutilized or not utilized at all.

I am the female and they bring me like a tiny, little role in this large contract. They bring me to the interview to make the showing because I interview well and so they're going to put me in front of people. ... Then no work comes out of it. There is no accountability so I think I have five large Wash DOT contracts under a prime, a large engineering firm, nothing.

Prime contracts were especially difficult to obtain. Many firm owners would like to perform prime work but are not afforded that opportunity.

When I'm prime ... I control my own destiny.

We are in darkness [as subconsultants]. You know how that goes.

I am not interested in subcontractor work because it is so brutal.

They need to push somehow for smaller projects where people can do the whole project or a substantial piece and you're not just this paperwork nightmare for a prime.

[DBEs] do end up competing against each other terribly because there's very little [subcontract] work. Once you're the "in" person, you get the very little work for WMBE subs on that kind of work.

By the time a small company gets a portion of that, because the only companies that WSDOT was looking at for those are the [large consulting firms ... how are you going to get any money out of that?

When you go through subbing to a mega firm, you're putting a very small number of white males in charge of defining who's going to survive and not survive as subs.

When you go and team up with prime [consultant]s they see you as future competition. So why should they cultivate competition?

[As specialists working as subconsultants,] we are constantly providing our intellectual property to these lovely, integrated [large consulting firm] teams that I love working on, but I also know that we are training their staff to do what we do.

B. Anecdotal Survey

To supplement the in- person interviews, we also conducted an electronic survey of firms on our availability list. 78 minority- and women-owned firms participated. 11.69% of DBEs had worked on WSDOT projects only as a prime contractor or consultant; 35.06% had worked only as a subcontractor; 22.08% had worked as both a prime contractor or consultant or as a subcontractor, subconsultant or supplier; and 31.17% had not done business on any WSDOT contracts. These respondents reported the following experiences.

- 64.10% answered yes to the question “Do you experience barriers to contracting opportunities based on race and/or gender?”
- 64.10% answered yes to the question “Do you have access to informal and formal networking information and have the same access to the same information as other non-DBE firms in your industry?”
- 56.41% answered yes to the question “Is your competency questioned based on your race and/or gender?”
- 11.6% reported they have unequal access to insurance; 16.67 % reported they have unequal access to surety bonding services; and 29.49% reported they have unequal access to financing and business capital.
- 65.38% reported they are solicited for WSDOT or government projects with DBE goals.
- 56.41% reported they are solicited for private projects and projects without DBE goals.
- 48.72% stated that WSDOT and/or prime contracts pay them promptly.
- 48.72% reported they experience job-related sexual or racial harassment or stereotyping.
- 24.36% stated they experience discrimination from suppliers or subcontractors because of their race and/or gender.
- 40.26% had accessed some type of supportive services or other program to assist DBEs and small firms:

- 7.79% had participated in financing or loan programs;
- 9.09% had accessed bonding support programs;
- 12.99% had participated in a mentor-protégé program or relationship;
18.18% had received support services such as assistance with marketing, estimating, information technology, etc.; and
- 20.78% had joint ventured with another firm.

C. Conclusion

Consistent with other evidence reported in this Study, the anecdotal interviews and the survey results strongly suggest that minorities and women continue to suffer discriminatory barriers to full and fair access to contracts and associated subcontracts. While not definitive proof that the Department needs to continue to implement race- and gender-conscious remedies for these impediments, the results of the qualitative data are the types of evidence that, especially when considered along side the numerous pieces of statistical evidence assembled, the courts have found to be highly probative of whether WSDOT would be a passive participant in a discriminatory market area without affirmative interventions and whether race-conscious remedies are necessary to address that discrimination.

VII. RECOMMENDATIONS FOR WSDOT’S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data in this study provide a thorough examination of the evidence of the experiences of disadvantaged, minority- and women-owned firms in WSDOT’s geographic and industry markets. As required by strict constitutional scrutiny, the Disadvantaged Business Enterprise (“DBE”) program for federal-aid transportation contracts,¹⁶¹ and the Ninth Circuit Court of Appeals’ jurisprudence, we analyzed evidence of DBEs’ utilization by WSDOT as measured by dollars spent. We next estimated the availability of DBEs in WSDOT’s markets in the aggregate and presented by funding source and detailed industry code. We then compared WSDOT’s utilization of DBES to the availability of all ready, willing and able firms in its markets to calculate whether there are disparities between utilization and availability. We also solicited anecdotal or qualitative evidence of DBEs’ experiences in obtaining contracts in the public and private sectors. These results provide the agency with the evidence necessary to narrowly tailor its DBE program for federal-aid contracts, as required by 49 C.F.R. Part 26. Based upon these findings, USDOT guidance and national best practices for DBE programs, we make the following recommendations.

A. Augment Race- and Gender-Neutral Measures

The courts and the DBE program regulations require that recipients use race-neutral¹⁶² approaches to the maximum feasible extent to meet the annual DBE goal. This is a critical element of narrowly tailoring the program, so that the burden on non-DBEs is no more than necessary to achieve WSDOT’s remedial purposes. Increased participation by DBEs through race-neutral measures will also reduce the need to set DBE contract goals. We therefore suggest the following enhancements of WSDOT’s current efforts, based on the business owner and stakeholder interviews, the input of agency staff, and national best practices for DBE programs.

Increase Certification Outreach and Expertise

In general, firms and other stakeholders understood and supported the need for a highly rigorous certification process to ensure program integrity. There were assertions that “front” companies still slip through the process, especially those owned by White women with family ties to the industry. Vigilance must be maintained to ensure that only those truly disadvantaged by their race or gender receive the benefit of the preference.

To address concerns about a lack of qualified DBEs, and to increase the pool of firms that can be used to meet contract goals, the Department should conduct additional outreach to uncertified minority- and women-owned firms. The Study identified businesses owned by minorities and women that are not DBE certified. The Office of Minority and Women Business Enterprises (“OMWBE”) should aggressively pursue these businesses to encourage applications.

¹⁶¹ 49 C.F.R. Part 26.

¹⁶² The term race-neutral as used here includes gender-neutrality.

In addition to encouraging non-certified firms to apply for the program, the Department should focus on increasing the pool of certified firms that can provide goods or services in construction subindustries where DBEs have received little work. For example, Black-owned DBEs received few to no dollars in Highway, Street and Bridge Construction (NAICS code 237310).

Many interviewees believed that the certification staff at OMWBE lack deep knowledge about the highway construction industry. We note that it is highly unusual for a state department of transportation to totally outsource DBE certification to another agency. While the Memorandum of Understanding between WSDOT and OMWBE has been approved by USDOT, and in theory there is nothing objectionable about this approach, it is critical that whoever is conducting certification reviews has a thorough understanding of the particulars of the transportation industry and its contracting marketplace. We therefore suggest that WSDOT ensure that firms applying for DBE certification are evaluated by a highway industry expert, and that WSDOT will be regularly consulted about certification issues and unusual situations. Perhaps the Department can assign some staff to work with OMWBE to review more complex applications.

Monitor Prompt Payment of Subcontractors

Many firms complained about slow payment by the State. This is a serious problem for all firms, but especially for DBEs and other small businesses with limited cash flow and financing options. The recent purchase of the B2GNow electronic contract tracking system will facilitate subcontractors' ability to know whether and when their prime contractor has been paid. WSDOT must fully implement the system and train staff, contractors and subcontractors on the compliance requirements and how to use the system. The Department should evaluate how well this approach addresses the complaint by subcontractors that prime contractors often withhold payment unnecessarily, despite the requirement that prime contractors promptly "pay when paid." Further, as suggested by WSDOT staff, small firms need to become better educated about their rights; perhaps some detailed information could be provided upon certification.

Increase Contract "Unbundling"

The size and complexity of the Department's contracts are major impediments to DBEs and other small firms in obtaining work as prime contractors and as subcontractors on very large projects. "Unbundling" contracts into smaller or less complex segments was endorsed by many firm owners as one method to provide fair access to WSDOT's projects. In conjunction with reduced insurance and bonding requirements where possible, unbundled contracts should permit smaller firms to move from quoting solely as subcontractors to bidding as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted, however, within the constraints of the need to ensure efficiency and limit costs to taxpayers. The Department should continue to stress unbundling as a component of the small business elements of its DBE Program Plan.

Ensure Bidder Non-Discrimination and Fairly Priced Subcontractor Quotations

Some DBEs voiced concerns that prime contractors may not be soliciting their subcontractor quotes in good faith on Department projects, and failed to solicit them at all on non-goals projects. Many prime contractors reported that using certified firms increases their costs and risks, and that DBEs often inflate bids because they assume they will be utilized.

To investigate these claims, WSDOT could require bidders to maintain all subcontractor quotes received on specified projects. Compliance could be treated as an element of maintaining prequalification or of being deemed a responsible bidder. At the Department's discretion, the prices and scopes can then be compared to evaluate whether bidders are in fact soliciting and contracting with subcontractors on a non-discriminatory basis and if DBEs cost more than White-male owned firms.¹⁶³

Review Insurance and Experience Requirements

Many business owners and stakeholders, DBEs and non-DBEs alike, agreed that WSDOT's insurance and qualifications requirements were major impediments to DBEs performing as prime contractors, and even as subcontractors. The Department should review surety bonding, insurance and experience criteria so they are no greater than necessary to protect the Department's interests. This might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bond from the calculation of the "as read" low bidder on appropriate solicitations.

Review DBE Policies for Consulting Contracts

There was close to universal consensus among DBEs and non-DBEs that the Department needs to revise its approach to ensuring opportunities for DBEs in the consulting industries. Business owners and stakeholder representatives pointed to two areas. First, prime consultants are not permitted to mark up the costs of their subconsultants. This is a serious disincentive to use DBEs or newer firms. There is a cost to supervising subconsultants. This prohibition needs to be reevaluated.

Next, the Safe Harbor program to set the audited rates for small consulting firms was repeatedly described as an impediment to DBE opportunities. This program was designed to permit small firms to perform on WSDOT contracts without having to produce audited financial statements. However, the permitted overhead rate of only 10 percent profit means that it is very difficult to make money. With margins this low, there was agreement that there is little incentive for DBEs to perform on WSDOT consulting contracts. While well intentioned, this approach does not achieve the objective of creating opportunities for small firms. The strong recommendation from the interviews

¹⁶³ A similar program element was part of the court-approved DBE plan for the Illinois Department of Transportation. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at * 87 (Sept. 8, 2005) ("IDOT requires contractors seeking prequalification to maintain and produce solicitation records on all projects... Such evidence will assist IDOT in investigating and evaluating discrimination complaints.").

was to return to the prior approach of permitting small firms to submit their rates without a ceiling on their profits, and requiring audited financial statements only for larger projects. We second this revision.

We further suggest that WSDOT provide as part of its supportive services program access to construction accountants at reduced fees. DBEs that seek to perform larger and more complex projects need access to affordable assistance to meet the Department's legitimate requirement that firms be financially responsible.

Next, WSDOT should review qualification requirements for consultant selection, including prequalification criteria, to ensure that small professional services firms are not unfairly disadvantaged and that there is adequate competition for Department work. For example, equivalent experience, especially that gained by working for other government agencies, should be permitted to increase access for small firms and guard against unfair incumbent advantages.

Finally, we recommend engaging in the contract-specific goal setting process for consulting contracts estimated to be \$100,000 and above. The current threshold is \$250,000, but there may well be opportunities for DBE participation at lower levels.

Provide Information and Training to Bidders Regarding Program Compliance

Many prime contractors found the operations of the DBE program to be somewhat opaque. One approach to increase transparency would be to provide with the invitation for bid or request for proposal the scopes of work used by the Department to set the contract goal. This would provide guidance to prime firms on where to concentrate their good faith efforts, as well as increase transparency about how the DBE program functions. It will be necessary to stress that firms may meet the goal using firms outside these industries and that only soliciting firms in the listed industries does not *per se* constitute making good faith efforts to meet the goal.

Many general contractors reported that it was unclear what constitutes a "commercially useful function," the standards to document their good faith efforts to meet DBE contract goals, the process to request and document a substitution of a non-performing DBE, and other compliance issues. They stated that the standards for establishing good faith efforts varied depending on whom they asked at the Department. Uniformity of approach is essential to ensure fairness and support program administration.

To address this issue, WSDOT staff persons and prime contractors suggested regular training sessions to provide information on how to comply with the requirements of the program. To provide an incentive for prime firms to take the training, perhaps participation could be mandated as part of the prequalification process.

Enhance the Small Business Enterprise element

WSDOT has adopted a Small Business Enterprise ("SBE") program as an element to its DBE Program Plan to comply with the mandate of 49 C.F.R. § 26.39, which requires small business elements in the DBE program. To enhance this element, we recommend WSDOT implement a SBE target market.

Under this USDOT-approved approach, the Department would set aside some smaller or less complex contracts for bidding only by SBEs as prime contractors. WSDOT would have to determine the size limits for contracts and the types of contracts to be included. For example, maintenance contracts and consulting contracts below the goal setting threshold might be successfully procured using this method. SBE set-asides are especially useful for those industries that do not operate on a prime vendor-subcontractor model, such as consulting services, or contracts with few opportunities for subcontracting. If implemented on a fully race- and gender-neutral basis, this is a constitutionally acceptable method to increase opportunities for all small firms and is an example listed in 49 C.F.R. § 26.39.

A SBE element could also include additional assistance for the vendors, such as quick pay (e.g., invoicing every two weeks); reduced experience requirements; no holding of retainage, etc.

Many small firms endorsed this initiative, and some general contractors correctly noted that this is a way to reduce the pressure to set contract goals to meet WSDOT's overall annual DBE goals.

Continue and Enhance Supportive Services and Business Development Programs

The Department's current supportive services and technical assistance programs cover a wide array of topics and needs. We recommend the Department continue the programs' current elements and delivery systems. Possible enhancements could include focusing on Black construction and consulting firms to address their unique challenges and expand their capabilities as prime and subcontractors.

As is common with many agencies, the Study revealed that DBEs are receiving few contracts in several industry codes, especially in construction sub industries that have high entry barriers but are more profitable.¹⁶⁴ For example, Black-owned firms received no FHWA dollars in the Highway, Street and Bridge Construction NAICS code (237110). WSDOT should therefore place special focus on increasing outreach and provide supportive services to expand the types of work performed by DBEs.

Many general contractors and some WSDOT staff mentioned the need for DBEs to become more proficient in meeting the Department's requirements for invoicing and other contractual compliance responsibilities. In addition to targeted training on how to do business with WSDOT, the agency could develop forms for small firms to use for invoicing and documenting other requirements.

The need for accounting and legal services to DBEs was mentioned by all types of firms and WSDOT officials as a crucial element of increasing DBEs' capacities and reach. WSDOT should consider providing a roster of experienced construction accountants and attorneys, with the department subsidizing the fees to enable small firms to afford these needed services. Business development, marketing, estimating, etc., are important

¹⁶⁴ See Tables 4.15, 4.24 and 4.33.

business skills, but success in the transportation industry requires specialized expertise to grow firms beyond the initial “mom and pop” stage.

Finally, it would be useful to research the rates at which certified firms submit bids; their success in receiving contracts; and any barriers to their participation in the program or on Department contracts. Perhaps a survey of firms certified by the Washington Unified Certification Program could be used to elicit feedback about their experiences with the program and suggestions for program enhancements.

Develop a Bonding and Financing Program for SBEs

Access to bonding and working capital are the two of largest barriers to the development and success of DBEs and small firms because traditional underwriting standards have often excluded them. One approach that has proven to be effective for some agencies is to develop a Department-sponsored bonding and financing assistance program for DBEs and certified SBEs. This goes beyond the Department’s current provision of information about outside bonding resources to provide actual assistance to firms through a program consultant; it is not, however, a bonding guarantee program that places the state’s credit at risk or provides direct subsidies to participants. Rather, this concept brings the commitment of a surety to provide a bond and a lender to provide financing for firms that have successfully completed the program. Other agencies have reported significant increases in DBEs’ bonding capacities and ability to take on larger projects.

Adopt a DBE Mentor-Protégé Program

The Department should consider implementing a Mentor-Protégé Program (“MPP”), in conformance with 49 C.F.R. § 26.35 and the Guidelines of Appendix D to Part 26. In addition to the standards provided in Part 26, the General Counsel’s Office at USDOT has provided some additional guidance¹⁶⁵, and USDOT’s Office of Small Disadvantaged Business Utilization had adopted a pilot program¹⁶⁶ and sample documents.¹⁶⁷ A Program for federally-assisted contracts will require approval by FHWA.

DBEs and several large prime contractors welcomed this as a way to increase DBEs’ capacities by assisting DBEs to move into non-traditional work and/or compete outside the DBE program, through the provision of training and assistance from other firms. Skill sets such as estimating, understanding of and adherence to specifications, billing and scheduling, accounting, safety, marketing, and meeting prequalification standards are possible areas of focus.

The following elements reflect these regulatory requirements, USDOT guidelines and best practices:

- A description of the qualifications of the mentor, including the firm’s number of years of experience as a highway construction contractor or consultant; the

¹⁶⁵ <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers>.

¹⁶⁶ <http://www.dot.gov/osdbu/procurement-assistance/mentor-protege-pilot-program>.

¹⁶⁷ <http://cms.dot.gov/small-business/procurement-assistance/mentor-protege> program.

agreement to devote a specified number of hours per month to working with the protégé; and the qualifications of the lead individual responsible for implementing the development plan.

- A description of the qualifications of the protégé, including the firm's number of years of experience as a highway construction contractor or consultant; the agreement to devote a specified number of hours per month to working with the mentor; and the qualifications of the DBE owner(s).
- A Department-approved written development plan, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement, a schedule for meetings and development of action plans, and the services and resources to be provided by the mentor to the protégé. The assistance provided by the mentor must be detailed and directly relevant to WSDOT work. The development targets should be quantifiable and verifiable—such as increased bonding capacity, increased sales, increased areas of work specialty or prequalification, etc.—and reflect objectives that increase the protégé's capacities and expand its business areas and expertise.
- A long term and specific commitment between the parties, *e.g.*, 12 to 36 months.
- The use of any equipment or equipment rental must be detailed in the plan, and should be further covered by bills of sale, lease agreements, etc., and require prior written approval by the Department.
- Extra credit for the mentor's use of the protégé to meet a contract goal (*e.g.*, 1.25 percent for each dollar spent), with a limit on the total percentage that could be credited on a specific contract and on total credits available under the MPP.
- Any financial assistance by the mentor to the protégé must be subject to prior written approval by WSDOT, and must not permit the mentor to assume control of the protégé.
- A fee schedule to cover the direct and indirect cost for services provided by the mentor for specific training and assistance to the protégé.
- The development plan must contain a provision that it may be terminated by mutual consent or by WSDOT if the protégé no longer meets the eligibility standards for DBE certification; either party desires to be removed from the relationship; either party has failed or is unable to meet its obligations under the plan; the protégé is not progressing or is not likely to progress in accordance with the plan; the protégé has reached a satisfactory level of self-sufficiency to compete without resort to the plan; or the plan or its provisions are contrary to legal requirements.
- Submission of quarterly reports by the parties indicating their progress toward each of the plan's goals.

- Regular review by the Department of compliance with the plan and progress towards meeting its objectives. Failure to adhere to the terms of the plan or to make satisfactory progress would be grounds for termination from the Program.

We recognize that this level of direction and oversight will require additional resources. Close monitoring of the program will be critical, but agencies such as the Missouri Department of Transportation¹⁶⁸ and the Ohio Department of Transportation¹⁶⁹ as well as USDOT¹⁷⁰ have reported success with such a USDOT-approved approach.

Provide Information and Training to WSDOT Staff and Local Subrecipients Regarding Program Compliance

The DBE program is always evolving. We suggest that in the wake of this study and the recent changes in guidance and regulations, WSDOT conduct agency wide and local subrecipient training for appropriate staff regarding the program and compliance elements and issues. It is especially important that local agencies fully understand and commit to the program and fulfill their monitoring responsibilities. Topics could include understanding certification eligibility requirements; goal setting; evaluating good faith efforts and commercially useful function; contract performance compliance and documentation; Title VI compliance; outreach and supportive services; and USDOT reporting. This is especially important for local agencies, some of which felt that they received insufficient guidance from headquarters.

Increase Program Resources

Interviewees based outside the Seattle-Tacoma area stated that they do not receive enough information and assistance with accessing the DBE program (for DBEs) and complying with the program (non-DBEs). We suggest the Department create liaisons in each District reporting to the Director of Civil Rights. These liaisons should convene working groups for their districts to address DBE program concerns and provide input to enhance the success of the program.

B. Continue to Implement a Narrowly Tailored DBE Program

The Study's results support the determination that WSDOT has a strong basis in evidence to continue to implement a fully race-conscious DBE program that includes all groups for race-conscious relief for its USDOT-funded contracts. The record— both quantitative and anecdotal— establishes that minorities and White women in the Department's market area continue to experience significant disparities in and barriers to their fair and equal access to the Department's federal-aid contracts, state-funded contracts and the transportation industry in Washington State. Even with the use of contract goals, DBEs suffered substantively and statistically significant disparities on federal-aid and state-funded jobs. They also continue to experience discrimination in

¹⁶⁸ www.modot.org/ecr.

¹⁶⁹ <http://www.fhwa.dot.gov/resourcecenter/teams/civilrights>.

¹⁷⁰ <http://www.dot.gov/osdbu/news/us-dots-first-mentor-protege-participants-reach-six-month-mark>.

access to networks and resources necessary for business success. This was true for all racial and ethnic groups and White females, leading to the inference that discrimination is a significant factor in those disparities. Without the use of contract goals to level the playing field, WSDOT might function as a “passive participant” in the “market failure” of discrimination.

Use the Study to Set the Narrowly Tailored Triennial DBE Goal

49 C.F.R. Part 26 requires that WSDOT engage in a two-step process to set a triennial goal for DBE participation in its federally-funded projects. To determine the Step 1 base figure for the relative availability of DBEs required by § 26.45(c),¹⁷¹ we suggest the Department use the DBE weighted availability findings in Chapter IV¹⁷² of 19.0 percent availability for FHWA-funded contracts and 11.0 percent availability for FTA-funded contracts. Our custom census is an alternative method permitted under § 26.45(c)(5), and is the only approach that has received repeated judicial approval.

To perform the Step 2 analysis required by § 26.45(d) to adjust the step 1 figure to reflect the level of DBE availability that would be expected in the absence of discrimination, WSDOT can use the statistical disparities in Chapter V in the rates at which DBEs form businesses. This is the type of “demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.”¹⁷³

Use the Study to Set DBE Contract Goals

As discussed in Chapter II, WSDOT’s constitutional responsibility is to ensure that its implementation of 49 C.F.R. Part 26 is narrowly tailored to its geographic and procurement marketplace. In the Ninth Circuit, this means examining whether each racial and ethnic group and white women have suffered discrimination in WSDOT’s market.¹⁷⁴

The study found that spending on federally-funded jobs for all groups (other than Native Americans¹⁷⁵ on FHWA contracts) did not reach parity with non-DBEs, even with the application of DBE contract goals.¹⁷⁶ These results were statistically significant.

¹⁷¹ Tables

¹⁷² Table 4.42 (FHWA-funded contracts) and Table 4.51 (FTA-funded contracts).

¹⁷³ 49 CFR § 26.45(d)(3); *see also* §23.51.

¹⁷⁴ 407 F.3d at 997-998 (“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. ... Moreover, even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”).

¹⁷⁵ Under the federal regulations, Native American-owned firms include businesses owned by tribes, as opposed to individuals as required for other racial groups. Tribal corporations do not have to meet the personal net worth limits for owners as do other DBEs, and several contracts were awarded to these corporations. 49 C.F.R. § 26.73(h).

¹⁷⁶ Tables 4.67 and 4.68

Disparities were especially low for Black-owned firms. On state-funded contracts for which DBE goals were not established, DBEs experienced a disparity ratio of 33.5 percent, including a ratio of 34.3 percent for White women.¹⁷⁷ The clear inference is that in the absence of contract goals as demonstrated by utilization on state contracts, the playing field for DBEs on federally-assisted contracts would not be level.

In our judgment, these results fit squarely within the framework of *Western States* by providing the type of quantitative and qualitative data that were totally lacking in that case.¹⁷⁸ This report presents statistical evidence of WSDOT's utilization of available DBEs in its market, as well as the economy-wide and unremediated markets data approved by the Ninth Circuit.¹⁷⁹ Business owners provided strong anecdotal evidence of the continuing existence of race- and gender-based barriers, including bias, stereotyping, harassment, exclusion from networks and unfair performance standards. The picture drawn by these results is of a playing field for WSDOT work that is still not level. These stark findings suggest that WSDOT may infer that the cause is the continued effects of discrimination on the basis of race and gender. Therefore, to ensure it is not a passive participant in this discriminatory market, we recommend that the Department continue to utilize race-conscious contract goals and include all groups for credit towards meeting contract goals.

The highly detailed availability estimates in Chapter IV can serve as the starting point for narrowly tailored contract goal setting that reflects the percentage of available DBEs as a percentage of the total pool of available firms. WSDOT should weigh the estimated scopes of the contract by the availability of DBEs in those scopes, and then adjust the result based on geography and current market conditions (for example, the volume of work currently underway in the market, the entrance of newly certified firms, specialized nature of the project, etc.).

The recently purchased B2GNow electronic data collection and monitoring system contains a contract goal setting module developed to utilize the study data as the starting point. Written procedures detailing the implementation of contract goal setting should be developed and disseminated so that all contracting actors understand the methodology. These should include counting all dollars as part of contract goal setting, and permitting prime vendors to count any DBE certified in the relevant NAICS code at the time of bid submission without reference to a separate coding system or qualifications process.

C. Develop Performance Measures for Program Success

WSDOT should develop quantitative performance measures for certified firms and the overall success of the program to evaluate its effectiveness in reducing the systemic barriers identified by the study. In addition to meeting the triennial goal, possible benchmarks might be:

¹⁷⁷ Table 4.69.

¹⁷⁸ 407 F3d. at 991-992.

¹⁷⁹ See Chapter II.

- The number of bids or proposals and the dollar amount of the awards, and the goal shortfall where the bidder submitted good faith efforts to meet the contract goal;
- The number and dollar amount of bids or proposals rejected as non-responsive for failure to make good faith efforts to meet the goal;
- The number, type, and dollar amount of DBE substitutions during contract performance;
- Increased bidding by certified firms;
- Increased prime contract awards to certified firms; and
- Increased “capacity” of certified firms as measured by bonding limits, size of jobs, profitability, etc.

APPENDIX A: FURTHER EXPLANATION OF THE MULTIPLE REGRESSION ANALYSIS

As explained in the Report, the multiple regression statistical techniques seek to explore the relationship between a set of independent variables and a dependent variable. The following equation is a way to visualize this relationship:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 and β_3 are coefficients, and μ is the random error term.

The statistical technique seeks to estimate the values of the constant term and the coefficients.

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, education and the state of residence were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. An additional factor was included: because of our interest in the impact of race and gender on wages and earnings, we made the assumption that the impact of those variables might vary from state to state (*i.e.*, the impact of being Black on wages is different in Missouri than it is in Iowa). We therefore developed new variables that would show the interaction between race and gender and one particular state. Since this Report examined Washington, that was the state employed. The coefficient for the new variable showed the impact of being a member of that race or gender in Missouri. Consequently, the impact of race or gender on wages or earnings had two components: the national coefficient and the state-specific impact.

APPENDIX B: FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis. While there are many differences between the underlying estimation techniques used in the probit regression and the standard regression analysis, the main differences from the layperson's point of view lie in the nature of the dependent variable and the interpretation of the coefficients associated with the independent variables.

The basic model looks the same:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 , and β_3 are coefficients, and μ is the random error term.

In the standard regression model, the dependent variable is continuous and can take on many values. In the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. For instance, in the standard regression analysis, we may be exploring the impact of a change in some independent variable on wages. In this case, the value of one's wage might be any non-negative number. In contrast, in the probit regression analysis, the exploration might be the impact of a change in some independent variable on the probability that some event occurs. For instance, the question might be how an individual's gender impacts the probability of that person forming a business. In this case, the dependent variable has two values: zero, if a business is not formed; one, if a business is formed.

The second significant difference – the interpretation of the independent variables' coefficients – is fairly straight-forward in the standard regression model: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.¹⁸⁰ However, in the probit model, the initial coefficients cannot be interpreted this way. One additional step - which can be computed easily by most statistical packages - must be undertaken in order to yield a result that indicates how the change in the independent variable affects the probability of an event (e.g., business formation) occurs. For instance, using our previous example of the impact on gender on business formation, if the independent variable was WOMAN (with a value of 0 if the individual was male and 1 if the individual was female) and the final transformation of the coefficient of WOMAN was -0.12, we would interpret this to mean that women have a 12% lower probability of forming a business compared to men.

¹⁸⁰ The exact interpretation depends upon the functional form of the model.

APPENDIX C: SIGNIFICANCE LEVELS

Many tables in this Report contain asterisks indicating a number has statistical significance at 0.001 or 0.01 levels and the body of the report repeats these descriptions. While the use of the term seems important, it is not self-evident what the term means. This Appendix provides a general explanation of significance levels.

This Report seeks to address the question whether non-Whites and White women received disparate treatment in the economy relative to White males. From a statistical viewpoint, this primary question has two sub-questions:

- What is the relationship between the independent variable and the dependent variable?
- What is the probability that the relationship between the independent variable and the dependent variable is equal to zero?

For example, an important question facing WSDOT as it explores whether each racial and ethnic group and White women continues to experiences discrimination in its markets is do non-Whites and White women receive lower wages than White men? As discussed in Appendix A, one way to uncover the relationship between the dependent variable (*e.g.*, wages) and the independent variable (*e.g.* non-Whites) is through multiple regression analysis. An example helps to explain this concept.

Let us say this analysis determines that non-Whites receive wages that are 35% less than White men after controlling for other factors, such as education and industry, which might account for the differences in wages. However, this finding is only an estimate of the relationship between the independent variable (*e.g.*, non-Whites) and the dependent variable (*e.g.*, wages) – the first sub-question. It is still important to determine how accurate is that estimation, that is, what is the probability the estimated relationship is equal to zero – the second sub-question.

To resolve the second sub-question, statistical hypothesis tests are utilized. Hypothesis testing assumes that there is no relationship between belonging to a particular demographic group and the level of economic utilization relative to White men (*e.g.*, non-Whites earn identical wages compared to White men or non-Whites earn 0% less than White men). This sometimes called the null hypothesis. We then calculate a confidence interval to find explore the probability that the observed relationship (*e.g.*, - 35%) is between 0 and minus that confidence interval.¹⁸¹ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. Hence, a statistical significance of 99% would have a broader confidence interval than statistical significance of 95%. Once a confidence interval is established, if - 35% lies outside of that interval, we can assert the observed relationship (*e.g.*, 35%) is accurate at the appropriate level of statistical significance.

¹⁸¹ Because 0 can only be greater than -35%, we only speak of “minus the confidence level”. This is a one-tailed hypothesis test. If, in another example, the observed relationship could be above or below the hypothesized value, then we would say “plus or minus the confidence level” and this would be a two-tailed test.