



COMMONWEALTH of VIRGINIA

Department of Small Business and Supplier Diversity

To: The Honorable Carrie H. Chenery
Secretary of Commerce and Trade

House of Appropriations & Senate Finance Committees

From: Willis A. Morris, Director 
Department of Small Business and Supplier Diversity

Date: February 17, 2026

CC: Laura L. Wilborn, Division of Legislative Automated Systems

Subject: 2025 Commonwealth Disparity Study

The Appropriation Act – Item 111 I. (2025 Session) requires the Department of Small Business and Supplier Diversity (SBSD) to produce a new statewide disparity study. As a result, the Department contracted with BBC Research and Consulting (BBC) to assess procurement opportunities in Virginia for small, micro, women-owned, minority-owned, and service-disabled veteran-owned businesses.

The purpose of the study was to examine whether there are any disparities or differences between the utilization or participation of small and diverse businesses and the availability of small and diverse businesses. The enclosed disparity study analyzed contracting in Virginia from July 1, 2019 to June 30, 2024. Based on the results of the study, BBC has made recommendations to address the study outcomes. The recommendations made in this report are not the opinion of the Department of Small Business and Supplier Diversity.

Thank you very much and please let us know if you have any questions regarding this report.



2025 Commonwealth of Virginia Disparity Study

Final Report

Final Report

February 2026

2025 Commonwealth of Virginia Disparity Study

Prepared for

Department of Small Business and Supplier Diversity
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CHAPTER ES.

Executive Summary

BBC Research & Consulting (BBC) conducted a *disparity study* to evaluate whether small businesses and microbusinesses as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) face any barriers in the contracts and procurements the Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) awarded. As part of the disparity study, we examined whether there are any *disparities*, or differences, between:

- The percentage of contract dollars the Commonwealth spent with small and diverse businesses during the *study period*, which was July 1, 2019 through June 30, 2024 (i.e., *utilization or participation*); and
- The percentage of contract dollars one might expect the Commonwealth to award to those businesses based on their availability to perform specific types and sizes of the prime contracts and subcontracts the organization awards (i.e., *availability*).

The Commonwealth's Department of Small Business and Supplier Diversity (SBSD) operates the Small, Women-owned, and Minority-owned Business (SWaM) Program to encourage the participation of small and diverse businesses in its work. Information from the disparity study will help the Commonwealth and SBSBD better understand outcomes for small and diverse businesses in its contracts and procurements, and help state agencies and HEIs address any substantial disparities between the participation and availability of those businesses for that work. Moreover, if the Commonwealth determines that it is appropriate use *race- and gender-based* measures as part of its contracting and procurement processes to address any substantial disparities for minority- and woman-owned businesses (e.g., awarding individual projects with the use of contract-specific participation goals), then the organization can rely on information from the disparity study to help ensure that its use of such measures adheres to the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

A. Disparity Study Results

BBC analyzed approximately \$27.1 billion worth of contracts and procurements for the construction, professional services, and non-professional services and goods contracts and procurements the Commonwealth awarded during the study period to measure the participation and availability of small and diverse businesses for that work to assess whether any disparities exist between those measures.¹

¹ BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

We summarize key results from those analyses below and identify sections of the report that provide more details about the methodology and results of each analysis.

1. Availability analysis (Chapter 6 and Appendix C of the report). BBC conducted a *custom census availability analysis* to estimate the availability of small and diverse businesses for Commonwealth work while accounting for the specific characteristics of relevant businesses that exist in the state of Virginia (the *relevant geographic marketplace*, or RGMA) and the specific characteristics of the relevant prime contracts and subcontracts the Commonwealth awards.

Figure ES-1 presents the availability of each relevant group of small and diverse businesses for all relevant contracts and procurements state agencies awarded during the study period, considered together. The availability of small businesses for state agency work is 88.5 percent, indicating that one might expect state agencies to award approximately 88.5 percent of its project dollars to small businesses based on the availability of those businesses for that work. The overall availability of microbusinesses is 40.4 percent.

The overall availability of minority-owned businesses considered together is 23.3 percent. Availability results differed for the individual minority-owned business groups we studied:

- The availability of Asian-owned businesses is 10.5 percent.
- The availability of Black-owned businesses is 7.7 percent.
- The availability of Hispanic-owned businesses is 4.7 percent.
- The availability of Native American-owned businesses is 0.4 percent.

The overall availability of White woman-owned businesses for state agency work is 13.6 percent, and the overall availability of SDV-owned businesses for state agency work is 7.1 percent.

Figure ES-1.
Availability estimates for state agency work

Note:
Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	
Business size	
Small business	88.5 %
Microbusiness	40.4 %
Race and gender	
Minority	23.3 %
Asian	10.5 %
Black	7.7 %
Hispanic	4.7 %
Native American	0.4 %
White woman	13.6 %
Veteran status	
Service-disabled veteran	7.1 %

BBC also estimated the availability of small and diverse businesses for tier 2 and tier 3 HEI contracts and procurements.² Tier 2 HEIs have a memorandum of understanding with the Commonwealth that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology. In contrast, tier 3 HEIs have complete autonomy in their contracting and procurement. As shown in Figure ES-2, the overall availability of different business groups for tier 2 HEI work is as follows:

- The overall availability of small businesses is 89.1 percent.
- The overall availability of microbusinesses is 45.4 percent.
- The availability of minority-owned businesses considered together for all tier 2 HEI work is 17.7 percent. Availability results for that work differed for the individual minority-owned business groups we studied:
 - The availability of Black-owned businesses is 5.9 percent.
 - The availability of Hispanic-owned businesses is 5.9 percent.
 - The availability of Asian-owned businesses is 5.5 percent.
 - The availability of Native American-owned businesses is 0.4 percent.
- The overall availability of White woman-owned businesses is 11.9 percent.
- The overall availability of SDV-owned businesses is 3.2 percent.

The overall availability of different business groups for tier 3 HEI work is as follows:

- The overall availability of small businesses is 88.2 percent.
- The overall availability of microbusinesses is 38.5 percent.
- The availability of minority-owned businesses considered together for all tier 3 HEI work is 19.1 percent. Availability results for that work differed for the individual minority-owned business groups we studied:
 - The availability of Asian-owned businesses is 6.7 percent.
 - The availability of Hispanic-owned businesses is 6.5 percent.
 - The availability of Black-owned businesses is 4.9 percent.
 - The availability of Native American-owned businesses is 1.0 percent.
- The overall availability of White woman-owned businesses is 9.5 percent.
- The overall availability of SDV-owned businesses is 3.0 percent.

² Tier 2 HEIs are Christopher Newport University, Longwood University, Norfolk State University, Old Dominion University, Radford University, University of Mary Washington, Virginia Community College System, Virginia Military Institute, and Virginia State University. Tier 3 HEIs are the University of Virginia, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, James Madison University, George Mason University, and the College of William & Mary.

Figure ES-2.
Availability estimates for
HEI work

Note:

Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	HEI Tier	
	Tier 2	Tier 3
Business size		
Small business	89.1 %	88.2 %
Microbusiness	45.4 %	38.5 %
Race and gender		
Minority	17.7 %	19.1 %
Asian	5.5 %	6.7 %
Black	5.9 %	4.9 %
Hispanic	5.9 %	6.5 %
Native American	0.4 %	1.0 %
White woman	11.9 %	9.5 %
Veteran status		
Service-disabled veteran	3.2 %	3.0 %

2. Utilization analysis (Chapter 7 of the report). BBC also calculated the participation of small and diverse businesses in the relevant contracts and procurements the Commonwealth awarded during the study period.³ As shown in Figure ES-3, state agencies awarded 59.0 percent of relevant project dollars to small businesses. The overall participation of microbusinesses in state agency work was 18.6 percent.

Additionally, state agencies awarded 10.7 percent of relevant project dollars to minority-owned businesses considered together. Individual minority-owned business groups exhibited different levels of participation in state agency work:

- The participation of Asian-owned businesses was 8.3 percent.
- The participation of Black-owned businesses was 1.2 percent.
- The participation of Hispanic-owned businesses was 1.1 percent.
- The participation of Native American-owned businesses was 0.1 percent.

In addition, state agencies awarded 4.1 percent of relevant project dollars to White woman-owned businesses and 0.8 percent to SDV-owned businesses.

³ The Commonwealth tracks the participation of small and diverse businesses in its contracting and procurement through its SWaM expenditure dashboard. The percentage of certified small business participation in Commonwealth contracts and procurements reported as part of the disparity study does not align with the percentage reported by the SWaM expenditure dashboard for various reasons. The Commonwealth has established a hierarchy for reporting participation by SWaM-certified businesses, and it does not count any single business in multiple categories (i.e., if a business is certified as a small business and a minority-owned business, the Commonwealth would report that participation as minority-owned business participation; in contrast, BBC would report that participation as both small business participation and minority-owned business participation). In addition, there are various differences in BBC and the Commonwealth's determination of discretionary spending. See Chapter 5 for information about the types of contracts and procurements that were not considered in-scope as part of the disparity study and the volumes of dollars included in each of those categories.

Figure ES-3.
Utilization results for Commonwealth projects

Note:
 Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	
Business size	
Small business	59.0 %
Microbusiness	18.6 %
Race and gender	
Minority	10.7 %
Asian	8.3 %
Black	1.2 %
Hispanic	1.1 %
Native American	0.1 %
White woman	4.1 %
Veteran status	
Service-disabled veteran	0.8 %

BBC also assessed the participation of small and diverse businesses in tier 2 and tier 3 HEI contracts and procurements. As shown in Figure ES-4, the overall participation of different business groups in tier 2 HEI work was as follows:

- The overall participation of small businesses was 68.9 percent.
- The overall participation of microbusinesses was 14.3 percent.
- The participation of minority-owned businesses considered together for all tier 2 HEI work was 7.6 percent. Participation in that work differed for the individual minority-owned business groups we studied:
 - The participation of Asian-owned businesses was 1.1%.
 - The participation of Black-owned businesses was 5.1%.
 - The participation of Hispanic-owned businesses was 1.1%.
 - The participation of Native American-owned businesses was 0.3%.
- The overall participation of White woman-owned businesses was 7.7 percent.
- The overall participation of SDV-owned businesses was 0.6 percent.

The overall participation of different business groups in tier 3 HEI work was as follows:

- The overall participation of small businesses was 74.9 percent.
- The overall participation of microbusinesses was 20.4 percent.
- The participation of minority-owned businesses considered together for all tier 3 HEI work was 3.3 percent. Participation in that work differed for the individual minority-owned business groups we studied:
 - The participation of Asian-owned businesses was 1.0%.
 - The participation of Black-owned businesses was 1.0%.
 - The participation of Hispanic-owned businesses was 1.2%.

- The participation of Native American-owned businesses was 0.1%.
- The overall participation of White woman-owned businesses was 4.7 percent.
- The overall participation of SDV-owned businesses was 0.3 percent.

Figure ES-4.
Utilization results for HEI work

Note:

Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	HEI Tier	
	Tier 2	Tier 3
Business size		
Small business	68.9 %	74.9 %
Microbusiness	14.3 %	20.4 %
Race and gender		
Minority	7.6 %	3.3 %
Asian	1.1 %	1.0 %
Black	5.1 %	1.0 %
Hispanic	1.1 %	1.2 %
Native American	0.3 %	0.1 %
White woman	7.7 %	4.7 %
Veteran status		
Service-disabled veteran	0.6 %	0.3 %

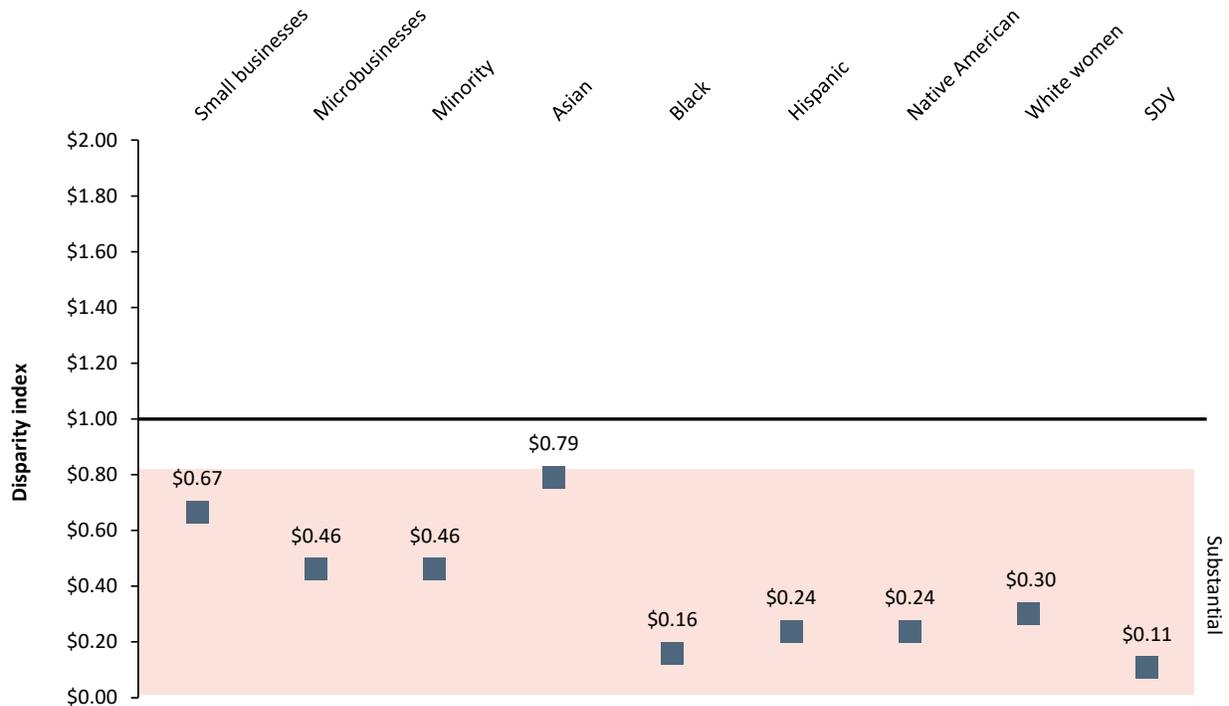
3. Disparity analysis (Chapter 8 and Appendix D). The crux of the disparity study was to assess whether any disparities exist between the participation and availability of small and diverse businesses for Commonwealth work. A *substantial disparity* between participation and availability—that is, a disparity index of less than \$0.80—indicates that the group is considered to have been substantially underutilized relative to its availability. Many courts have considered substantial disparities as inferences of discrimination against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-based measures*—to address corresponding barriers (for details, see Chapter 2).

Figure ES-5 presents disparity indices for small and diverse businesses for all relevant prime contracts and subcontracts state agencies awarded during the study period. As shown in Figure ES-5, small businesses exhibited a disparity index of \$0.67 for all relevant contracts and procurements state agencies awarded during the study period, indicating a disparity where they awarded \$0.67 to small businesses for every \$1.00 one might expect state agencies to award to those businesses based on their availability for state agency work. Microbusinesses exhibited a disparity index of \$0.46 for all state agency work considered together.

Minority-owned businesses considered together exhibited a disparity index of \$0.46 for all relevant contracts and procurements state agencies awarded during the study period. Asian-owned businesses (disparity index of \$0.79), Black-owned businesses (disparity index of \$0.16), Hispanic-owned businesses (disparity index of \$0.24), and Native American-owned businesses (disparity index of \$0.24) exhibited substantial disparities for state agency work.

White woman-owned businesses exhibited a substantial disparity (disparity index of \$0.30) for all relevant contracts and procurements state agencies awarded during the study period. SDV-owned businesses also exhibited a substantial disparity (disparity index of \$0.11) for state agency work.

Figure ES-5.
Overall disparity analysis results for state agency work



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

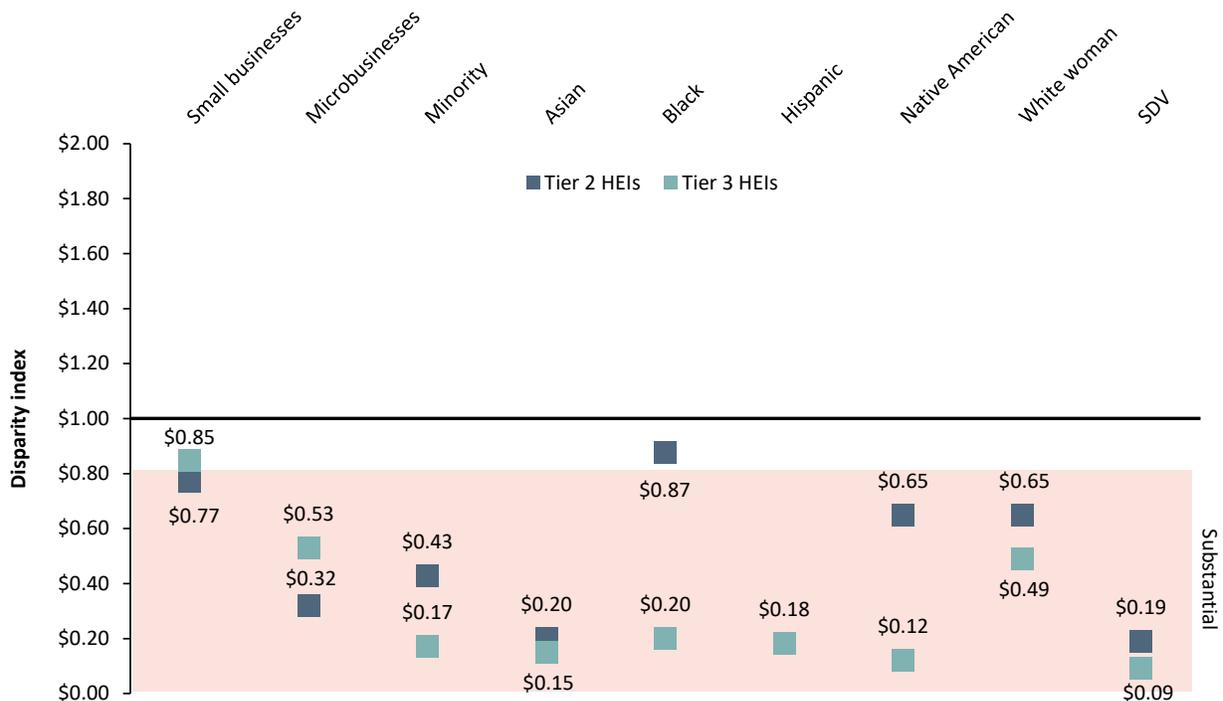
BBC also measured overall disparities of small and diverse businesses for tier 2 and tier 3 HEI contracts and procurements. As shown in Figure ES-6, overall disparity indices of different business groups for tier 2 HEI work are as follows:

- Small businesses exhibited a substantial disparity with a disparity index of \$0.77.
- Microbusinesses exhibited a substantial disparity with a disparity index of \$0.32.
- Minority-owned businesses considered together exhibited a substantial disparity with a disparity index of \$0.43 for all tier 2 HEI work. There were some differences in disparities when considering each individual minority-owned business group separately:
 - Asian-owned businesses (disparity index of \$0.20), Hispanic-owned businesses (disparity index of \$0.18), and Native American-owned businesses (disparity index of \$0.65) exhibited substantial disparities for tier 2 HEI work.
 - In contrast, Black-owned businesses exhibited a disparity, though not a substantial disparity, for tier 2 HEI work (disparity index of \$0.87).
- White woman-owned businesses exhibited a substantial disparity with a disparity index of \$0.65.
- SDV-owned businesses exhibited a substantial disparity with a disparity index of \$0.19.

The overall disparity indices of different business groups for tier 3 HEI work are as follows:

- Small businesses exhibited a disparity, though not a substantial disparity, with a disparity index of \$0.85.
- Microbusinesses exhibited a substantial disparity with a disparity index of \$0.53.
- Minority-owned businesses considered together exhibited a disparity index of \$0.17 for all tier 3 HEI work. Each individual minority-owned business group exhibited substantial disparities for tier 3 HEI work, though there were some differences in disparities when considering each individual minority-owned business group separately:
 - Asian-owned businesses exhibited a disparity index of \$0.15.
 - Black-owned businesses exhibited a disparity index of \$0.20.
 - Hispanic-owned businesses exhibited a disparity index of \$0.18.
 - Native American-owned businesses exhibited a disparity index of \$0.12.
- White woman-owned businesses exhibited a substantial disparity with a disparity index of \$0.49.
- SDV-owned businesses exhibited a substantial disparity with a disparity index of \$0.09.

Figure ES-6.
Overall disparity analysis results for HEI work



Note: For more detail see Figures D-30 and D-37 in Appendix D.

a. Comparison across project sets. BBC assessed disparities across numerous sets of projects associated with Commonwealth work. Figure ES-7 presents a visualization of various state agency project sets for which relevant small and diverse business groups exhibited substantial disparities, as indicated by black circles. Figure ES-8 presents a visualization of various HEI project sets for which relevant small and

diverse business groups exhibited substantial disparities. As shown in Figures ES-7 and ES-8, all relevant small and diverse business groups exhibited substantial disparities for various project sets BBC examined as part of the disparity study.

Figure ES-7.
Substantial disparities observed for state agency work

Contract set	Business Group									
	Small	Micro	Minority	Asian	Black	Hispanic	Native American	White woman	SDV	
1) All work	●	●	●	●	●	●	●	●	●	
2) Prime contracts	●	●	●	●	●	●	●	●	●	
3) Subcontracts			●		●	●	●	●	●	
4) Construction			●	●	●	●	●	●	●	
5) Professional services	●	●	●		●	●	●	●	●	
6) Non-professional services and goods	●	●	●		●	●	●	●	●	
7) Large prime contracts	●	●	●	●	●	●	●	●	●	
8) Small prime contracts	●	●	●	●	●	●	●	●	●	
9) Micro prime contracts	●	●	●	●	●	●	●	●	●	
10) Hampton Roads region	●	●	●	●	●	●	●	●	●	
11) Southern region	●	●	●	●	●	●	●	●	●	
12) Southwest region	●	●	●	●	●	●	●	●	●	
13) West Central region		●	●	●	●	●	●	●	●	
14) Central region	●	●	●		●	●	●	●	●	
15) Valley region	●	●	●	●	●	●		●	●	
16) Northern region	●	●	●	●	●	●	●	●	●	
17) Eastern region	●	●	●	●	●	●	●		●	
18) Eastern Shore region			●	●	●	●	●	●	●	

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

Figure ES-8.
Substantial disparities observed for HEI work

Contract set	Business Group									
	Small	Micro	Minority	Asian	Black	Hispanic	Native American	White woman	SDV	
1) Tier 2 overall	●	●	●	●		●	●	●	●	
2) Tier 3 overall		●	●	●	●	●	●	●	●	
3) University of Virginia		●	●	●	●	●	●	●	●	
4) Virginia Polytechnic Institute & State University		●	●	●	●	●	●	●	●	
5) Virginia Commonwealth University	●	●	●	●	●	●	●	●	●	
6) George Mason University	●	●	●	●	●	●	●	●	●	
7) James Madison University		●	●	●	●	●	●	●	●	
8) College of William & Mary		●	●	●	●	●	●	●	●	

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

b. Comparisons to 2020 Commonwealth disparity study. BBC last conducted a disparity study for the Commonwealth in 2020. It is instructive to compare disparity indices for small and diverse businesses in

state agency work between the 2020 and 2025 disparity studies to assess whether outcomes are improving for those businesses in state agency work over time.

Since the 2020 disparity study was conducted, BBC made two relevant changes in methodology:

- The utilization analyses in the 2025 study focused only on businesses that had a location in the RGMA. In the 2020 study, BBC included businesses outside of the RGMA as part of the utilization analysis.
- As part of the 2025 study, BBC used Markov Chain Monte Carlo (MCMC) simulations to improve the accuracy of the availability analysis to better account for random error or potential for unintended bias (see Chapter 6 for more details on MCMC analyses). The availability estimates reported in Chapter 6 are the availability estimates we observed adjusted for results from the MCMC process. The 2020 disparity study did not include an MCMC analysis as part of the availability analysis.

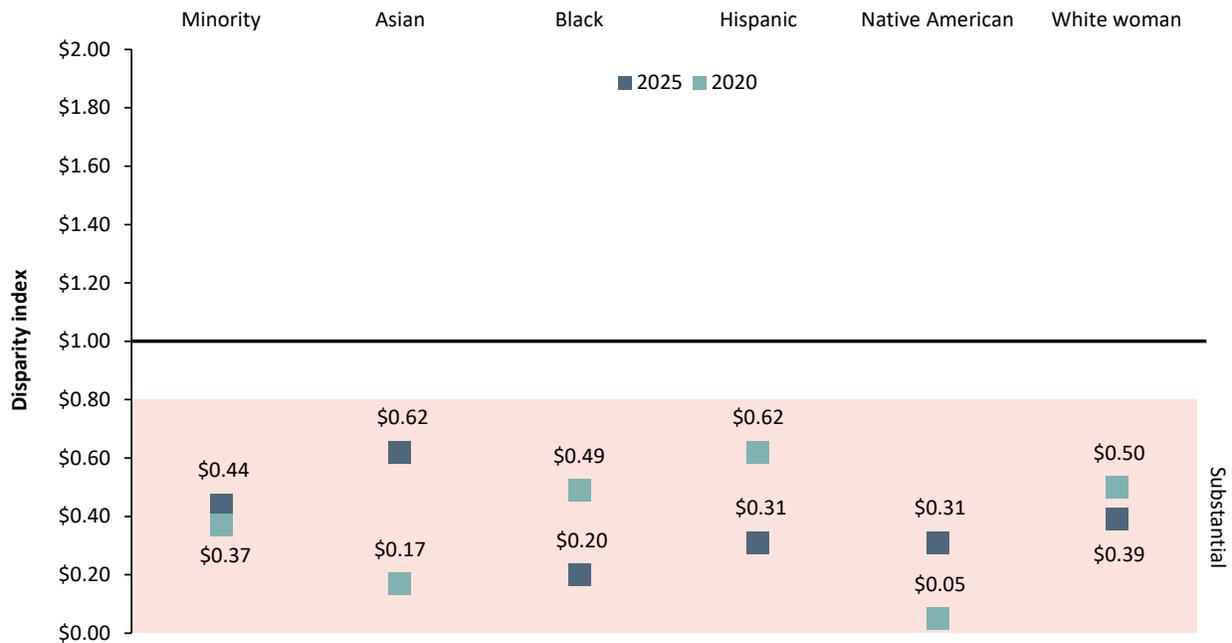
To more accurately assess changes in disparity results for minority- and woman-owned businesses since 2020, BBC presents 2025 disparity results in Figure ES-9 based on availability estimates that have *not* undergone the MCMC analysis and utilization results that include businesses both within and outside the RGMA.

Figure ES-9 presents overall disparity indices for minority- and woman-owned business groups for all relevant state agency projects considered together from the 2020 and 2025 disparity studies. As shown in Figure ES-9, minority-owned businesses considered together exhibited smaller disparities in 2025 (disparity index of \$0.44) than in 2020 (disparity index of \$0.37). Disparity analysis results differed by individual minority-owned business group and study year:

- Asian-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.62) than in 2020 (disparity index of \$0.17).
- Black-owned businesses exhibited a larger disparity in 2025 (disparity index of \$0.20) than in 2020 (disparity index of \$0.49).
- Hispanic-owned businesses exhibited a larger disparity in 2025 (disparity index of \$0.31) than in 2020 (disparity index of \$0.62).
- Native American-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.31) than in 2020 (disparity index of \$0.05).

White woman-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.39) than in 2020 (disparity index of \$0.50).

Figure ES-9.
Overall disparity indices from 2020 and 2025 disparity studies



B. Guidance (Chapter 11 of the report)

The disparity study provides substantial information that the Commonwealth could examine as it considers potential refinements to its implementation of the SWaM Program and other efforts to further encourage the participation of small and diverse businesses in its contracts and procurements. BBC presents several recommendations for the Commonwealth’s consideration.

1. Certification. SBSD certifies small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses, as part of its SWaM Program. Results from the disparity study may suggest that businesses are unaware of the SWaM Program, that certification is a barrier to some businesses that would qualify, or perhaps that businesses may not see benefits to obtaining SWaM certification. The Commonwealth could consider measures it could take to ensure that its certification processes are accessible, efficient, and aligned with the Commonwealth’s broader inclusion objectives. In particular, the Commonwealth could consider:

- Expanding education and awareness of its SWaM Program to encourage more businesses to seek out certification and participate in the program measures; and
- Re-evaluating its certification criteria to ensure that only businesses that are truly small meet the agency’s definition and thus can benefit from program measures reserved for small businesses.

2. Small business support. The Commonwealth already uses a variety of race- and gender-neutral program measures to encourage the participation of all small businesses in its contracts and procurements. To address the disparities that small businesses and microbusinesses experience in its work, the Commonwealth could also explore additional program measures targeted toward small businesses and microbusinesses, with measures tailored to each size tier. In particular, the Commonwealth could consider:

- Refining its use of set asides to ensure that small business set asides are effectively encouraging the participation of small businesses and microbusinesses; and
- Setting contracting goals for *small business* participation on the individual contracts and procurements it awards.

3. Business development. The Commonwealth could consider expanding its program measures designed to support small and diverse businesses by expanding business development opportunities specifically tailored to helping these businesses build capacity and perform work for the Commonwealth and other public sector organizations. In particular, the Commonwealth could consider:

- Expanding its networking and outreach efforts to introduce new businesses to work opportunities;
- Expanding technical assistance programs, including business incubators, administrative assistance, and bid and proposal support; and
- Re-establishing a Mentor-Protégé Program as a permanent statewide measure to introduce new businesses to prime contractors and Commonwealth decision makers, guide growing businesses, and increase the capacities of these businesses to perform Commonwealth work as prime contractors or prime consultants themselves.

4. Procurement policies. The Commonwealth could consider refining its contract and procurement policies in ways that make Commonwealth work more accessible to a greater number of businesses, including small and diverse businesses. In particular, the Commonwealth could consider:

- Unbundling large contracts into smaller contract elements; and
- Exploring different ways to engage with businesses that have not participated in its work in the past.

5. Monitoring and data collection. The Commonwealth currently maintains comprehensive data on the participation of certified SWaM businesses in Commonwealth work, which it reports as part of its SWaM Expenditure Dashboard. The Commonwealth could continue to collect this information, as well as consider how it can monitor the success of its contracting inclusion methods in greater depth and detail. In particular, the Commonwealth could consider:

- Requiring that all state agencies gather subcontractor data on all subcontractors, regardless of SWaM certification status;
- Requiring bidders and proposers to report whether they plan to work with subcontractors on the project, and if they are planning to do so, provide information about each subcontractor, regardless of certification status, as part of their bid and proposal submissions;
- Strengthening SWaM Program compliance measures with state agencies and prime contractors; and
- In addition to tracking the overall volume and percentage of dollars the Commonwealth awards to small and diverse businesses, tracking other Key Performance Indicators that better reflect all the value that the SWaM Program provides.

6. Race- and gender-based measures. The Commonwealth currently only uses race- and gender-neutral program measures as part of its implementation of the SWaM Program, which are designed to encourage small business participation in Commonwealth work, regardless of the race/ethnicity or gender of business owners. However, disparity study results as well as qualitative evidence collected as part of the disparity study indicate that the Commonwealth could consider whether race- and gender-based measures would help address the disparities that minority- and woman-owned businesses in particular face as part of the organization's contracting and procurement processes. In particular, the Commonwealth should consider whether it has maximized its use of race- and gender-neutral measures, including fully leveraging existing race- and gender-neutral measures and considering whether additional measures might be sufficient to address disparities without the use of race or gender classifications. If the Commonwealth decides to implement race- or gender-based measures, then it must ensure that its use of those measures meets the requirements of the *strict scrutiny* standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring that their use is *narrowly tailored* (see Chapter 2 for more information).

7. Overall aspirational goals. Currently, the Commonwealth has an overall aspirational goal for the participation of SWaM-certified small businesses in Commonwealth contracts and procurements. As part of its implementation of the SWaM Program, the Commonwealth could update its overall aspirational goal for the participation of small businesses and establish separate annual overall aspirational goals for the participation of microbusinesses, as well as minority-, woman-, and SDV-owned businesses in its contracting. The Commonwealth could follow a common two-step process to develop overall aspirational goals for small and diverse businesses, which would consist of establishing a base figure (based on the availability of each business group for Commonwealth work) and considering an adjustment to its base figure based on the past participation of those businesses in Commonwealth work, information about local marketplace conditions, and other factors that might impact the ability of those businesses to compete for and perform work on its contracts.

CHAPTER 1.

Introduction

The Commonwealth of Virginia’s Department of General Services (DGS) and Virginia Information Technologies Agency have statutory authority to establish and enforce statewide procurement policy for executive branch agencies and certain higher education institutions (HEIs) that lack procurement autonomy. The Virginia Department of Transportation and HEIs with procurement autonomy have statutory or delegated authority to establish and enforce procurement policies for their own operations, consistent with the Virginia Public Procurement Act. The Commonwealth of Virginia’s Department of Small Business and Supplier Diversity (SBSD) implements the Small, Women-owned, and Minority-owned Business (SWaM) Program to encourage the participation of small businesses and microbusinesses as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) in those contracts and procurements.

Commonwealth of Virginia state agencies and HEIs (collectively referred to as *the Commonwealth*) retained BBC Research & Consulting (BBC) to conduct a new *disparity study* to evaluate whether small and diverse businesses face any barriers in their contracting and procurement. As part of the study, we examined whether there are any *disparities*, or differences, between:

- The percentage of contract dollars the Commonwealth spent with small and diverse businesses during the *study period*, which was July 1, 2019 through June 30, 2024 (i.e., *utilization or participation*); and
- The percentage of contract dollars one might expect the Commonwealth to award to those businesses based on their availability to perform specific types and sizes of the prime contracts and subcontracts the organization awards (i.e., *availability*).

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

- The legal framework surrounding the Commonwealth’s implementation of the SWaM Program;
- Local marketplace conditions for small and diverse businesses; and
- Contracting practices and business assistance programs the Commonwealth has in place or could consider implementing in the future.

BBC relied on results from the disparity study to provide guidance to the Commonwealth on how it could help address any barriers that small and diverse businesses face as part of the organization’s contracting and procurement processes and in the surrounding marketplace.

BBC introduces the 2025 Commonwealth of Virginia Disparity Study in three parts:

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

A. Background

In 2006, then-Governor Tim Kaine established the SWaM Program by executive order to enhance opportunities for small businesses and minority- and woman-owned businesses in Commonwealth contracting. As part of Executive Order 33 (2006), Governor Kaine established various measures to assist small businesses and minority- and woman-owned businesses, including:

- Setting an overall annual goal of 40 percent for the participation of small businesses in Commonwealth contracts and procurements;
- Requiring prime contractors to include SWaM participation plans as part of their bids or proposals for Commonwealth contracts and procurements;
- Requiring Commonwealth agencies to develop processes to track the participation of SWaM-certified businesses in their contracts and procurements;
- Requiring DGS to create a small business set-aside program and implement other efforts to enhance small business participation in Commonwealth contracts and procurements;
- Requiring Commonwealth agencies to submit SWaM plans that include information about their implementations of the SWaM Program to SBSB on an annual basis;
- Requiring Commonwealth agencies to actively recruit small businesses to bid or propose on their contract and procurement opportunities; and
- Requiring Commonwealth agencies' purchasing manuals, regulations, and guidelines to include SWaM purchasing regulations and guidelines.¹

Since the establishment of the SWaM Program, the Commonwealth has established refinements to its implementation of the program through various Executive Orders:

- **Executive Order 20**, issued by then-Governor Terry McAuliffe in 2014, expanded the program by introducing the microbusiness category and raising the aspirational goal for small business participation to 42 percent for professional services and non-professional services and goods work and 50 percent for construction work.
- **Executive Order 35**, issued by then-Governor Ralph Northam in 2019, formally added SDV-owned businesses to the SWaM Program, mandated a disparity study (which BBC conducted), and strengthened subcontracting requirements for large contracts.

The Virginia Association of State College and University Purchasing Professionals (VASCUPP) was established in 1992 under the objective of identifying opportunities for cooperative procurements and cost savings for HEIs in Virginia. Tier 2 HEI members have a memorandum of understanding with the Commonwealth that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology. In contrast, tier 3 HEIs have complete autonomy in their contracting and procurement. Figure 1-1 presents a list of HEIs included in the disparity study and indicates each HEI's level of procurement autonomy.

¹ http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder_id=0&dvs=1608248864548~628

**Figure 1-1.
VASCUPP HEIs
included in the
disparity study**

VASCUPP Tier	
Tier 2 HEIs	Tier 3 HEIs
Christopher Newport University	University of Virginia
Longwood University	Virginia Polytechnic Institute and State University
Norfolk State University	Virginia Commonwealth University
Old Dominion University	James Madison University
Radford University	George Mason University
University of Mary Washington	College of William & Mary
Virginia Community College System	
Virginia Military Institute	
Virginia State University	

The Commonwealth currently uses *race- and gender-neutral measures* to encourage the participation of small and diverse businesses in its contracting and procurement. In contrast with *race- and gender-based measures*, race- and gender-neutral measures are designed to increase the participation of *all* small businesses in Commonwealth contracts and procurements, regardless of the race or gender of the business' owners.² The Commonwealth does not currently use race- or gender-based measures as part of its implementation of the SWaM Program.

B. Study Scope

BBC assessed whether any disparities exist between the participation and availability of small and diverse businesses for the construction, professional services, and non-professional services and goods contracts and procurements the Commonwealth awards.³ We based those and other analyses on contracts and procurements the Commonwealth awarded between July 1, 2019 and June 30, 2024, which we treated as a proxy for the contracts and procurements the Commonwealth will award in the future.

1. Definitions of small and diverse businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC defined small businesses and microbusinesses as well as minority-, woman, and SDV-owned businesses and SWaM-certified businesses in our analyses.

a. Small businesses. BBC defined a small business as a business that, together with affiliates, has 250 employees or fewer or that has average annual revenues of \$10 million or less. We considered businesses to be small based on their revenue and employee characteristics, regardless of whether they were SWaM-certified or held any other types of certification.

² Race- and gender-based measures are contracting inclusion measures specifically designed to increase the participation of minority-owned businesses and woman-owned businesses, respectively, in an organization's contracts and procurements.

³ BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

b. Microbusinesses. BBC defined a microbusiness as a business that, together with affiliates, has 25 employees or fewer and that has average annual revenues of \$3 million or less. We considered businesses to be microbusinesses based on their revenue and employee characteristics, regardless of whether they were SWaM-certified or held any other types of certification.

c. Minority-owned businesses. BBC focused our analyses on the following minority-owned business groups: Asian-, Black-, Hispanic-, and Native American-owned businesses. Our definition of minority-owned businesses included both businesses owned by men of color and women of color. For example, we grouped results for businesses owned by Black men with results for businesses owned by Black women to present results for Black-owned businesses in general. We gathered business ownership information from a variety of different sources, including surveys, business listings, and Internet research. We considered businesses to be minority-owned based on the known races of their business owners, regardless of whether they were SWaM-certified or held any other types of certification.

d. Woman-owned businesses. Because we classified businesses owned by women of color according to their corresponding racial groups, analyses and results for woman-owned businesses pertain specifically to results for *non-Hispanic White woman-owned businesses*. As with minority-owned businesses, we considered businesses to be woman-owned based on the known genders of their business owners, regardless of whether they were SWaM-certified or held any other types of certification.

e. SDV-owned businesses. BBC defined an SDV-owned business as a business owned by veterans of the United States military who suffer from physical or mental disabilities resulting from their military service. We considered businesses to be SDV-owned based on the known SDV status of their business owners, regardless of whether they were SWaM-certified or held any other types of certification.

f. SWaM-certified businesses. A SWaM-certified business is a business that is certified as a small business, microbusiness, minority-owned business, woman-owned, or SDV-owned business by SBSB. Businesses seeking SWaM certification are required to submit an application to SBSB. Applications require business owners to submit various information about their companies, including business names; contact information; tax information; work specializations; and the races, genders, and veteran statuses of their owners.

g. SWaM-eligible businesses. A SWaM-eligible business is a business in Virginia that BBC determined meets the criteria to be a SWaM-certified small business; microbusiness; or minority-, woman-, or SDV-owned business, regardless of whether it is certified as such.

2. Analyses in the disparity study. The crux of the disparity study was to assess whether any disparities exist between the participation and availability of small and diverse businesses for the contracts and procurements the Commonwealth awards in the areas of construction, professional services, and non-professional services and goods. The study also includes various analyses related to outcomes for small and diverse businesses throughout the local marketplace. BBC presents results from those analyses as follows:

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant laws, legal decisions, and other information to guide the methodology for the disparity study and inform our

recommendations for refinements to the SWaM Program. BBC presents the legal framework and analysis for the study in **Chapter 2** and **Appendix B**.

b. Marketplace conditions. The study team conducted extensive quantitative analyses of conditions and potential barriers in the local marketplace for minority-, woman-, and SDV-owned businesses. In addition, we collected qualitative insights about potential barriers small and diverse businesses face in Virginia through in-depth interviews, focus groups, and public meetings. BBC presents quantitative information about marketplace conditions in **Chapter 3** and qualitative information in **Chapter 4**.

c. Data collection. BBC examined contract, procurement, and vendor data from multiple sources to complete the utilization and availability analyses. We present information on our contract, procurement, and vendor data collection processes in **Chapter 5**.

d. Availability analysis. The study team analyzed the percentage of contract and procurement dollars one might expect the Commonwealth to award to small and diverse businesses based on their availability to perform specific types and sizes of Commonwealth work. That analysis was based on Commonwealth data and surveys the study team conducted with 1,565 local businesses that work in industries related to the types of contracts and procurements the Commonwealth awards. We present results from the availability analysis in **Chapter 6** and **Appendix C**.

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

f. Disparity analysis. BBC examined whether there were any disparities between the participation and availability of small and diverse businesses for contracts and procurements the Commonwealth awarded during the study period. We present results from the disparity analysis in **Chapter 8** and **Appendix D**.

g. Program measures. BBC reviewed the measures the Commonwealth uses to encourage the participation of small and diverse businesses in its contracting and procurement, as well as its implementation of the SWaM Program. We present that information in **Chapter 9**.

h. Analyses of the business community. BBC conducted key analyses of business characteristics, beyond owner race and gender, of businesses potentially available for the contracts and procurements the Commonwealth awards and the businesses that performed work for the Commonwealth during the study period. We present that information in **Chapter 10**.

i. Recommendations. BBC provided guidance related to additional program options and changes to current contracting practices the Commonwealth could consider implementing. We present those recommendations in **Chapter 11**.

C. Study Team Members

The disparity study was conducted by a study team made up of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with contracting inclusion programs.

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

2. Keisler Social and Behavioral Research (Keisler SBR). Keisler SBR is a minority woman-owned qualitative and quantitative research firm based in Washington, DC. Keisler SBR conducted in-depth interviews with businesses located in Virginia and conducted analyses of all qualitative data collected as part of the study.

3. Yas Consulting Services (YCS). YCS is a minority woman-owned diversity, equity, and inclusion consulting firm based in Great Falls, Virginia. YCS conducted in-depth interviews and focus groups with businesses and trade organizations located in Virginia as part of the study team's qualitative analyses of marketplace conditions.

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

5. Holland & Knight. Holland & Knight is a law firm with offices throughout the country. The firm conducted a review of the legal framework for the study.

CHAPTER 2.

Legal Framework and Analysis

Commonwealth of Virginia state agencies and higher education institutions (collectively referred to as *the Commonwealth*) commissioned a disparity study to assess whether there are any statistical disparities between the participation and availability of small businesses and microbusinesses, as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses, for the contracts and procurements the Commonwealth awards. One of the primary reasons for those assessments is to determine whether compelling evidence of discrimination exists for specific business groups in obtaining work on Commonwealth projects and efforts the Commonwealth could consider using to help address those barriers. Chapter 2 summarizes the legal standards that govern the use of race- and gender-based and race- and gender-neutral measures in three parts:

- A. Legal standards;
- B. Court decisions; and
- C. Addressing legal requirements with the disparity study.

A. Legal Standards

The Commonwealth operates the Small, Women-owned, and Minority-owned Business (SWaM) Program to encourage the participation of small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses, in the contracts and procurements it awards. There are different legal standards for determining the constitutionality of measures government organizations use as part of contracting inclusion programs, depending on whether they are *race- and gender-neutral* or *race- and gender-based* in nature. In the context of government contracting, race- and gender-based measures are efforts designed to specifically encourage the participation of minority- and woman-owned businesses, respectively, in the contracts and procurements a government organization awards (e.g., using condition-of-award goals for the participation of certain eligible business groups as part of awarding individual projects). In contrast, race- and gender-neutral measures are efforts designed to encourage the participation of certain groups of businesses in an organization's work, regardless of the race or gender of business owners. The Commonwealth's SWaM Program is made up entirely of race- and gender-neutral measures.

1. Race- and gender-neutral measures. Examples of race- and gender-neutral contracting measures include an organization's use of small business participation goals or setting aside certain projects for exclusive competition among SDVs. Because race- and gender-neutral measures are not based on the race, gender, sexual orientation, or other *legally suspect* characteristics of business owners, courts apply the *rational basis* test—which is the least rigorous test for evaluating the constitutionality of contracting measures—to assess whether an organization's use of such measures is constitutional. To meet the requirements of the rational basis test, an organization must ensure that its use of race- and gender-neutral measures is rationally related to legitimate government interests (e.g., encouraging the participation of economically disadvantaged businesses in its work).

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

a. Strict scrutiny. An organization’s use of race-based contracting measures is subject to the strict scrutiny standard of review, which is the most stringent standard for evaluating the constitutionality of contracting measures that include legally suspect classifications. (In 2023, the United States Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* reaffirmed that the strict scrutiny standard is the appropriate standard for assessing the constitutionality of race-based inclusion measures.¹) To meet the strict scrutiny standard, government organizations must show a *compelling governmental interest* in using race-based measures and demonstrate that their use is *narrowly tailored*.

i. Compelling governmental interest. Government organizations using race-based contracting measures must have evidence of the existence of discrimination within their own *relevant geographic market areas* (RGMA)s—including statistical and anecdotal evidence—that supports the use of such measures.² It is not necessary for organizations themselves to have discriminated against minority-owned businesses for them to demonstrate a compelling governmental interest. If evidence indicates that they are *passive participants* in race-based discrimination that exists in their RGMA)s, then they could consider using race-based measures to account for that discrimination as part of their contracting and procurement processes.³ Passive participation in discrimination refers to organizations perpetuating discrimination that exists in their marketplaces through the policies and practices they use to award projects (e.g., by requiring high insurance requirements to perform work on their projects when demonstrable barriers exist for minority-owned businesses in local insurance markets).

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

- The necessity of such measures and the efficacy of alternative, race-neutral measures;
- The degree to which the use of such measures is limited to those groups for which evidence of discrimination exists in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- Whether any numerical, race-based participation goals are related to the local marketplace; and
- Whether the use of such measures is overly burdensome for businesses not owned by minorities.

¹ *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

² See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

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

b. Intermediate scrutiny. In 1976, the United States Supreme Court (SCOTUS) ruled that a government organization's use of gender-based inclusion measures must meet the requirements of the intermediate scrutiny standard, which is less rigorous than the strict scrutiny standard but more rigorous than the rational basis test.⁴ To meet the requirements of intermediate scrutiny, an organization must demonstrate that its use of gender-based contracting measures serves an important government objective and is substantially related to achieving that objective. Although the use of gender-based measures are technically subject to the requirements of intermediate scrutiny, most courts assess the constitutionality of both race-based and gender-based contracting measures based on the requirements of strict scrutiny. In accordance with that practice, BBC Research & Consulting (BBC) generally treats both race- and gender-based measures as being subject to strict scrutiny requirements.

B. Court Decisions

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

- *City of Richmond v. J.A. Croson Company (Croson)*;⁵ and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.⁶

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

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

- Organizations' use of race-based measures must meet the strict scrutiny standard of constitutional review. That is, in remedying any race-based discrimination, they must establish a compelling governmental interest to do so and must ensure the use of such measures is narrowly tailored.
- Organizations must assess the availability of local minority-owned businesses for their work and their use of race-based contracting measures must be tailored to such assessments.
- In assessing the availability of minority-owned businesses for their work, organizations must account for various characteristics of the projects they award and the degree to which local minority-owned businesses are *ready, willing, and able* to perform that work.

⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

⁵ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

- If organizations have evidence of statistical disparities between the percentage of dollars they awarded to minority-owned businesses and the percentage of dollars those businesses are available to perform, then *inferences of discrimination* could exist, supporting the use of narrowly tailored, race-based measures.

SCOTUS' decision in *Adarand* expanded its decision in *Croson* to include the use of race-based measures in federal government contracting programs. In *Adarand*, SCOTUS ruled that *federal* contracting programs must also adhere to the requirements of strict scrutiny.

2. Subsequent decisions. Many subsequent decisions in federal courts have refined the requirements for using race- and gender-based contracting measures as part of contracting inclusion programs, including cases in the Fourth Circuit, the federal judicial circuit in which the Commonwealth operates. Examples of those cases include *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.* and *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*. The study team summarizes those decisions as well as many other decisions relevant to contracting inclusion programs and disparity study methodology in Appendix B of this report.^{7, 8}

C. Addressing Legal Requirements with the Disparity Study

Many government organizations have used information from disparity studies to:

- Determine whether different business groups face barriers as part of their contracting processes or in their marketplaces that make it more difficult for those businesses to compete for or obtain work on the projects they award;
- Design efforts to encourage the participation of different business groups in their contracts and procurements; and
- Ensure that their use of any race- or gender-based measures meets the requirements of the strict scrutiny standard.

Various aspects of the 2025 Commonwealth of Virginia Disparity Study specifically address requirements SCOTUS and other federal courts have established around the use of race- and gender-based measures:

- The study includes extensive econometric analyses and analyses of qualitative insights to assess whether any economic barriers exist for minorities, women, and minority- and woman-owned businesses in the RGMA and whether the Commonwealth is actively or passively participating in those barriers.
- BBC accounts for various characteristics of the projects state agencies award—such as work type and size—as well as the specific characteristics of businesses located in the RGMA—such as primary lines of work, bid capacities, and interest in performing government work—in estimating the availability of minority- and woman-owned businesses for state agency work.

⁷ *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

⁸ *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749.

- The study includes assessments of whether minority-, woman-, and SDV-owned businesses exhibit substantial, statistical disparities between their participation in and availability for state agency work, indicating whether any inferences of discrimination exist for specific groups of those businesses.
- The study includes various recommendations to help the Commonwealth consider whether the use of race- and gender-based contracting measures is appropriate and how to do so effectively and legally.

CHAPTER 3.

Marketplace Conditions

In the United States, numerous legal, economic, and social obstacles have historically inhibited minorities and women from starting and operating successful businesses. Systemic injustices and barriers such as slavery, racial oppression, segregation, race-based displacement, labor market discrimination, and other discriminatory government policies have produced substantial disparities for minorities and women. Those barriers have limited opportunities for them to obtain quality education, gain workplace experience, and build wealth, the effects of which still impact these communities today.^{1, 2, 3, 4, 5}

A. Historical and Current Marketplace Conditions

Historically, minorities and women in Virginia have faced political, economic, and social barriers similar to those experienced by minorities and women nationwide. Following the Civil War, Virginians had to adapt to an economy that was devastated by damaged infrastructure, a loss of human capital, and debt. Free Black business owners and formerly enslaved men and women experienced additional barriers such as a lack of access to financial capital, intimidation from former Confederates, and political restrictions that hindered their economic mobility.^{6, 7} These restrictions included disenfranchisement and the 1866 Virginia Vagrancy Law, which permitted local law enforcement to arrest and detain unemployed former slaves.⁸

In 1902, Virginia's State Constitution codified voting restrictions as well as many other Jim Crow laws enforcing racial segregation that would persist through the mid-20th century.⁹ Jim Crow legislation became even more rigid in the 1920s when the Virginia Racial Integrity Act established the requirement that anyone with any non-White ancestry be categorized as "colored," leading to the mass erasure of Native American identity and reinforcing discriminatory practices against all minority groups.¹⁰ Segregation permeated the daily life of minorities in Virginia, as they were required to use separate facilities at restaurants, public buildings, and cultural institutions, and had to develop their economies independently under the pervasive threat of violence.¹¹ For instance, Black residents were forced to live in segregated neighborhoods and send their children to segregated schools. Several of the most well-documented examples of redlining—a practice by which Black residents were systematically denied access to banking and mortgage services because they were deemed to live in higher-risk, "undesirable" neighborhoods—occurred in places like Richmond and Norfolk, Virginia.¹²

Segregation also extended into the labor market, as minorities in Virginia and nationwide were concentrated in low-wage work in agriculture and other industries with few opportunities for advancement.^{13, 14} Moreover, advances in the economic wealth of minorities in Virginia were often actively dismantled and reversed. For example, in the mid-20th century, urban renewal initiatives in Charlottesville, Virginia, displaced over 1,000 residents of the historically Black neighborhood of Vinegar Hill. Because poll taxes prevented many residents from voting in the referendum that authorized the projects, lower-income minority residents were effectively excluded from the decision.¹⁵ Similarly, the historically Black neighborhood of Jackson Ward, one of the most prominent hubs in the nation for Black entrepreneurship by the 1950s, was disrupted by the construction of a large highway

system and various other urban renewal projects. The initiative displaced many long-established Black-owned businesses and about 10 percent of Richmond’s Black population.¹⁶

Women also faced labor market barriers in 20th-century Virginia, as they were typically restricted to either being homemakers or taking gender-specific jobs with low pay and scarce advancement opportunities.^{17, 18, 19} Even when they were allowed to enroll in college, their studies were often restricted to certain topic areas well into the 20th century. It was not until 1970 that women were admitted to all of the undergraduate schools at the University of Virginia.²⁰ Alongside rigid cultural norms, gender inequalities in Virginia’s education and political systems restricted women from receiving equal pay and benefits or from participating in the workforce altogether.²¹

In the middle of the 20th century, as a result of the Civil Rights movement, many reforms opened up new opportunities for minorities and women in Virginia and nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Over the course of several decades, workplaces adopted policies and programs in an effort to diversify their staffs.²² Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women.^{23, 24, 25, 26} Despite those improvements, however, minorities and women today experience enduring barriers—such as incarceration, residential segregation, and disproportionate family responsibilities—that make it more difficult for them start and operate businesses successfully.^{27, 28, 29, 30}

B. Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses to assess whether minorities; women; service-disabled veterans (SDVs); and minority-, woman-, and SDV-owned businesses face any barriers in the construction, professional services, and non-professional services and goods industries in Virginia. The study team also examined the potential effects any such barriers have on the formation and success of businesses as well as their availability for contracts and procurements that the Commonwealth of Virginia state agencies and higher education institutions (collectively referred to as *the Commonwealth*) award. We examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether minorities, women, and SDVs face barriers related to education, employment, and gaining industry experience;
- **Financial capital**, to assess whether minorities, women, and SDVs face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether minorities and women own businesses at rates comparable to that of White men and whether SDVs own businesses at rates that are comparable to that of all others; and
- **Business success**, to assess whether minority- and woman-owned businesses have outcomes similar to those of businesses owned by White men and whether SDV-owned businesses have outcomes similar to those of all other businesses.

1. Human capital. Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual’s ability to perform and succeed in particular labor markets. Factors such as education, business experience, and managerial experience have been shown to be

related to business success.^{31, 32, 33, 34} Any barriers related to those factors may make it more difficult for minorities, women, and SDVs to work in relevant industries and may prevent many of them from starting and operating businesses successfully.

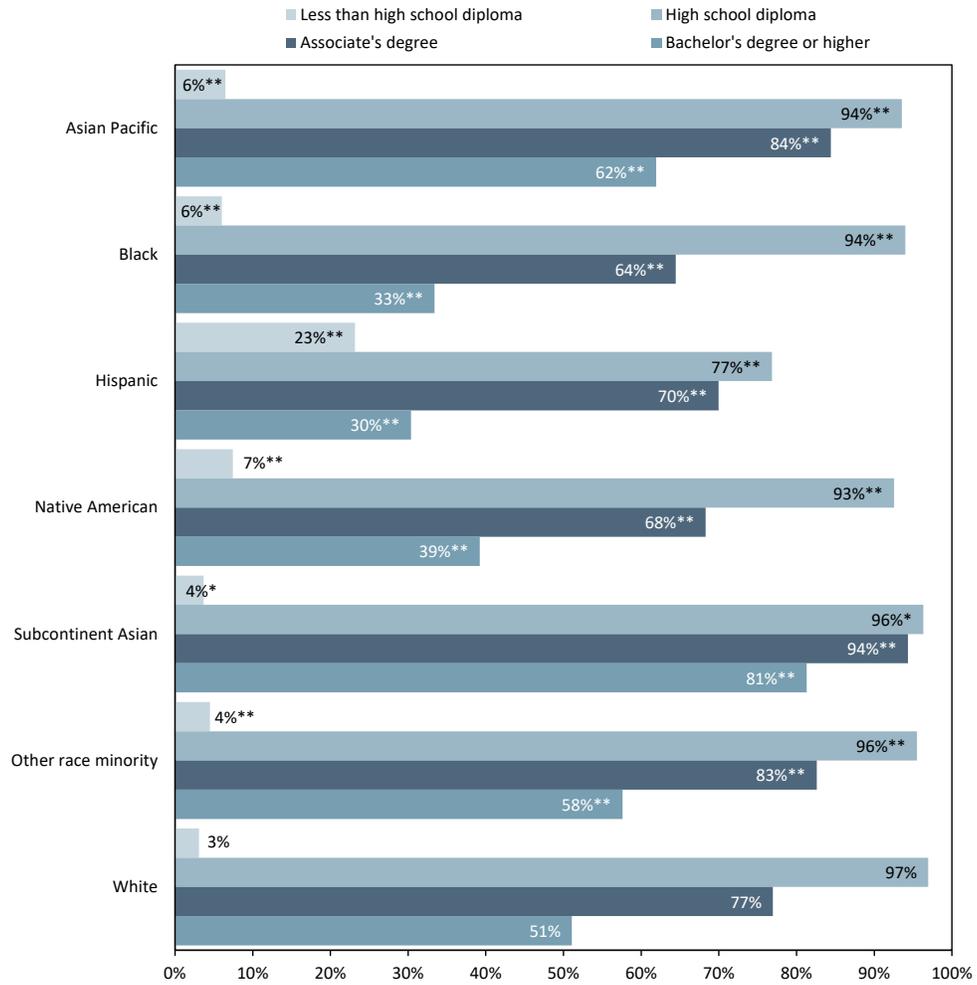
a. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations require at least a four-year college degree. In addition, education is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{35, 36, 37} Nationally, minority residents lag behind White residents in terms of both educational attainment and the quality of education they receive.^{38, 39, 40} Minority students are more likely than White students to attend schools that do not provide access to core classes in science and math.⁴¹ In addition, Black students are more likely than White students to be expelled or suspended from high school.⁴² For those and other reasons, minorities are far less likely than people who identify as White to attend college, enroll at selective four-year college institutions, and earn college degrees.⁴³

Educational outcomes for minorities in Virginia are similar to those for minorities nationwide. BBC's analyses of the labor force of the Virginia marketplace indicate that people who identify with certain minority groups earn education degrees at lower rates than people who identify as White. Figure 3-1 presents the rates of educational attainment of workers in the Virginia marketplace, broken down by race, gender, and SDV status. As shown in Figure 3-1, Asian Pacific (94%), Black (94%) Hispanic (77%), Native American (93%), Subcontinent Asian (96%), and other race minority workers (96%) are less likely than White workers (97%) to have high school diplomas, and Black (64%), Hispanic (70%), and Native American workers (68%) are less likely than White workers (77%) to have associate's degrees. Additionally, Black (33%), Hispanic (30%), and Native American workers (39%) are less likely than White workers (51%) to have bachelor's degrees or higher.

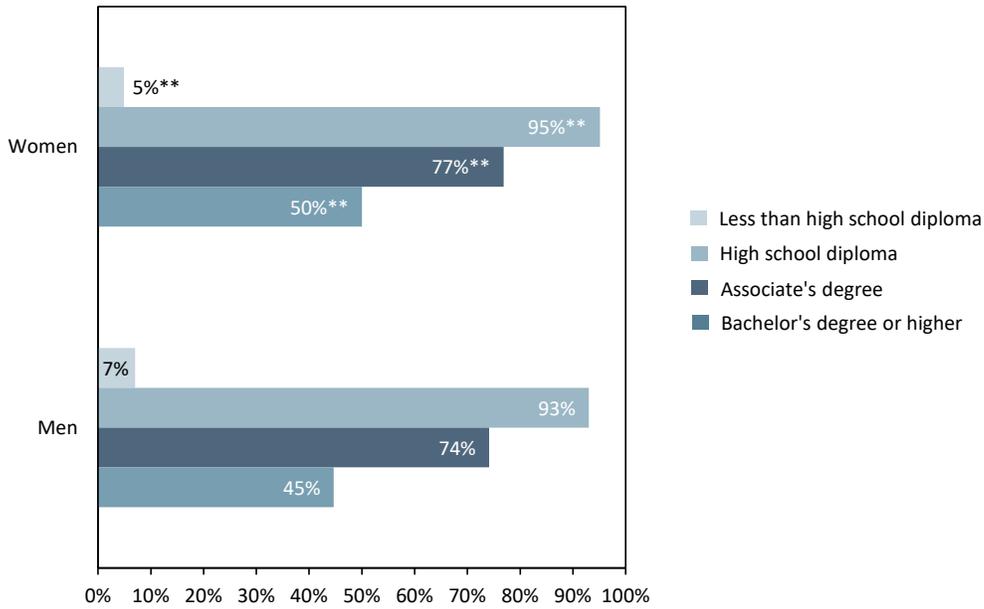
In contrast, Asian Pacific (84%), Subcontinent Asian (94%), and other race minority workers (83%) are more likely to have associate's degrees than White workers (77%), and Asian Pacific (62%), Subcontinent Asian (81%), and other race minority workers (58%) are more likely to have bachelor's degrees or higher than White workers (51%). Women are more likely than men to have high school diplomas (women: 95%; men: 93%), associate's degrees (women: 77%; men: 74%), and bachelor's degrees or higher (women: 50%; men: 45%). SDVs are more likely than all others to have high school diplomas (SDVs: 99%; all others: 94%), associate's degrees (SDVs: 78%; all others: 75%), and bachelor's degrees or higher (SDVs: 59%; all others: 47%).

Figure 3-1.
Percentage of all workers who have obtained various levels of education, Virginia, 2018-2022

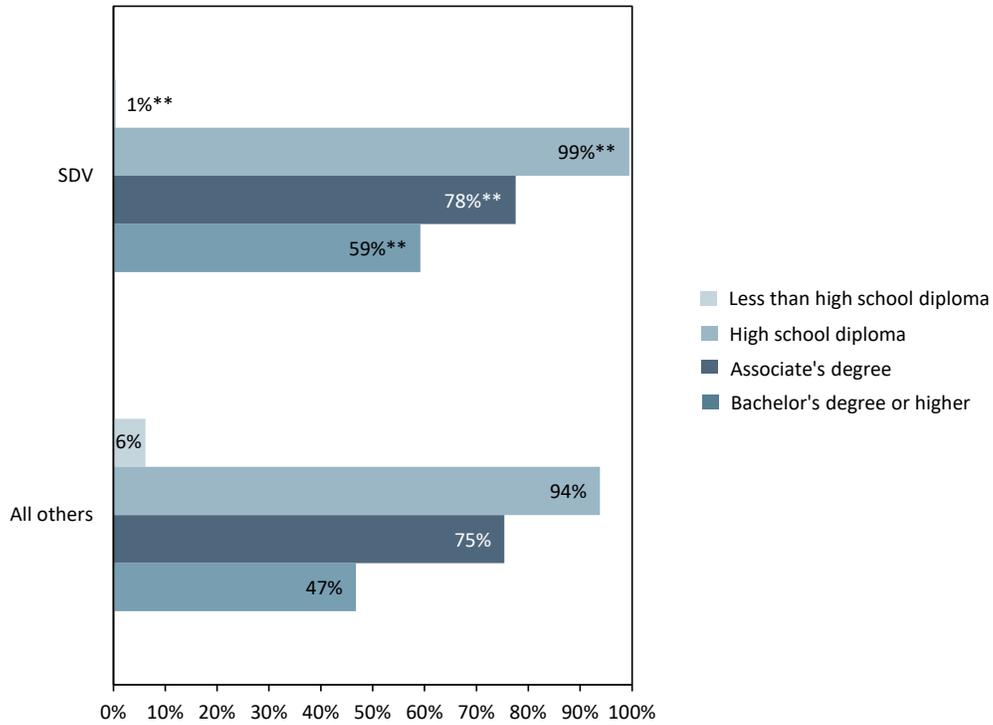
a) Race



b) Gender



c) SDV status



Note: *, ** Denotes that the difference in proportions between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 90% and 95% confidence levels, respectively.

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

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

i. Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{44, 45, 46} When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of minorities and women.^{47, 48, 49, 50, 51, 52} In addition, Black, Hispanic, and Native American residents are incarcerated at greater rates than White residents in Virginia and nationwide, which contributes to many labor obstacles, including difficulties finding jobs and slow wage growth.^{53, 54, 55, 56, 57, 58, 59}

The study team's analyses of the labor force in Virginia are consistent with nationwide findings. Figure 3-2 presents the percentage of minority, woman, and SDV workers in various Virginia industries. The industries with the highest representations of minority workers are childcare, hair, and nails (52.7%); other services (49.5%); and transportation, warehousing, utilities, and communications (47.8%). The industries with the lowest representations of minority workers are extraction and agriculture (24.8%), education (34.1%), and wholesale trade (35.6%).

The Virginia industries with the highest representations of women are childcare, hair, and nails (85.5%); healthcare (78.1%); and education (69.7%). The industries with the lowest representations of women are construction (12.1%), extraction and agriculture (19.5%), manufacturing (29.3%), and wholesale trade (29.3%).

The Virginia industries with the highest representations of SDVs are public administration and social services (8.6%) and professional services (4.2%). The industries with the lowest representations of SDVs are extraction and agriculture (0.6%); childcare, hair, and nails (0.8%); retail (1.2%); and construction (1.2%).

Figure 3-2.
Percent representation of workers in various industries in Virginia, 2019-2023

a) Race

	Asian Pacific	Black	Hispanic	Native American	Subcontinent Asian	Other race minority	White
Extraction and agriculture (n=1,751)	1.1 % **	8.3 % **	13.5 % **	0.7 %	0.5 % **	0.4 % **	75.2 % **
Construction (n=11,891)	2.3 % **	10.2 % **	26.5 % **	0.8 % **	0.5 % **	0.7 % **	58.2 %
Manufacturing (n=14,376)	4.1 % **	21.2 % **	8.2 % **	0.7 %	1.7 % **	0.9 %	62.5 % **
Wholesale trade (n=3,268)	3.8 % **	18.7 %	9.2 % **	0.5 %	1.1 % **	0.8 %	64.4 % **
Retail (n=19,107)	5.4 %	23.4 % **	9.2 % **	0.7 % *	2.7 %	0.9 %	56.0 % **
Transportation, warehousing, utilities, and communications (n=12,729)	5.2 %	27.1 % **	9.1 % **	0.6 %	2.9 %	0.7 % **	52.2 % **
Professional services (n=38,863)	7.3 % **	14.9 % **	7.3 % **	0.6 %	7.0 % **	1.2 % **	60.0 % **
Education (n=22,066)	4.5 % **	17.6 % **	6.6 % **	0.5 % **	2.4 % **	0.9 % *	65.9 % **
Healthcare (n=20,354)	6.3 % **	26.3 % **	7.6 % **	0.5 % **	2.4 % **	0.9 %	54.7 % **
Other services (n=26,691)	5.4 %	21.3 % **	18.0 % **	0.7 %	1.8 % **	1.1 %	50.5 % **
Childcare, hair, and nails (n=4,146)	14.0 % **	20.9 %	12.2 % *	0.5 % *	2.5 %	0.9 %	47.3 % **
Public administration and social services (n=25,959)	5.3 %	21.6 % **	8.1 % **	0.6 %	2.0 % **	1.1 %	60.0 % **
All Industries	5.5 %	20.0 %	10.9 %	0.6 %	2.9 %	1.0 %	57.7 %

b) Gender

	Women	Men
Extraction and agriculture (n=1,751)	19.5 % **	80.5 % **
Construction (n=11,891)	12.1 % **	87.9 % **
Manufacturing (n=14,376)	29.3 % **	70.7 % **
Wholesale trade (n=3,268)	29.3 % **	70.7 % **
Retail (n=19,107)	48.2 % *	51.8 % *
Transportation, warehousing, utilities, and communications (n=12,729)	29.9 % **	70.1 % **
Professional services (n=38,863)	46.5 % **	53.5 % **
Education (n=22,066)	69.7 % **	30.3 % **
Healthcare (n=20,354)	78.1 % **	21.9 % **
Other services (n=26,691)	46.6 % **	53.4 % **
Childcare, hair, and nails (n=4,146)	85.5 % **	14.5 % **
Public administration and social services (n=25,959)	49.2 % **	50.8 % **
All Industries	47.5 %	52.5 %

c) SDV status

	SDV	All others
Extraction and agriculture (n=1,751)	0.6 % **	99.4 % **
Construction (n=11,891)	1.2 % **	98.8 % **
Manufacturing (n=14,376)	3.0 %	97.0 %
Wholesale trade (n=3,268)	1.7 % **	98.3 % **
Retail (n=19,107)	1.2 % **	98.8 % **
Transportation, warehousing, utilities, and communications (n=12,729)	3.3 %	96.7 %
Professional services (n=38,863)	4.2 % **	95.8 % **
Education (n=22,066)	1.7 % **	98.3 % **
Healthcare (n=20,354)	1.7 % **	98.3 % **
Other services (n=26,691)	1.3 % **	98.7 % **
Childcare, hair, and nails (n=4,146)	0.8 % **	99.2 % **
Public administration and social services (n=25,959)	8.6 % **	91.4 % **
All Industries	3.0 %	97.0 %

Note: *, ** Denotes that the difference in proportions between the minority group and White, between women and men, or between SDVs and all others in the specified industry and all industries is statistically significant at the 90% and 95% confidence levels, respectively.

Source: 2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also assessed the representation of minority, woman, and SDV workers in the Virginia construction, professional services, and non-professional services and goods industries compared to their representation in all Virginia industries considered together. As presented in Figure 3-3:

- Smaller percentages of people who identify as Asian Pacific (2.3%), Black (10.2%), Subcontinent Asian (0.5%), other race minority (0.7%), women (12.1%), and SDVs (1.2%) work in the construction industry compared to all industries considered together. In contrast, greater percentages of people who identify as Hispanic (26.5%), Native American (0.8%), men (87.9%), and all others who are not SDVs (98.8%) work in the construction industry compared to all industries considered together.
- Smaller percentages of people who identify as Black (11.9%), Hispanic (7.6%), women (34.2%), and all others who are not SDVs (93.2%) work in the professional services industry compared to all industries considered together. In contrast, greater percentages of people who identify as Asian Pacific (8.7%), Subcontinent Asian (9.3%), other race minority (1.2%), White (58.7%), men (65.8%), and SDVs (6.8%) work in the professional services industry compared to all industries considered together.
- Smaller percentages of people who identify as Asian Pacific (3.9%), Native American (0.5%), Subcontinent Asian (1.7%), White (52.5%), and women (32.0%) work in the non-professional services and goods industry compared to all industries considered together. In contrast, greater percentages of people who identify as Black (22.8%), Hispanic (16.6%), and men (68.0%) work in the non-professional services and goods industry compared to all industries considered together.

Figure 3-3.
Demographic characteristics of workers in study-related contracting industries and all industries, Virginia, 2019-2023

Group	All industries (n=212,299)	Construction (n=11,891)	Professional services (n=19,299)	Non-prof. services and goods (n=11,159)
Race/ethnicity				
Asian Pacific	5.5 %	2.3 % **	8.7 % **	3.9 % **
Black	20.0 %	10.2 % **	11.9 % **	22.8 % **
Hispanic	10.9 %	26.5 % **	7.6 % **	16.6 % **
Native American	0.6 %	0.8 % **	0.6 %	0.5 % **
Subcontinent Asian	2.9 %	0.5 % **	9.3 % **	1.7 % **
Other race minority	1.0 %	0.7 % **	1.2 % *	1.0 %
Total minority	40.9 %	41.0 %	39.3 %	46.5 %
White	57.7 %	58.2 %	58.7 % **	52.5 % **
Total	98.6 %	99.2 %	98.0 %	99.0 %
Gender				
Women	47.5 %	12.1 % **	34.2 % **	32.0 % **
Men	52.5 %	87.9 % **	65.8 % **	68.0 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
SDV status				
SDV	3.0 %	1.2 % **	6.8 % **	2.8 %
All others	97.0 %	98.8 % **	93.2 % **	97.2 %
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all other industries is statistically significant at the 90% and 95% confidence levels, respectively.

Source: 2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also examined the relationships between race, gender, and SDV status and unemployment. Figure 3-4 presents unemployment rates among minorities, women, and SDVs compared to those of White people, men, and all others, respectively. Compared to people who identify as White (3%), people who identify as Asian Pacific (4%), Black (7%), Hispanic (5%), and Native American (5%) are more likely to be unemployed in Virginia. In contrast, SDVs (3%) are less likely than all others (4%) to be unemployed in Virginia.

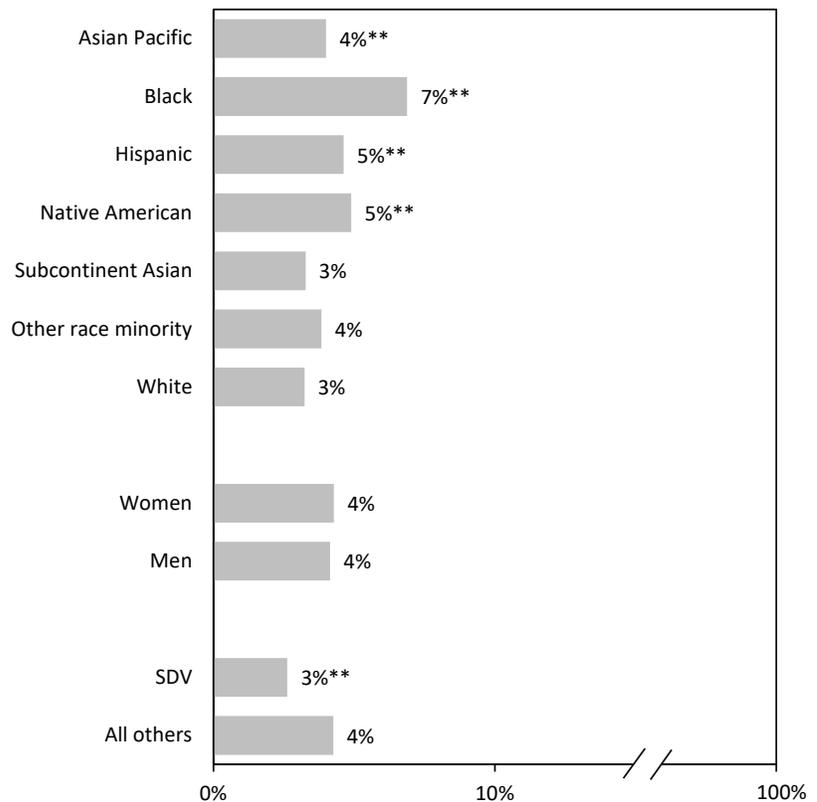
Figure 3-4.
Unemployment rates, Virginia,
2019-2023

Note:

** Denotes that the difference in proportions between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 95% confidence level.

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



We also conducted regression analyses to assess whether there are relationships between race and gender and unemployment, even after accounting for various personal factors such as age, education, family status, and location. Figure 3-5 presents results of those analyses, which indicate that, even after accounting for such factors, people who identify as Asian Pacific, Black, Native American, and Subcontinent Asian are more likely to be unemployed compared to people who identify as White. In addition, women are more likely to be unemployed compared to men.

Figure 3-5.
Predictors of unemployment, Virginia
marketplace, 2019-2023

Notes:

The regression included 191,078 observations.

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

The referent for race variables is White.

Source:

2019-2023 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Asian Pacific	0.1202 **
Black	0.2841 **
Hispanic	0.0085
Native American	0.1259 **
Subcontinent Asian	0.1175 **
Other race minority	0.0478
Women	0.0886 **

ii. Management experience. Managerial experience is an important predictor of business ownership and success, but discrimination remains an obstacle to greater diversity in management positions.^{60, 61, 62, 63} Nationally, minorities and women are far less likely than White men to work in management positions.^{64, 65, 66} Similar outcomes exist for minorities and women in Virginia. BBC examined the

representation of minorities, women, and SDVs in management positions in the Virginia construction, professional services, and non-professional services and goods industries. As shown in Figure 3-6:

- Smaller percentages of people who identify as Asian Pacific (6.4%), Black (5.2%), Hispanic (4.2%), and Subcontinent Asian (4.9%) work as managers in the construction industry than people who identify as White (13.5%). Additionally, smaller percentages of women (7.3%) than men (10.3%) work as managers in the construction industry.
- Smaller percentages of people who identify as Asian Pacific (7.2%), Black (5.9%), Hispanic (6.5%), Subcontinent Asian (6.1%), and other race minority (6.1%) work as managers in the professional services industry than people who identify as White (10.0%). Additionally, a smaller percentage of women (7.8%) work as managers in the professional services industry than men (8.9%).
- Smaller percentages of people who identify as Asian Pacific (1.2%), Black (0.8%), Hispanic (0.8%), and Native American (0.9%) work as managers in the non-professional services and goods industry than people who identify as White (4.5%). Additionally, a smaller percentage of women (2.4%) work as managers in the non-professional services and goods industry than men (3.2%), and a smaller percentage of SDVs (1.6%) work as managers in the non-professional services and goods industry than all others (3.0%).

Figure 3-6.
Percentage of non-owner workers who worked as a manager in each study-related industry, Virginia, 2019-2023

Group	Construction	Professional services	Non-prof. services and goods
Race/ethnicity			
Asian Pacific	6.4 % **	7.2 % **	1.2 % **
Black	5.2 % **	5.9 % **	0.8 % **
Hispanic	4.2 % **	6.5 % **	1.0 % **
Native American	13.4 %	8.9 %	0.9 % **
Subcontinent Asian	4.9 % **	6.1 % **	3.3 %
Other race minority	22.1 %	6.1 % **	3.3 %
White	13.5 %	10.0 %	4.5 %
Gender			
Women	7.3 % **	7.8 % *	2.4 % **
Men	10.3 %	8.9 %	3.2 %
SDV status			
SDV	9.5 %	7.1 %	1.6 % *
All others	9.9 %	8.6 %	3.0 %
All individuals	9.9 %	8.5 %	2.9 %

Note: *, ** Denotes that the difference in proportions between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 90% and 95% confidence levels, respectively.

Source: 2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

We also conducted regression analyses to assess whether there are relationships between race and gender and holding a management position, even after accounting for various personal factors such as age and family status. Figure 3-7 presents results of those analyses, which indicate that, even after accounting for such factors, people who identify as Asian Pacific, Black, Hispanic, and Subcontinent Asian are less likely to hold management positions in the Virginia construction industry than those who identify as White, and women are less likely to hold management positions in the Virginia construction industry than men. People who identify as Asian Pacific, Black, Hispanic, and Subcontinent Asian are less likely to hold management positions in the Virginia professional services industry than those who identify as White. People who identify as Asian Pacific and Black are less likely to hold management positions in the Virginia non-professional services and goods industries than people who identify as White.

Figure 3-7.
Predictors of management in study-related industries,
Virginia, 2019-2023

Variable	Coefficient		
	Construction	Professional services	Non-prof. services and goods
Asian Pacific	-0.5900 **	-0.1661 **	-0.6023 **
Black	-0.4647 **	-0.2308 **	-0.5048 **
Hispanic	-0.2615 **	-0.2479 **	-0.2668
Native American	0.1019	0.0777	-0.5123
Subcontinent Asian	-0.8341 **	-0.3265 **	-0.3707
Other race minority	0.3837	-0.1746	-0.0166
Women	-0.5050 **	-0.0338	-0.1029

Notes: The construction regression included 7,626 observations.

The professional services regression included 14,794 observations.

The non-professional services and goods regression included 7,792 observations.

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

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

Source: 2019-2023 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

2. Financial capital. In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{67, 68, 69} Individuals can acquire financial capital through many sources, including wages, personal wealth, homeownership, and loans. If barriers exist in financial markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

a. Wages and income. Wage and income gaps between minorities and White people and between women and men exist nationwide, even when researchers have accounted for various personal factors.^{70, 71, 72, 73} For example, nationally, on average, Black and Hispanic residents have household incomes less than two-thirds and three-fourths, respectively, those of White residents.⁷⁴ Women have also faced wage and income gaps relative to men. Nationally, the median hourly wage of women is only 85 percent that of men, even after accounting for various personal factors.⁷⁵ Such disparities make it difficult for minorities and women to use wages as a source of business capital.

BBC observed wage disparities in Virginia consistent with those observed nationally. Figure 3-8 presents mean annual wages for Virginia workers by race, gender, and SDV status. People who identify as Black (\$59,148), Hispanic (\$62,825), and Native American (\$75,053) earn less than people who identify as White (\$87,975). In addition, women (\$67,026) earn less than men (\$93,832). In contrast, people who identify as Asian Pacific (\$90,232) and Subcontinent Asian (\$120,451) earn more than people who identify as White (\$87,975), and SDVs (\$108,537) earn more than all others (\$79,945).

Figure 3-8.
Mean annual wages, Virginia,
2019-2023

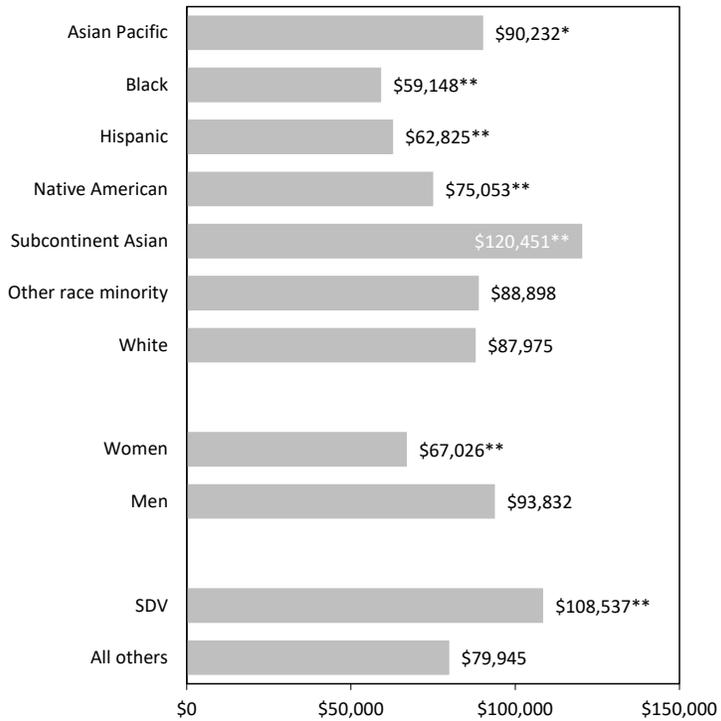
Notes:

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

*, ** Denotes that the difference in mean between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



We also conducted regression analyses to assess whether wage gaps for minorities or women exist even after accounting for various personal factors such as age, family status, and location. Figure 3-9 presents results of those analyses, which indicate that, in Virginia, workers of all minority race groups earn less than White workers, and women earn less than men, even after accounting for such factors.

Figure 3-9.
Predictors of annual wages (regression),
Virginia, 2019-2023

Notes:

The regression includes 112,626 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The referent for race variables is White.

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

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated coefficient
Asian Pacific	0.895 **
Black	0.814 **
Hispanic	0.866 **
Native American	0.916 **
Subcontinent Asian	0.909 **
Other race minority	0.906 **
Women	0.780 **

b. Personal wealth. Another source of business capital is personal wealth, and there are substantial disparities between minorities and White people and between women and men in personal wealth, even after accounting for various personal characteristics.^{76, 77, 78, 79} For example, in 2019, Black and Hispanic residents across the country exhibited average household net worth that was 14 percent and 17 percent, respectively, that of White residents.⁸⁰ In Virginia, 16.8 percent of Black residents, 12.0 percent of Hispanic residents, 6.8 percent of Asian/Native Hawaiian/Pacific Islander residents, and 22.9 percent of Native American residents are living in poverty, compared to 8.3 percent of White residents.⁸¹

c. Homeownership. Home equity has also been shown to be a key source of business capital, but minorities appear to face substantial barriers nationwide in owning homes, and those disparities appear to be at least partly due to discrimination.^{82, 83, 84} Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their races.⁸⁵ ⁸⁶ In addition, minority homeowners tend to own homes worth less than those of White homeowners and tend to accrue less equity.^{87, 88, 89} Differences in home values and equity can be attributed—at least, in part—to the depressed property values that tend to exist in racially segregated neighborhoods.^{90, 91, 92} Minorities appear to face homeownership barriers in Virginia similar to those observed nationally. As shown in Figure 3-10, people who identify as Asian Pacific (69%), Black (49%), Hispanic (53%), Native American (65%), Subcontinent Asian (70%), and other race minority (66%) own homes at rates that are less than that of people who identify as White (75%).

Figure 3-10.
Homeownership rates,
Virginia, 2019-2023

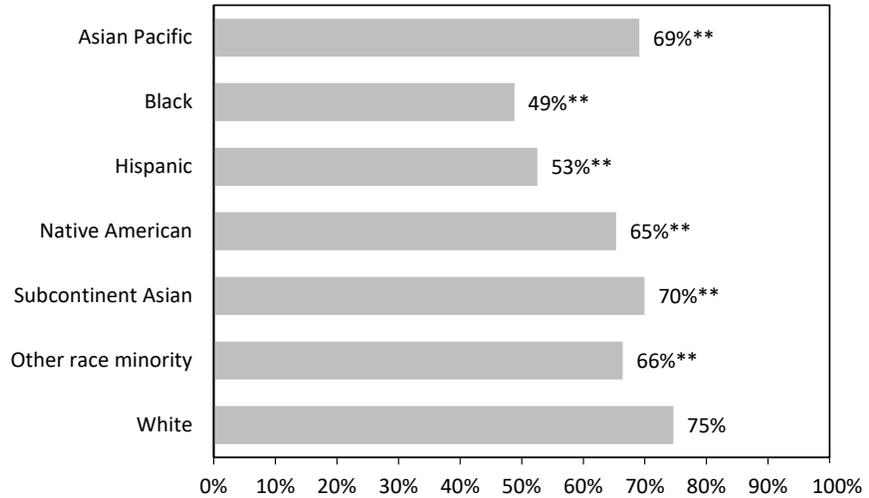
Notes:

The sample universe is all households.

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

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



We also conducted regression analyses to assess whether gaps in homeownership rates for minorities exist even after accounting for various personal factors such as age, family status, and location. Figure 3-11 presents results of those analyses, which indicate that, in Virginia, people who identify with all minority race groups are less likely to own homes than people who identify as White.

Figure 3-11.
Predictors of home ownership (regression),
Virginia, 2019-2023

Notes:

The sample universe is all owner-occupied housing units.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

The referent for race variables is White.

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

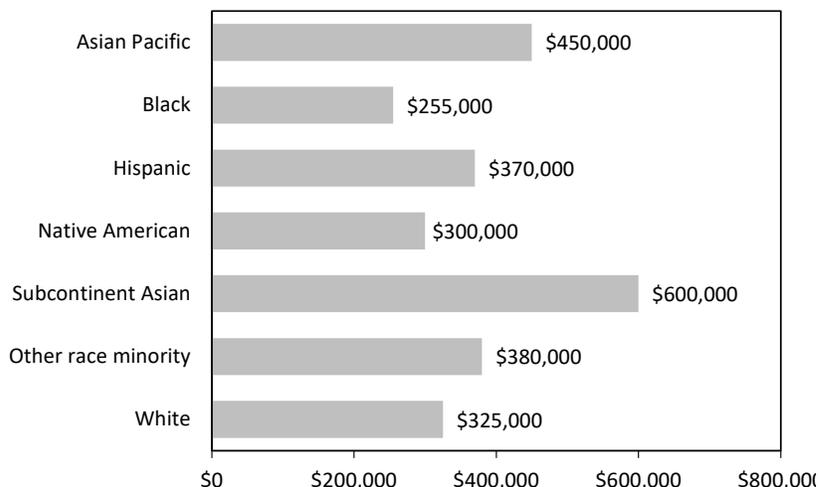
Variable	Exponentiated coefficient
Asian Pacific	0.945 **
Black	0.572 **
Hispanic	0.742 **
Native American	0.830 **
Subcontinent Asian	0.780 **
Other race minority	0.831 **

Figure 3-12 presents median home values among minority homeowners in Virginia. Those data indicate that Black (\$255,000) and Native American (\$300,000) homeowners own homes that, on average, are worth less than those of White homeowners (\$325,000). In contrast, Asian Pacific (\$450,000), Hispanic (\$370,000), Subcontinent Asian (\$600,000), and other race minority homeowners (\$380,000) own homes that, on average, are worth more than White homeowners (\$325,000).

Figure 3-12.
Median home values,
Virginia, 2019-2023

Note:
 The sample universe is all owner-occupied housing units.

Source:
 2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



We also conducted regression analyses to assess whether differences in median home values for minorities exist even after accounting for various personal factors such as age, family status, and location. Figure 3-13 presents results of those analyses, which indicate that, in Virginia, people who identify as Black, Hispanic, and Native American have lower median home values than people who identify as White, even after accounting for such factors. In contrast, people who identify as Subcontinent Asian have higher median home values than people who identify as White, even after accounting for various personal factors.

Figure 3-13.
Predictors of home value (regression),
Virginia, 2019-2023

Notes:
 The regression includes 109,760 observations.
 The sample universe is all owner-occupied households.
 ** Denotes statistical significance at the 95% confidence level.
 The referent for race variables is White.
 For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

Source:
 2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated coefficient
Asian Pacific	1.011
Black	0.805 **
Hispanic	0.918 **
Native American	0.913 **
Subcontinent Asian	1.068 **
Other race minority	1.025

d. Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home and business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{93, 94, 95, 96, 97, 98} BBC assessed difficulties minorities and women face in home and business credit markets.

i. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples include discriminatory treatment of minorities and women during pre-application processes and less favorable loan terms when minority and women borrowers are approved for home loans.^{99, 100} Disparities in home loan denial rates and in mortgage costs may prevent minorities and women from accessing the wealth-building potential of homeownership.^{101, 102, 103, 104, 105} To examine how minorities fare in the home credit market relative to White residents in Virginia, we analyzed home

loan denial rates for high-income households by race in the marketplace. As shown in Figure 3-14, people who identify as Black (16%) and Hispanic (10%) in Virginia are denied home loans at greater rates than people who identify as White (5%).

Figure 3-14.
Denial rates of conventional purchase loans for high-income households, Virginia, 2024

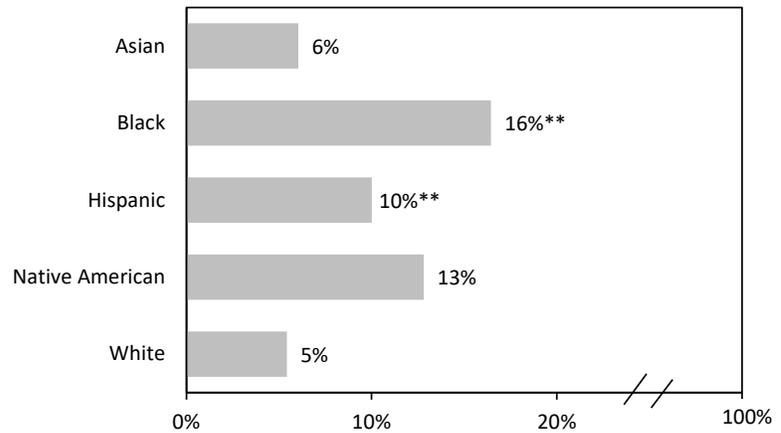
Notes:

** Denotes that the difference in proportions between the minority group and White is statistically significant at the 95% confidence level.

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2024. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

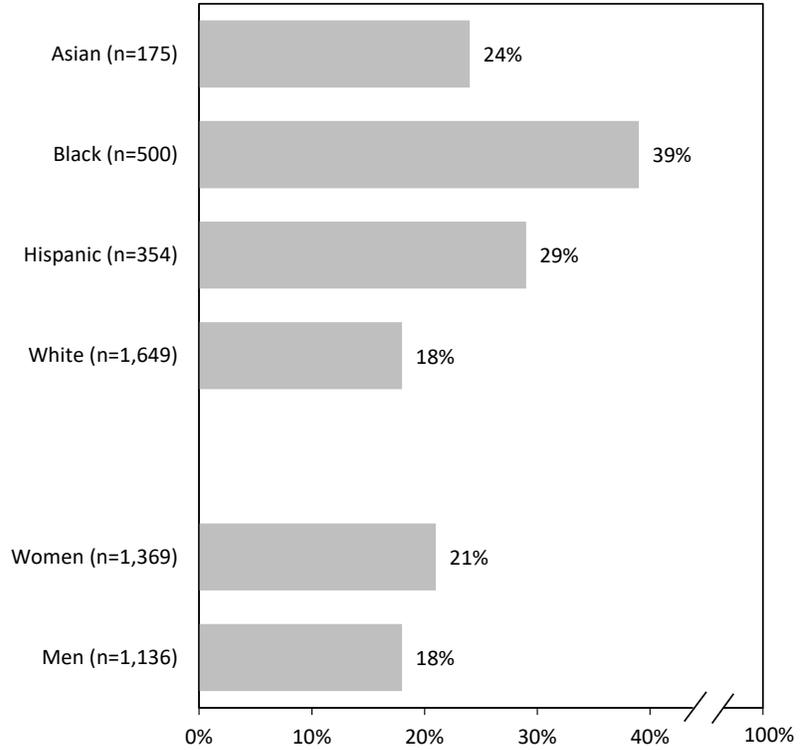


ii. Business credit. Minority- and woman-owned businesses also face difficulties accessing business credit. For example, during pre-application meetings, minority-owned businesses are given less information about loans, are subjected to more information requests, and are offered less support than White-owned businesses.¹⁰⁶ In addition, minority- and woman-owned businesses are more likely to forego submitting business loan applications because of fears of denial.^{107, 108, 109} They are also more likely to be denied business credit when they do seek loans and are less likely to receive all the financing they originally sought if their loans are approved.^{110, 111, 112, 113, 114, 115} Finally, minority and women business owners face worse loan outcomes even after accounting for creditworthiness.^{116, 117, 118} Without equal access to capital, minority- and woman-owned businesses operate with less capital than White-owned businesses and businesses owned by men, respectively, and must rely more on personal finances.^{119, 120, 121, 122}

BBC analyzed denial rates for loans, lines of credit, and cash advances for minorities and women relative to White people and men, respectively, at a national level. As shown in Figure 3-15, minority-owned businesses are denied loans at greater rates than White-owned businesses, and businesses owned by women are denied loans at greater rates than businesses owned by men.

Figure 3-15.
Loan, line of credit, and
cash advance denial rates,
United States, 2024

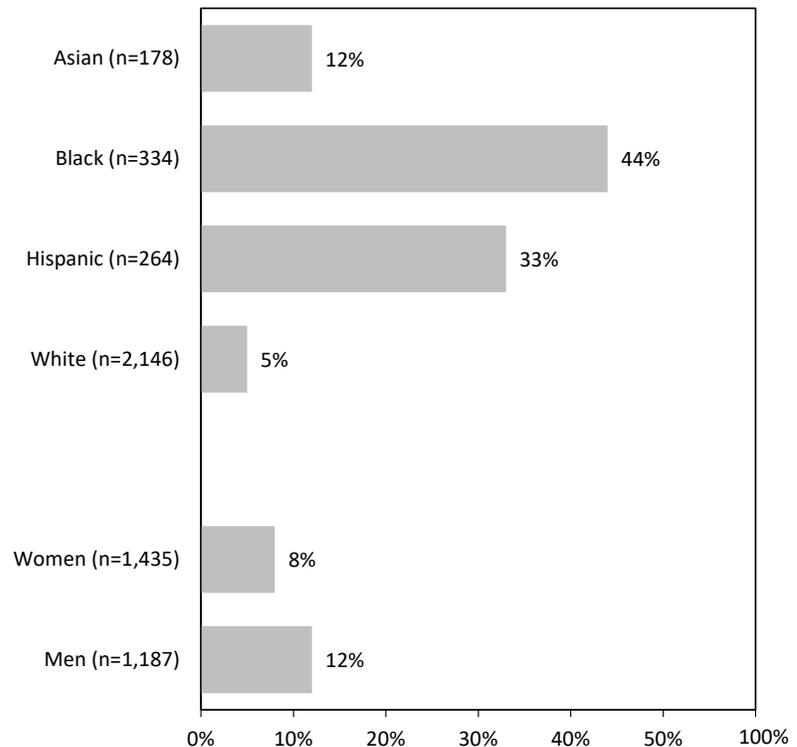
Source:
2024 Small Business Credit Survey.



We also analyzed the degree to which minority- or woman-owned businesses do not apply for loans due to a fear of denial at a national level. Figure 3-16 presents the rates at which those businesses forego loan applications due to fears of denial relative to White-owned businesses and businesses owned by men, respectively. Nationally, minority-owned businesses are more likely than White-owned businesses to not apply for loans due to a fear of denial.

Figure 3-16.
Businesses that did not apply
for loans due to fear of denial,
United States, 2024

Source:
 2024 Small Business Credit Survey.



3. Business ownership. Nationally, there has recently been substantial growth in the number of minority- and woman-owned businesses. For example, from 2017 to 2020, the number of woman-owned businesses with employees increased by 9 percent, Black-owned businesses increased by 14 percent, and Hispanic-owned businesses increased by 17 percent.^{123, 124} However, important barriers in starting and operating businesses remain. People who identify as Black, Hispanic, and women are still less likely to start businesses than White men.^{125, 126, 127, 128, 129} In addition, minorities and women have not been able to penetrate all industries equally. They disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of minorities and women.^{130, 131, 132} BBC examined rates of self-employment (i.e., business ownership) in the Virginia marketplace for each relevant industry by race, gender, and SDV status. As shown in Figure 3-17:

- People who identify as Black (13.6%), Hispanic (16.5%), and Native American (16.2%) own construction businesses at rates less than that of people who identify as White (22.7%). In addition, women (14.0%) own construction businesses at a rate less than men (21.0%), and SDVs (14.3%) own construction businesses at a rate less than all others (20.3%).
- People who identify as Asian Pacific (6.9%), Black (6.7%), Hispanic (8.6%), and Subcontinent Asian (8.4%) own professional services businesses at rates less than that of people who identify as White (10.8%). In addition, women (8.9%) own professional services businesses at a rate less than men (9.9%), and SDVs (7.5%) own construction businesses at a rate less than all others (9.7%).
- People who identify as Asian Pacific (8.7%), Black (11.9%), and Subcontinent Asian (9.7%) own non-professional services and goods businesses at rates less than that of people who identify as White (14.8%). In addition, women (13.1%) own non-professional services and goods businesses at a rate less than men (14.7%).

BBC also conducted regression analyses to determine whether differences in business ownership rates in the Virginia marketplace exist based on race and gender even after statistically controlling for various personal factors such as income, education, and familial status. As shown in Figure 3-18, even after accounting for various personal factors, in Virginia, people who identify as Black and Subcontinent Asian are less likely to own construction businesses than people who identify as White, and women are less likely to own construction businesses than men. People who identify as Asian Pacific are less likely to own professional services businesses than people who identify as White. People who identify as Asian Pacific and Black are less likely to own non-professional services and goods businesses than people who identify as White, and women are less likely to own non-professional services and goods businesses than men.

Figure 3-17.
Self-employment rates in study-related contracting industries, Virginia, 2019-2023

Group	Construction	Professional services	Non-prof. services and goods
Race/ethnicity			
Asian Pacific	26.6 %	6.9 % **	8.7 % **
Black	13.6 % **	6.7 % **	11.9 % **
Hispanic	16.5 % **	8.6 % *	16.7 %
Native American	16.2 % **	13.5 %	18.3 %
Subcontinent Asian	13.0 %	8.4 % **	9.7 % *
Other race minority	17.7 %	11.9 %	18.4 %
White	22.7 %	10.8 %	14.8 %
Gender			
Women	14.0 % **	8.9 % *	13.1 % *
Men	21.0 %	9.9 %	14.7 %
SDV status			
SDV	14.3 % *	7.5 % *	13.5 %
All others	20.3 %	9.7 %	14.2 %
All individuals	20.2 %	9.6 %	14.2 %

Note: *, ** Denotes that the difference in proportions between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 90% and 95% confidence levels, respectively.

Source: 2019-2023 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure 3-18.
Predictors of business ownership in study-related industries
(regression), Virginia, 2019-2023

Variable	Coefficient		
	Construction	Professional services	Non-prof. services and goods
Asian Pacific	0.0616	-0.1624 **	-0.3678 **
Black	-0.3152 **	-0.0931	-0.1210 *
Hispanic	-0.0631	-0.0411	0.1175
Native American	-0.2249	0.2522	0.1435
Subcontinent Asian	-0.4808 **	-0.0865	-0.1145
Other race minority	-0.1580	0.1319	0.3206
Women	-0.3914 **	-0.0539	-0.0796 *

Notes: The construction regression included 9,886 observations.
 The professional services regression included 17,124 observations.
 The non-professional services and goods regression included 9,277 observations.
 *, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

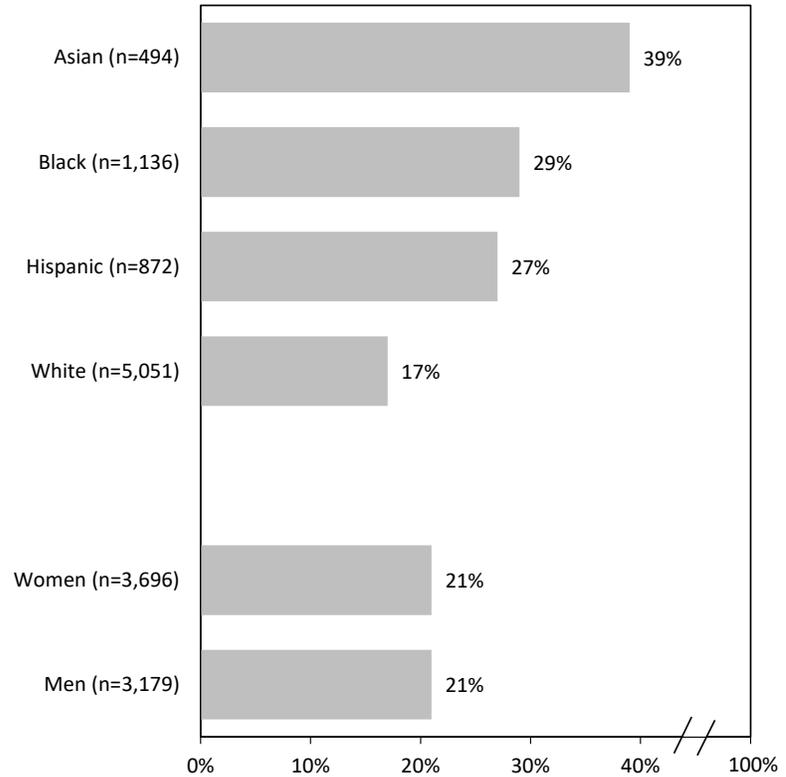
Source: 2019-2023 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

4. Business success. Research indicates that, nationally, minority- and woman-owned businesses fare worse than businesses owned by White men. For example, minority- and woman-owned businesses are more likely to experience financial challenges relative to those owned by people who identify as White and men, respectively.^{133, 134} In addition, minority- and woman-owned businesses have been shown to be less successful than those owned by White people and men, respectively, based on a number of different indicators such as profits and business size.^{135, 136, 137, 138} BBC examined data on business financial conditions, business receipts, and business owner earnings to further explore business success nationally and in the Virginia marketplace.

a. Financial condition. BBC examined the reported *financial condition* of businesses in the United States by the race and gender of their owners at the national level according to the Small Business Credit Survey. Financial condition refers to a business’ increase or decrease in revenue and number of employees in the past 12 months as well as anticipated increase in revenue and number of employees over the next 12 months. Financial condition also assesses financial challenges a business may have experienced in the past 12 months, including weak sales, difficulty paying expenses, uneven cash flow, and credit availability. As shown in Figure 3-19, Asian- (39%), Black- (29%), and Hispanic-owned businesses (27%) are more likely than White-owned businesses (17%) to report being in poor financial condition. Woman-owned businesses are equally likely as businesses owned by men to report being in poor financial condition.

Figure 3-19.
Businesses in poor
financial condition, United
States, 2024

Source:
2024 Small Business Credit Survey.



b. Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in the Virginia marketplace earn as much as those owned by people who identify as White and men, respectively. Figure 3-20 indicates that Asian- (\$1.71 million), Black- (\$1.23 million), and Hispanic-owned businesses (\$1.36 million) in Virginia have mean annual business receipts less than White-owned businesses (\$3.14 million). In addition, woman-owned businesses (\$1.37 million) have mean annual business receipts less than businesses owned by men (\$3.46 million). In contrast, Native Hawaiian and other Pacific Islander-owned businesses (\$4.77 million) have mean annual business receipts greater than White-owned businesses (\$3.14 million).

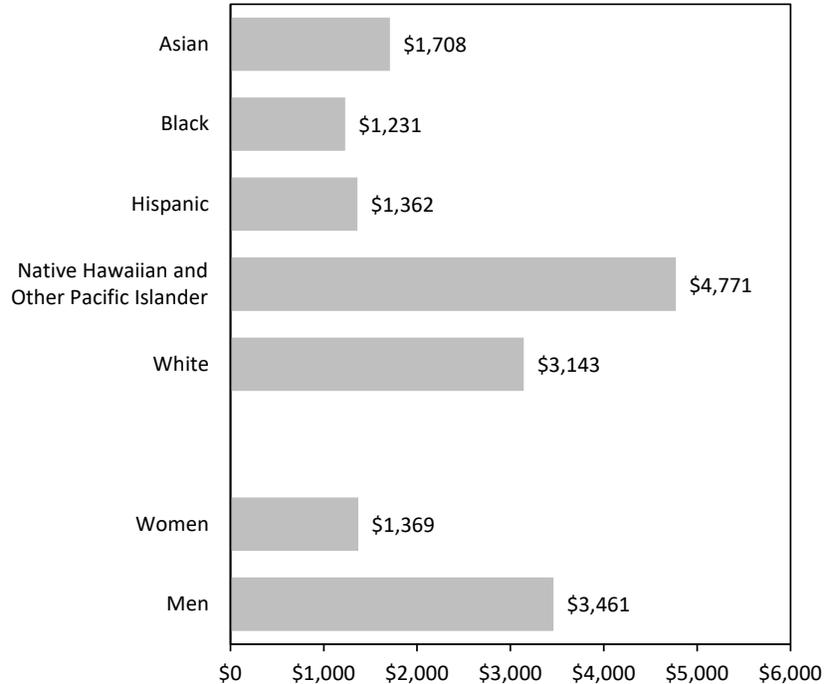
Figure 3-20.
Mean annual business receipts (in thousands), Virginia

Note:

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

Source:

2022 Annual Business Survey.



c. Business owner earnings. BBC also analyzed the earnings of business owners to assess whether business owners who are minorities, women, and SDVs in Virginia earn as much as business owners who identify as White, men, and all others, respectively. Figure 3-21 indicates that Black (\$40,214), Hispanic (\$48,426), and Native American (\$40,912) business owners earn less on average than White business owners (\$57,445), and women business owners (\$38,590) earn less on average than business owners who are men (\$66,680). In contrast, Subcontinent Asian business owners (\$89,786) earn more on average than White business owners (\$57,445), and business owners who are SDVs (\$74,769) earn more on average than all other business owners (\$53,920).

Figure 3-21.
Mean annual business owner earnings, Virginia, 2019-2023

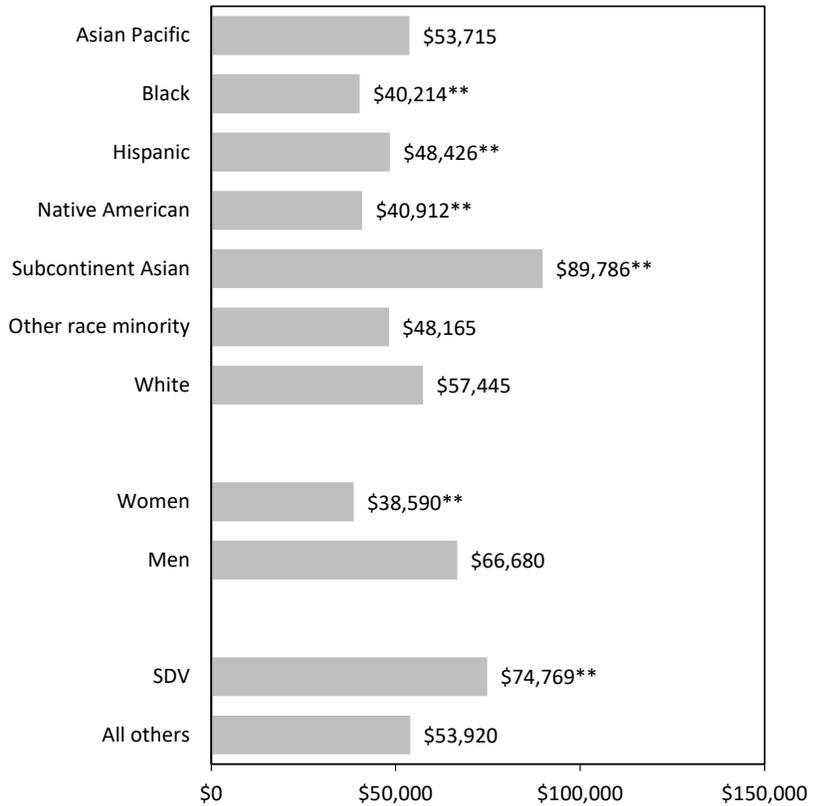
Notes:

The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2023 dollars.

** Denotes that the difference in mean between the minority group and White, between women and men, or between SDVs and all others is statistically significant at the 95% confidence level.

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to determine whether race- or gender-based differences in business owner earnings in Virginia exist even after statistically controlling for various personal factors such as age, education, family status, and location. Figure 3-22 presents the results of those analyses. As shown in Figure 3-22, women business owners earn substantially less compared to business owners who are men. In contrast, Hispanic business owners earn substantially more than White business owners.

Figure 3-22.
Predictors of business owner earnings (regression), Virginia, 2019-2023

Notes:

The regression includes 9,863 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

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

The referent for race variables is White.

Source:

2019-2023 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Exponentiated coefficient
Asian Pacific	0.983
Black	0.979
Hispanic	1.143 *
Native American	0.704
Subcontinent Asian	1.073
Other race minority	0.903
Women	0.562 **

C. Summary

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

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CHAPTER 4.

Qualitative Insights

As part of the disparity study, business owners, trade association representatives, and other stakeholders had the opportunity to share personal insights about their experiences working in Virginia, as well as with the Commonwealth of Virginia state agencies and higher education institutions (collectively referred to as *the Commonwealth*) and other government agencies. BBC Research & Consulting (BBC) documented those insights and identified key themes about conditions in Virginia for small businesses and microbusinesses as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) and other businesses. We used that information to augment many of the quantitative analyses we conducted as part of the disparity study to provide context for study results and provide explanations for various barriers diverse businesses potentially face as part of Commonwealth contracting and procurement.

A. Data Collection

The study team collected personal insights about marketplace conditions, experiences working with the Commonwealth, and recommendations for the Commonwealth's implementation of the Small, Women-owned, and Minority-owned Business (SWaM) Program. We made various efforts between June 2025 and December 2025 to collect that information:

- **Public meetings:** BBC solicited stakeholders to provide written and verbal insights at four public meetings—two in-person meetings on June 17, 2025, and two virtual meetings on June 10 and 25, 2025.
- **In-depth interviews:** The study team conducted 65 in-depth interviews with owners and other high-level representatives of local construction, professional services, and non-professional services and goods businesses to collect interviewees' perceptions of, and experiences with, the local contracting industry, working or attempting to work with government organizations in Virginia, the Commonwealth's implementation of its business assistance programs, and other relevant topics. BBC identified some interview participants from a random sample of businesses the study team contacted during the availability survey process (see Chapter 6 for details). Other interview participants were identified from a database of registered businesses in the Commonwealth. Businesses were stratified by business type; location; and the race/ethnicity, gender, and SDV status of business owners (if available).
- **Availability surveys:** As part of the availability analysis, the study team conducted surveys with 1,565 businesses located and operating in the Virginia marketplace. The survey included an opportunity for participants to share qualitative insights about whether they have experienced barriers starting or expanding businesses in their industries, obtaining work in Virginia, or working with government organizations in Virginia. A total of 355 survey participants provided such comments.
- **Focus groups:** The study team conducted four focus groups with representatives of microbusinesses certified as part of the SWaM Program, as well as representatives of business organizations, such as chambers of commerce, business assistance organizations, and other

business groups. We conducted the focus groups in October and November 2025 with a total of 13 participants across the four groups. During each group, participants engaged in discussions and shared insights about working in Virginia with public and private sector organizations.

- **Written comments:** Throughout the study, stakeholders and community members had the opportunity to submit written comments directly to BBC regarding their experiences working in Virginia. A total of six stakeholders and community members shared such comments.

B. Key Findings

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

1. Financial capital;
2. Obtaining work;
3. Doing business with public agencies;
4. Workforce and labor;
5. Barriers related to race and gender;
6. Business inclusion programs;
7. Supporting Commonwealth businesses.

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

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

We preface each quotation with a brief description of the ownership characteristics of the business and the business’ line of work. We indicate whether each participant represents a business that holds a SWaM certification or any other relevant certifications. BBC edited quotations for clarity and brevity.

1. Financial capital. Business owners discussed barriers related to their ability to secure financial capital, which includes the business’ revenue in addition to lines of credit, loans, and bonds.

a. Financing barriers. Business owners and representatives shared that it can be difficult for small or emerging businesses to get approved for any kind of financing or loans to support the growth of their businesses. For example:

The owner of a White woman-owned, SWaM-certified non-professional services and goods firm stated, “I was about to bid three different bids at the same time, and I probably wasn’t going to win all of each of them, but I might win a part of each of them and I was going to

have to do deposits and it was going to stretch us out too thin. And I remember going to [the bank] and laying it all out and them saying, 'Well, you're probably about to turn the corner, but you're too young, you're too new as a company.'" [#47]

The representative of a White male-owned, certified SDV-owned business stated, "I can't get a small business loan for my business until I have a minimum of two years of operational business revenue is what I'm being told by just about every creditor that's out there. They want to have at least two years of financial stability and workflow of how much money I've been taking in over the last however long. It's a huge list of stuff that they require in order to get a \$50,000 [loan] ... that's nothing for me as far as going and purchasing equipment or specialized things." [#27]

The representative of a Woman-owned Business Enterprise (WBE)-certified non-professional services and goods microbusiness stated, "As a new startup, having a cash flow was very difficult and for the first three to five years was definitely living day-to-day. And even though I had a very valid business model, and even with a couple of years of proof of product, there's no funding. As a small business owner, that's extremely difficult." [#52]

b. Insurance barriers. Some small business representatives described difficulties they faced in affording insurance and obtaining the type of insurance coverage needed for their work. In addition, some business owners expressed that insurance requirements for contracts can be difficult to understand. For example:

The White male owner of a professional services company stated, "What I found the most difficult thing about insurance is how much you want to be insured for. So when you're small and you only have so much gross receipts, they limit the amount of insurance that you can have, which limits the size of the projects you can go after." [#62]

The White male-owner of a professional services company stated, "There's a lot of documents that are sitting here on my desk. It's like more than 100 pages worth of legalese. ... I suppose I am insured for stuff, but [the insurance company is] not making that abundantly clear. It's not in their interest to, and there's nothing to hold them accountable for doing that. ... When something goes wrong, there's probably a pretty good chance that there's something in there that says they don't have to pay for that thing." [#37]

c. Payments. Most of the business owners and representatives interviewed reported experiencing delayed payments at some point, limiting their cash flow and affecting their financial well-being. For example:

A representative of a Native American male-owned professional services company stated, "One of the bigger issues we face is people just deciding not to pay, period. That is a problem in our industry." [#33]

The Asian Pacific male owner of a professional services company stated, "I would say that a small business has less recourse to demand payment. Even through the courts, it becomes a time-consuming and costly proposition if you have to hire a lawyer to get your payment. ... We have less resources to invest in fraud detection. So if you think about something like checks or credit card chargebacks, I feel like smaller businesses are at greater risk than large businesses." [#35]

Business owners and representatives also shared instances of non-payment. Recuperating those payments is often time-consuming and costly, which interviewees feel places a disproportionate burden on smaller businesses that may have inadequate resources to pursue legal action.

The White male owner of a non-professional services and goods business stated, “There are people out there ... who look to contract with small businesses knowing full well that they’re not going to have lawyers and they’re not going to be able to spend the time to chase money and things like that.” [#65]

The Black male owner of a SWaM-certified professional services business stated, “It will never be a fight we can win. Large businesses, they have [resources to make] a dispute. They send it to their general counsel. The client in the public sector, they have their general counsel. ... Us little guys will never win that fight. ... If a public sector [client] disputes a charge after you’ve demonstrated it’s a legitimate charge, you’re not getting paid. I think that’s a serious disadvantage to small businesses, because we don’t have the legal resources to stand up for us. ... I’ve been involved in litigation, and it’s me, getting in the car and driving to the courthouse, making sure I’m there on time to state my case. So if we don’t have somebody who can go to court on this, it’s not happening.” [#63]

The White male owner of a SWaM-certified construction microbusiness stated, “The amount [owed by a private sector client] was about \$20,000, and the attorney that I contacted basically said, ‘It’s going to cost you more to recoup it than it is to get it. So, just write it off.’” [#58]

2. Obtaining work. Business owners and representatives shared their experience learning about and bidding on upcoming work, including attending networking events and forming project teams. Small business owners and representatives described the challenges they faced in obtaining work, particularly when they have fewer resources than larger businesses.

a. Networking and business development. Business owners and representatives described how important networking and relationship-building can be for business success. For example:

A participant in the SWaM-certified microbusiness focus group stated, “That’s why I’m always going to these events, learning who does [what], getting the contacts, and then somehow we connect again down the road, become business friends and go to events, make money together.” [FG #1]

The White woman owner of a SWaM-certified construction company stated, “There’s a couple of ... social networks where you go out and you have brunch and then they have a small webinar of different things that’s going on in the community, and then you get the network with the different businesses there. That was very helpful.” [#40]

Some business owners and representatives described their perceptions that networking and relationship building were more useful for finding work in the private sector, and that it was more challenging to use those tools to obtain public sector work. For example:

A representative of a White male-owned, SWaM-certified professional services microbusiness stated, "The majority of our work comes through direct referral, which is great because what better way to know what you're getting than somebody saying, 'Hey, I trust these guys. You should trust them too.' Unfortunately, that referral system cannot work for the government bidding process." [#5]

Some business owners and representatives described experiencing discrimination at networking events, giving them the impression that networking events can be easier to navigate and more fruitful for White, male business owners than for minority and women business owners. For example:

The Black woman owner of a professional services business stated, "But a lot of networking and trying to do business with larger companies, they don't use objective selection criteria. So even if you can get a company to sign you as a partner, why would they work with me over somebody else? Over someone who maybe is male or a little older or maybe they find to be more compelling? It's very subjective and it kind of reinforces that deficit that you're experiencing as a female-owned, minority-owned business." [#14]

A representative of a White male-owned professional services company shared, "And it still is the case that, at networking events, I find it much easier to ... look for someone that you can identify with in some ways, you have something in common [with], so you can start a conversation. And so I do think that socially that it's a barrier that we all, hopefully in the DC area, are big enough and smart enough to get past, but it is still a thing for how you get started and you make connections and you make those conversations." [#32]

Perhaps the most prevalent barrier small business owners described related to networking and business development was the challenge of performing those activities (e.g., monitoring solicitation requests, conducting market research, scoping programmatic needs of clients) while also conducting the day-to-day work of the business.¹ In particular, small business owners discussed not having the dedicated staff that large businesses may have to pursue networking opportunities. For example:

The Black male owner of a SWaM-certified professional services business stated, "I mean, the large businesses I compete with, they actually have somebody whose job it is to just play golf with their commercial clients. I mean, I can't afford to do that. And it's under the guise of business development, and we do business development activities. But we can't fly folks across the country to see our integration facility, and we can't take every client to a ballgame or a golfing event just to keep the relationship. It's very hard to compete like that. It's very hard to compete against the larger businesses." [#63]

Business owners also described how it can be time-consuming to monitor solicitation platforms for bid opportunities, which can be a barrier for smaller businesses that may not have staff members dedicated to this process. For example:

The White male owner of a non-professional services and goods business stated, "I mean, as a small business, I don't have a significant amount of business development people or

¹ See also Section 3: Doing business with public agencies.

salespeople that get to hear about things before they're put out the bid. And then once they're put out the bid, generally speaking, there's people who already have, I won't say inside track, but have knowledge of it that gives them a leg up." [#65]

The Asian Pacific female owner of a WBE- and Minority-owned Business Enterprise (MBE)-certified professional services microbusiness stated, "It's like you need a full-time person to [monitor solicitations] ... it takes too much time on eVA to look for something that you can actually do and make some money off of." [#50]

b. Forming project teams. Business owners and representatives discussed how they assemble project teams and the factors that influence their decisions to work with other businesses. Prime contractors interviewed for the study shared a few different tools they use to develop their pool of subcontractors and potential project partners. Some prime contractors shared that they actively conduct outreach with subcontractors, consult business lists, or rely on previous partners and word of mouth to find potential project partners. Other prime contractors rely on referrals from other businesses and customers to find potential subcontractors. For example:

A representative of a Native American male-owned professional services company stated, "I looked at our list of consultants and then tried to find out if they were certified by going to their website or oftentimes they say so in their email signatures. And that's usually where I would start because I like working with people that we have relationships with and not just picking people because they have a certification or whatever." [#33]

The White woman-owner of a SWaM-certified professional services company shared, "We typically look for somebody with the expertise that the RFP [request for proposals] is calling for. It just so happens that 50 percent of the time, they are SWaM certified. ... So, I don't pick and choose my partners like, "Oh, we could both be SWaM." We go for the expertise first." [#36]

The Black male-owner of a SWaM-certified, MBE-certified non-professional services and goods microbusiness stated, "I look at reviews, and then I call around to the companies that I do want to use. I also would put out a little ad or whatever for subcontractors to see. And then we just interview them and ask them about their experience, their work experience. And we see that they may be a good fit. We'll bring them on for a job or two, depends on the scope of work. And, that's pretty much how we do it." [#51]

The Black male owner of a SWaM-certified professional services business stated, "So we have a network of folks we trust. We have contacts [on which] maybe [we] can't do the work, but know someone who can do the work. It's not hard. And we have enough relationships where we end up with a trusted subcontractor." [#63]

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

The Asian Pacific male owner of a professional services company stated, "So I see who has a reliable history of payment and I also look at rate of pay and geographic location of the prime contractor." [#35]

The White non-binary owner of a WBE-certified construction microbusiness stated, "Some of that is just from longevity and reputation that they have found me, because I do a specialty part of construction. So I have just over the years, either they've contacted me or I've contacted them and gotten on their bid lists, so they have me on their generic list of people to reach out to because they've heard of me or found me, whatever." [#56]

The Black male owner of a SWaM-certified professional services business stated, "Now, being a subcontractor to a prime is a totally different story. You have to prove yourself. You have to stay in front of them. You have to market yourself. You have to always be in contact with them, so that when they need a subcontractor that does what we do, they remember who we are and they call us. So that's hard." [#63]

3. Doing business with public agencies. Business owners and representatives discussed their experiences learning about, bidding on, and performing work with the Commonwealth and other public agencies, and how those aspects of doing business compare with private sector clients.

a. Registration. Interviewees representing businesses that work with the Commonwealth described the administrative burden associated with registering to work with the Commonwealth and individual localities and voiced a desire for a shared registration process or consistency across agencies' registration processes. For example:

The Asian Pacific male owner of a professional services company stated, "Each locality has their own process, their own pre-submission requirements and setting up a business account for each location is time-consuming." [#35]

b. Identifying opportunities. Interviewees remarked on the considerable differences in the process of identifying work opportunities between private and public sector organizations. Whereas the private sector relies on word-of-mouth and direct advertising, the public sector relies heavily on formal solicitations and bidding processes. For example:

The owner of an Asian Pacific male-owned, SWaM-certified construction company stated, "I need to spend three hours every week going through and trying to sift through that nonsense set of [published solicitations on solicitations boards] for my projects." [#22]

The representative of a construction firm stated, "We don't know how to get into government projects. There is no advertisement for it. You need to know where to go. As a young owner, we don't know how to get into it." [#AV123]

Some expressed that it is time-consuming to review solicitations from public sector organizations to understand the requirements and determine whether an opportunity is a good fit. For example:

The Asian Pacific female owner of a WBE- and MBE-certified professional services microbusiness stated, "There are a couple of filters in [eVA]. I think that the eVA system

itself is pretty archaic when you have to know commodity codes as opposed to what I do. If somebody said, 'What's your commodity code for screen printing?' I don't know." [#50]

The White male owner of a professional services firm stated, "But, it's last-minute all the time. ... It's not enough time to react when you've got other things going on. It's not enough time to download, and digest the RFP, and come up with your questions." [#62]

The representative of a White male-owned, SWaM-certified microbusiness stated, "There's so many portals that you really can't see everything. ... Who has got time to look at every county's website in case they have one job that you can do?" [#28]

Others, however, voiced satisfaction with the eVA system and the transparency in the public sector solicitation process. For example:

The owner of a White woman-owned, SWaM- and MBE-certified professional services business stated, "Well, obviously it's like the eVA platform that has been I think most advantageous, and that was what I was referring to, just in the overarching identifying, finding available contracts. They separated out by ... I think they have the set-asides for the micro and small businesses, but that's just been I think really helpful." [#8]

The owner of a woman-owned, SWaM-certified business stated, "It seems like things are pretty transparent, especially with how they've gone to online bid openings and everybody. ... I think the way that it's moving is much easier and more transparent than it was." [#39]

c. Submitting bids and proposals. Some common sentiments expressed by business owners and representatives are that they find the bid and proposal submission process to be burdensome and time-consuming; they find the bid and past performance requirements to be challenging for small businesses; and the time allocated to provide a response to solicitations is often insufficient. In addition, some voiced a desire for more time to prepare responses and feedback on the outcome and evaluation of their bids.

Business owners and representatives expressed that they must weigh the administrative and labor costs of preparing a bid with the likelihood of winning the work, and some felt that they did not experience a high enough success rate in the public sector to justify the opportunity cost to their business. Small business owners and representatives often compared their own capacity to prepare bids with the capacity of large businesses, many of which have dedicated teams for bidding. For example:

A representative of a White male-owned, SWaM-certified professional services microbusiness stated, "You almost have to have a full-time person to fill out all of these RFPs. It is very time-consuming. That non-billable time takes away from our billable staff's project time. ... I'm a paper pusher and I'm learning a lot, but in order to read through a desired scope of work, that takes some technical expertise that I don't have." [#5]

The representative of a professional services firm stated, "We primarily work in the private sector. As a small firm, it is hard to devote the time necessary to apply to follow all the way through the public RFQ [request for quotes]/RFP process from beginning to end. The process can get lengthy and take away a lot of billable hours since we are not large enough to employ the admin staff necessary to respond to many of these." [#AV 79]

Multiple interviewees shared that the bid requirements and past performance requirements are challenging for them because of the degree of specificity of the work scope or the years of experience required. For example:

The Black woman owner of a professional services firm stated, "What was really challenging as a small business is listing the experience that you have. So say you're applying to [work for] a university and you want to do a student center, while they ask for examples of student centers that you've done before. Well, if you're a small firm and you're trying to get into a job with a student center, you don't have any student center projects." [#14]

A representative of a Black woman-owned professional services company stated, "Past performance requirements can preclude small businesses as it can be very specific. ... I can out price larger firms but don't have the past performance and very few are willing to sub." [#AV 397]

The representative of a White woman-owned, WBE-certified professional services company stated, "When we look at the RFPs and we read through the quick quotes, a lot of times, it can be a very small requirement and we can have a person who's an expert. It could be something that work that is fulfilled by one person and they could have 20 years of experience, but we don't have three or four years of past performance as a firm. So a lot of times the way the criteria is written disqualifies us from providing those expert consulting services despite the fact that we have the personnel and the knowledge to do so." [#3]

Largely due to the challenges described above, some interviewees expressed the feeling that larger companies have an advantage when bidding for jobs, as they are likely to have more time, resources, and personnel to dedicate to the bid process. For example:

A participant in the SWaM-certified microbusiness focus group stated, "Typically I do all the work myself and I was bidding against an agency that had I don't know how many people. And so you had five people working on an RFP versus one person. Because they have all these different people doing different parts and I'm doing all of it, plus proofing it, plus writing it, plus laying it out, it is a big difference." [FG #1]

The Asian Pacific male owner of a professional services company stated, "I think it's just having a lot of financial documentation that a mid- or more large-size business would have, but things like formal accounting statements is something that a small business might not have. And so I think [it] took a lot of time. It's just you need more flexibility on how small businesses can meet the internal control requirements." [#35]

Some business owners voiced frustration with not receiving feedback on the outcome of their bid or, in the case of a losing bid, why they were not successful. For example:

A representative of a Black woman-owned professional services company stated, "There's not really a good feedback process. We need follow up info to directly improve upcoming bids to potentially get them." [#AV236]

The Black woman owner of a professional services business stated, "It's been very difficult to know if we should take a different approach because we're not receiving any feedback to refine the approach." [#14]

The Black woman owner of a SWaM-certified non-professional services and goods microbusiness stated, "I do get notifications when I submit, but I don't get a notification as to when it's been awarded. So I have to go out there myself and find out. ... I don't get notifications when the bid has been opened and awarded, like it used to be." [#48]

Some business owners and representatives compared the experience of bidding on public sector work to the experience of bidding on private sector work, noting that the process for public sector work is typically more burdensome. For example:

The representative of a White woman-owned, WBE-certified professional services company stated, "It's just kind of fruitless to even apply because also the application process takes many, many hours. And with private [sector clients], I can land a job with ... an hour-long walk-through. My client [has] full faith in me and I'm done. I don't need to do eight pages of paperwork and find these references and freshen up my resume. And it's like hours and hours of time for a job I'm not going to get, it just starts to feel fruitless." [#3]

The owner of a White male-owned, SWaM-certified professional services company stated, "I've already mentioned RFP process and all the different portals and opportunities. It's just me as a small microbusiness [owner] doing [the bid preparation] ... I spend the four hours, eight hours, 10 hours ... on that RFP getting in the door [whereas] with a private vendor [I'm] turning something over a little more quickly." [#4]

d. Getting paid in the public sector. Generally, business owners and representatives expressed that they have fewer challenges getting paid, both in terms of receiving timely payments and getting paid what they felt they were owed, in the public sector versus the private sector.

The representative of a WBE-certified non-professional services and goods microbusiness stated, "When I have a customer [i.e., a public sector client] that is so regulated to pay on time, why do I want to go into the private sector and worry about collection costs? So, what rare issues we have with payments are 99 percent of the time ... a problem with the process that got messed up along the payment process on the government side. So that just involves me following up and finding the right person to make the changes, so not an issue." [#52]

The representative of a White-owned, WBE-certified construction firm stated, "With the state, no [I don't have problems]. [I] just [send] a reminder email or two that this is past due, and I usually get it taken care of. Some [of our private-sector clients] are right on time, on schedule [with payments], and some [pay] when they get to it. ... [The Commonwealth is] nothing like working in the private sector where we're chasing payments from contractors." [#46]

The owner of a White woman-owned, SWaM-certified non-professional services and goods firm stated, "When I had the biggest [private sector] customer we had, they stretched me out 90 days on \$60,000. And I'm like, 'I don't know where I'm going to get this money.' And

it just finally worked out. And it can be very, very challenging. No one prepares you for that cashflow stress.” [#47]

Small business owners emphasized the need for prompt payment policies to be enforced and noted that failure to do so adversely affects their ability to do business. For example:

A participant in the SWaM-certified microbusiness focus group stated, “Some of these contracts you really have to have some capital and reserve to be able to fulfill the contracts because the payment ... they got some of them having net 30s, net 60s [payment schedules]. Waiting all that time before you even get paid, you still got to make sure you're keeping your business afloat. ... So I feel like that's kind of a barrier. I wish they really could change that. I mean, it's 2025, why do we have to wait 30, 60 days?” [FG #1]

Another participant in the SWaM-certified microbusiness focus group stated, “We have just started receiving our payment, but we just received our payments for our August service by September 15th. That left me well over 45 days with no currency. And this is on multiple contracts that they have and, like they said, if the person that's supposed to process it just sees it as an invoice, that's all it is, is a piece of paper on the desk. But to the person who submitted, it's their lifeline.” [FG #1]

4. Workforce and labor. When trying to hire new employees, small business owners reported facing challenges due to their inability to provide the same kind of benefits that a larger company could provide. The cost of health insurance can also be a challenge when trying to retain existing employees, according to some business owners. For example:

The White male owner of a non-professional services and goods business stated, “I would tell you that owning a small business and trying to get health insurance is extremely painful and we get charged significantly more because they're obviously not making money off of us because of the size.” [#65]

The Black male owner of a SWaM-certified professional services business stated, “The health insurance part of our benefits package escalates 5 percent year after year after year, and there's sometimes 10 percent. And we had one instance where it was 12 percent. ... We pay a portion of our healthcare, of our employee's healthcare, and then they pay a portion, we do a matching, and [when] the employee's costs go up, our costs go up. Our employees are vocal when that happens, and our employees' families are vocal when that happens. ... Because of our size, we don't have access to plans that are [better].” [#63]

Some small business owners reported that the process of finding quality candidates and hiring new personnel can be difficult and time-consuming. For example:

The representative of a Black woman-owned, SWaM-certified non-professional services and goods business stated, “I can't afford to hire anyone. Not that I don't want to hire anyone, I do, but I just can't afford it.” [#42]

A representative of a Native American male-owned professional services company stated, “I think that's been our biggest struggle. ... We just don't have access to as great a talent pool unless people are getting desperate, I think. Because we're a good half hour, 40

minutes from downtown DC and that's without traffic. And a lot of the young talent, they want to live in the city. So I think to be out in the burbs basically is going to limit the access for us.” [#33]

The White male owner of a non-professional services and goods business stated, “But even now after COVID, it's been a struggle to find employees. They either want \$20, \$25 an hour, which I'm not going to pay that, and I'm only looking for part-time help. Or they come in and they think they can just sit here and not do anything.” [#20]

Due to the uncertainty associated with contracted work and the current market conditions, some small business owners reported feeling hesitant to hire new personnel out of fear that they will not have enough work in the future to afford to pay them. For example:

The Asian Pacific male owner of a professional services company stated, “I've been hesitant to hire because of my concerns about being able to provide them a decent income. So both a living wage and then also my ability to keep them on the payroll full time.” [#35]

A representative of a White male-owned, SWaM-certified professional services microbusiness stated, “And since then, since COVID, our ability to, I guess predict and our confidence level in our ability to predict workflow out really past four months is very low. Very rare. So we are ... hesitant to go through a hiring process.” [#5]

5. Barriers related to race and gender. Interviewees discussed additional barriers related to the race or gender of business owners and staff, such as stereotypical attitudes that ascribe negative assumptions to the capabilities of minority- and woman-owned businesses or their employees.

a. Discrimination based on gender. Business owners shared perceptions of gender-based discrimination when trying to obtain work and while performing work. Interviewees reported perceived preference among men to work with other men, discrediting women's ideas or suggestions, and other stereotypical attitudes and beliefs based on gender. Some voiced that they feel discrimination is lessening over time and is more prevalent among older men. For example:

The White woman owner of a SWaM-certified non-professional services and goods microbusiness stated, “I do believe that, being a female in my industry ... I have literally had men call me and ask to speak to other men, and I am literally the top person in this company. Not only do I own it, but I know everything inside and out and I run it, and my employees are my employees. But they hear a woman and they want to talk to a man.” [#44]

The owner of a White woman-owned, SWaM-certified non-professional services and goods firm stated, “A little bit later we're walking through the building and he goes, ‘Well, you do know that if we were to renegotiate your line, we would want to have all your operating [accounts] with us as well.’ And I said, ‘I understand that. Any large bank is going to want the whole package, the operating account, the line of credit and the savings or whatever.’ He said, ‘Well, is your husband going to be okay with that?’” [#47]

The White non-binary owner of a WBE-certified construction microbusiness stated, “It's just a completely male-dominated field and very exclusive. ... There are places where I walk in and they're like, ‘Oh, I think you're in the wrong place, and I'm like, ‘No, I am actually.

I'm a contractor. Thank you.' The amount of times that I have people doubt my knowledge and skills and capability, where I know that they wouldn't doubt it if the same thing came out of a dude's mouth is innumerable. I think that that is a very real concern because if someone presumes that you're unknowledgeable about something, then they often will presume that they can charge you more for it." [#56]

The Black woman owner of a professional services business stated, "I have gone to trade conferences, I've gone to Chamber of Commerce events, different things. I've invested a lot of money into them. And sometimes some people will ask if you're someone's assistant, sometimes it can be difficult to be taken seriously. And that's something I've dealt with my entire career." [#14]

The woman representative of a White male-owned, SWaM-certified non-professional services and goods business stated, "When I first started this position, speaking to a lot of manufacturers, suppliers, which is who we need quotes from in order to get opportunities and bids. A lot of them were more standoffish at first because they wanted to talk to the man of the company, but they either have since retired or we've worked past that. But in the beginning, and like I said, things have definitely changed in the past five years. It doesn't seem to matter who you are, what you are, the person will either talk to you or not. So it definitely seems like it has changed, but have I experienced [discrimination]? Yes." [#41]

The Asian Pacific woman owner of a professional services company stated, "If myself and my prior designer, who is definitely a Caucasian male, would show up at a client meeting, the automatic assumption was he was the lead and I would be the assistant." [#15]

b. Discrimination based on race. Business owners shared experiences of race-based discrimination when trying to obtain work and while performing work. Interviewees reported a perceived resistance to working with minority-owned businesses and other stereotypical attitudes and beliefs based on race. For example:

The owner of an Asian Pacific male-owned, SWaM-certified construction company stated, "When you are starting, when you don't have any business, nobody wants to be the first person to give you the opportunity. It's very hard. And being a minority ... makes it even more [difficult], particularly in construction." [#22]

The representative of a WBE-certified non-professional services and goods microbusiness stated, "I think it certainly makes it harder to break into the businesses. ... We struggle with some of our vendors who don't like working with women or minorities ... because we live in Southwest Virginia, it is very much an old boys' network in this area. We've had a couple of incidents where a particular customer might not be comfortable with one of our employees who is a minority, so English is his second language, but we just manage that as a company and that's going to happen on the individual level. ... We have had very few incidents with the government itself, with the state employees itself, just one offs, tiny things." [#52]

The Black woman owner of a SWaM-certified non-professional services and goods microbusiness stated, "There would be [potential clients] that would reach out to me to do group transportation and they would ask for a meeting. And I noticed, when I would

actually see them in person, it wasn't the same energy that we [had] on the phone. ... And then I didn't get those jobs." [#49]

Some business owners and representatives reported facing financing or insurance barriers due to discrimination based on race. For example:

The representative of a Black woman-owned, SWaM-certified non-professional services and goods business stated, "Well, I know that when I tried to obtain funding, sometimes we were denied before they even looked at our paperwork. ... And so before they would even sit down and consider us, there were times when we were just escorted on out. I know this for a fact." [#42]

The Black male owner of a SWaM-certified non-professional services and goods business stated, "Other businesses that may not be diverse in face, the funding opportunities are easier. Even though people say that's not true. I mean, that could be very well so, but in my experience, that's been the case." [#25]

The Asian Pacific male owner of a professional services company stated, "I've heard stories about different risks. Like, if you operate in certain neighborhoods that insurance companies are more likely to drop you. So I don't work in the retail field, but I do know in that sector they have a lot of barriers in minority communities." [#35]

6. Business inclusion programs. Interviewees discussed their experiences with the Commonwealth's implementation of the SWaM Program, as well as how participation in the SWaM Program impacts their ability to compete at the local level.

a. Perceptions of SWaM certification. Interviewees shared their experiences with SWaM certification and discussed the benefits and disadvantages of being certified. Some business owners reported finding SWaM certification to be helpful in getting work and working with companies that would otherwise rely more heavily on pre-existing relationships. For example:

The White woman owner of a SWaM-certified non-professional services and goods microbusiness stated, "I ended up getting some good deals with some entities and having that certification, it does help. People, when I say, 'look, I'm SWaM certified' ... they're like, 'yay,' because they know that that opens up more opportunities of being able to work with us." [#44]

The White non-binary owner of a WBE-certified construction microbusiness stated, "The ears perk up when I tell people I'm SWaM-certified, and I know that I get reached out to by other construction companies because they've got a requirement on what percentage of the work has to be done by SWaM-certified businesses. And I think otherwise they would not give a [expletive] and it would just go straight to the good old boy network. So I definitely think that it forces the hand for people to think outside of their friend group or whatever for who they can work with. And I think that's helpful." [#56]

A representative of a Hispanic woman-owned, SWaM-certified construction microbusiness stated, "And from what I heard ... Virginia has to provide [a certain percentage] of all of its revenue ... to [SWaM-certified] businesses. And that's huge. That's an amazing regulation or requirement for the state. And I feel that those [types] of things set in place allow for the

opportunity for small businesses like myself to be involved in something that is essentially a life-changing experience to be able to have a government contract.” [#24]

The representative of a WBE-certified non-professional services and goods microbusiness stated, “The problem is that men who are not minorities start off with more experience, more education, more money, more acceptance, more trust than women or minority males. And so I think that the SWaM Program and any program that runs along this line is really needed in order to help level the playing field and help pull women and minorities out of poverty.” [#52]

The White woman-owner of a SWaM-certified professional services company shared, “We were getting more and more involved in these State RFPs, and we just kept seeing it come up like, you get 10 points for this and 15 points for being SWaM. And we just kept seeing SWaM, and we thought, ‘Man, we got to get on this because it couldn’t be the thing that precluded us for moving forward in RFPs.’ And that’s why we felt it was so essential. But it was also essential for us to be recognized as such. ... We were very proud of the fact that we were a small woman-, minority-owned business. So, yeah, again, I go back to the word necessary to win business, but it also was important, I think, to be recognized as such an agency.” [#36]

Other business owners expressed feeling as though Virginia public agencies implement the SWaM Program only to “check a box” without creating meaningful pathways for small and diverse businesses to have greater opportunities. Additionally, one business owner shared the feeling that SWaM certification can be perceived as an indicator that a business cannot provide larger companies with the service that they need. For example:

A representative of an Asian Pacific woman-owned, SWaM-, WBE-, and MBE-certified professional service microbusiness stated, “We don’t want to be just teamed up with to fulfill some quotas for having SWaM-certified businesses and then not end up being used.” [#19]

The White male owner of a SWaM-certified non-professional services and goods microbusiness stated, “I think they look at it as capacity to do the work or capability. I think [SWaM certification] slaps a label on you. If the State slaps a label on me that says I am a small or microbusiness, I think micro designation has hurt me just as much as anything because then they automatically have the assumption that we don’t have the capacity to serve them in the way that they need, which has never been true.” [#45]

b. Certification process. While some business owners and representatives reported finding the SWaM certification process to be easy and straightforward, others found it more complicated. For example:

The owner of a White male-owned, SWaM-certified professional services company stated, “The [SWaM certification process], I just remember it being simple and easy. I thought it was going to take weeks. I remember, I think it took like two weeks. It took me an hour or two to submit everything and then just the turnaround time of getting approved wasn’t that long. I had no complaints.” [#4]

The representative of a construction firm stated, "It is really hard to sign up for SWaM. A lot of paperwork. I keep running into time and paperwork restraints. I used to be on those lists, but I'm having trouble getting back on small business lists." [#AV 368]

A representative of a Hispanic woman-owned, SWaM-certified construction microbusiness stated, "The process and being able to attain all of these requirements and qualifications and certifications was pretty smooth. It was a pretty smooth process overall, and I appreciated the welcoming assistance that was available through the State, through the different agencies that would answer questions and [help me understand] how to go about this process and successfully attain the required documents that were needed. ... It felt good, it was very welcoming." [#24]

Interviewees who found the certification process to be more challenging expressed frustration with the paperwork requirements. Additionally, some business owners felt that they were not able to get the help they needed when they had questions about certain steps in the process. For example:

The representative of a White male-owned, SWaM-certified non-professional services and goods microbusiness stated, "It takes a long time. They want documentation that they want to show where the company was sold. They want shares, they want tax documents, but they don't want them redacted. ... I know one of the stipulations was they wanted the president and the vice president's resumé. ... It was just very tedious and cumbersome and I'm thankful that it's not often that we have to do it. ... It's just a headache to get all the documents and then it's done and then you're like, 'Great, totally forgetting about it until we have to do it again.' ... And then it takes them forever to review. If your SWaM [certification] expires in December, you have to start it in June in order for it to be reviewed in a timely fashion." [#41]

The White woman owner of a SWaM-certified non-professional services and goods microbusiness stated, "It was a little bit of a challenge because I couldn't get anybody to really help me. ... Because I was like, 'What do you mean you want proof?' They wanted proof of deposits of how we paid for the business. ... It was a challenge because I didn't know exactly what they wanted and ... it made it difficult. That's why I didn't certify early ... It was just like, 'Jump through this hoop, jump through that hoop.' And I didn't really see any benefit of it." [#44]

c. Pass-throughs, fronts, and fraud. Interviewees also shared knowledge of instances of abuse of Commonwealth business programs in the form of "pass-throughs" or fronts. For example:

The White male owner of a professional services company stated, "I know somebody ... she's a woman and a veteran who has a business and she's like, 'I can sub out.' It's some huge percentage of their work. And it's like, well, what's the point of you even existing then? You know what I mean? It's like they exist just to pass stuff through." [#34]

The representative of a WBE-certified non-professional services and goods microbusiness stated, "And then the other hole in the system ... I will notice a competitor and then I will go and look at that competitor on the internet with very little time and under an hour, and I can determine that that SWaM competitor is a front for a larger company or for a male-owned company who's using his wife's name." [#52]

Finally, some interviewees reported experiencing larger companies falsely reporting participation of SWaM-certified companies in their bids to win contracts. For example:

The owner of a White woman-owned, SWaM-certified non-professional services and goods firm stated, "So I've since heard from a lot of contractors who say, 'Yeah, we got listed for the purpose of the bid, but when the rubber hit the road and the contract was awarded, they never saw a dime.' ... So [they] use your resumé and say, 'This is who we're going to use. They're going to be on our team.' And then you never got invited to the table." [#47]

The representative of a WBE-certified non-professional services and goods microbusiness stated, "We've had contractors reach out to us in the past and ask us, they're not micro-SWaM, and they want to use our company to help them get a bid. And so they found us on eVA as a micro-SWaM. ... So they've reached out to us and asked us to bid, and then used us as a way to get the bid because they've got micro-SWaM subcontractors, and then they don't use us." [#52]

7. Supporting Commonwealth businesses. Many interviewees shared their own recommendations on how the Commonwealth could further support businesses operating in the marketplace, particularly small and diverse businesses.

a. Start-up assistance. Some business owners recommended programs to assist small businesses during the start-up period, such as reduced-rate office space, start-up funding, informational support, and set-aside contracts for new small businesses. For example:

A participant in the SWaM-certified microbusiness focus group stated, "They actually should have a grant program just for SWaM[-certified] people that we can apply for. Because otherwise it's just a logo that looks really nice, but is it really benefiting me? Is it really setting me aside when I'm bidding for these contracts?" [FG #1]

The Asian Pacific male owner of a professional services company stated, "Think about grants and loans, that's a kind of large factor in what would allow my business to grow. So I did receive a moderate-sized grant from the Small Business Investment Grant program and I think that was helpful to at least stabilize one of our service offerings." [#35]

The White male owner of a professional services business stated, "Start-up funding to get people underway, to give them the space to be able to build out a business. So ... funds that could be linked to that, or even just banking introductions where they sell relationships with [banks]." [#16]

A participant in the SWaM-certified microbusiness focus group stated, "But I think they need to ... make more, I guess, small office spaces or something like that where they give you some time to get your business together." [FG #1]

The representative of a WBE-certified non-professional services and goods microbusiness stated, "So the incubators that I'm familiar with [in another state], they do have work space that's at a reduced rate. And we do have one of those here in Arlington. So that's very beneficial for startups, but they also have a lot of resources as it relates to people you can call who have information ... and then they have a strong network of mentors." [#52]

The owner of a woman and Black-owned professional services business stated, "It would be great if they had a startup set aside ... work that the government says, 'Hey, we're going to pull this business aside for companies that have less than 20 employees and have been in business for only a couple years, but have a very interesting angle or market offering that we want to take advantage of.'" [#14]

b. Resources and communication. During interviews, business owners expressed a desire for direct communication with representatives from the Commonwealth as well as easier access to information regarding operating a business in Virginia. For example:

The Asian Pacific female owner of a WBE- and MBE-certified professional services microbusiness stated, "Give me a person to talk to instead of a computer and I will happily jump through hoops to market my company. ... But talking to a computer or looking to a computer, it's just not, unfortunately, it's not my thing." [#50]

The owner of an Asian Pacific male-owned professional services business stated, "One thing I don't know is where to find out more information about how things run in Virginia, where to get information, where to find the kind of businesses that I would target. Are there programs in Virginia? Probably. I don't know how to find that. I don't know where they are." [#2]

c. Business administration assistance. Business owners also recommended programs designed to provide administrative assistance to small businesses, including providing employee benefits, legal counsel, and accounting services. For example:

The representative of a WBE-certified non-professional services and goods microbusiness stated, "Yeah, ideally some program that helps support small businesses to provide insurance for their employees." [#52]

The owner of a White woman-owned, SWaM- and MBE-certified professional services business stated, "Supporting roles that every business needs, whether that's legal counsel, accounting, and tax preparation, I think those types of supporting services and structures, I would consider that a value add if the Commonwealth provided guidance and instruction on getting those set up." [#8]

d. SWaM Program recommendations. During interviews, some business owners expressed a desire for the SWaM Program to expand to include more minority groups, such as businesses owned by members of the LGBTQ+ community. For example:

The White non-binary owner of a WBE-certified construction microbusiness stated, "I think it would be cool if the state had something like that for sexual minority-type folks. If that became part of the SWAM thing or whatever, that would be interesting." [#56]

The White male owner of a professional services business stated, "I'm a gay man and years ago ... I was discriminated against and lost business because I was gay. ... I remember talking to somebody from the Small Business Administration and I said, 'Could I qualify as a disadvantaged minority?' And they said, 'Yes, but you'd have to build a case for it.'" [#7]

e. Finding work and networking. Some business owners recommended additional methods to advertise upcoming work, including posting anticipated future projects as well as more direct outreach about existing opportunities. For example:

The Black male owner of a SWaM-certified professional services business stated, "Put your plans, your five-year plan on your website so that we can go, 'Hey, we can help you there. We can help you there.' We can send you collateral, 'Here's some things you should consider before you write that RFP.' We already know we're ahead of it, but if you just go to bid boards and try to respond to our piece, it doesn't work." [#63]

The White male owner of a professional services firm stated, "We don't receive a regular notification from any of them about opportunities, which I think would be beneficial if you just send out these opportunities or notices, instead of you having to scour their websites, so you just sign up for, and then they send it." [#62]

Additionally, many interviewees recommended networking events for small business owners to meet and learn from each other, local government representatives, and other vendors. Along with learning about existing and upcoming opportunities, interviewees believe these events could provide attendees with a better understanding of contract procurement and working with the Commonwealth. For example:

The representative of a White woman-owned, WBE-certified professional services company stated, "So maybe having a platform where local governments and vendors can just meet one another or they know that they have projects coming up and so they have a table where the architects could come or the janitors could come or what have you. Just an opportunity to get some of that face time, some of that dialogue literally. So it's not just forms and paperwork and kind of anonymous." [#3]

The White male owner of a non-professional services and goods business stated, "I would say if there was anything that I would recommend to the people of the state ... getting upfront introductory type, 'Hey, this is what we do, this is who we are, this is how we can help type of meetings.'" [#65]

A participant in the small business support organization focus group stated, "If the Commonwealth held ... some sort of government contracting conference or something along those lines so that at least people could get in the room with those decisionmakers." [FG #2]

The owner of a Hispanic male-owned professional services business stated, "Yeah, it's almost like if it was a small business conference where people came together and talked about their business ... what would happen is you might come in and say, 'Well, here's what my business is like and here's where we're having issues with growth,' and you might be talking about your business and other people are listening to you talk about your business and then saying, 'Well, hey, I can provide, I could help you in this way. Here's my card.'" [#21]

f. Bid process. Interviewees recommended relaxing certain criteria for some RFPs, such as past performance and years of experience, which often exclude new and small businesses. For example:

The owner of a woman- and Black-owned professional services business stated, "I also think that for some smaller, lower-risk requirements, for them to really consider whether past performance is necessary to demonstrate that we have the knowledge and expertise. Maybe there is other criteria that we can utilize, we can provide samples of some of our work, I think that would be a more effective way of demonstrating our capabilities without precluding us from the business because we haven't done it for as long as some of the other companies." [#14]

The Black male owner of a SWaM-certified non-professional services and goods microbusiness stated, "Another thing that I'm finding is kind of hard is that for small business owners who don't have that past performance. And this is another big thing that we face, because we don't have [an] abundance of past performance. It's like, how can I build past performance where I can't even get a nice size contract to even prove ourselves? So, some type of micro contracting tiers or starter contracts that allow small businesses to be able to build past performance, that would be amazing." [#51]

The White male owner of a professional services firm stated, "Eliminating all the regulation and the RFP saying you have to have this past experience, or this, or that, you have to have a certain size firm, or whatever it might be. 10 years [of] experience in this, or this project's experience. Relaxing this somewhat, you're going to get a larger pool of A/E [architecture and engineering] firms bidding is what I'm trying to get at. And, making it knowledgeable to the industry that you're putting out these RFPs that are less regulated." [#62]

Additionally, some interviewees recommended that the Commonwealth notify applicants when a contract is awarded and provide feedback on proposal evaluations in order to understand scoring and to improve future submissions. For example:

A representative of a White male-owned, SWaM-certified professional services microbusiness stated, "You don't necessarily have to show us the rubric, but that would be great. Where did we score? What exactly are you looking for that we didn't meet your expectations, so that we can do it better the next time? That would be extraordinarily helpful." [#5]

g. Mentorship programs. Interviewees voiced the need for more mentorship programs in the Commonwealth, recommending programs that pair more established, larger businesses with new, smaller businesses in order to provide guidance and support. Additionally, some interviewees recommended mentorship programs specifically aimed at assisting new and small businesses in working with the Commonwealth.

A Black woman owner of a professional services business stated, "In [the] federal government market, there are mentor-protege programs where you have the larger organizations...who will take on a small business and mentor them...That would be very helpful because you would at least have some sort of guidance and maybe you would make less mistakes and not take as much time trying to support the Commonwealth by going in as a sub under a prime within the Commonwealth. It just feels like it's a pattern that works on the federal side." [#11]

The woman owner of a general services business stated, "So you have an experienced company that's been through the financing and the startup. And you have these young bucks that come in ... and you explain to them how it works. ... You take experienced knowledge from people that have been there and share that with the newbies." [#43]

The owner of a general services business stated, "I'll say that I would like the opportunity to do business with the Commonwealth, and I don't know how. I have all of the tools already. It's just that it doesn't seem to work. And I fully admit that that could 100% be my [problem] that I'm not making it work right. But if that's the case, then I'd like to have some guidance from someone on what I'm doing wrong." [#45]

CHAPTER 5.

Data Collection and Analysis

Chapter 5 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the 2025 Commonwealth of Virginia Disparity Study and the processes we used to collect relevant prime contract, subcontract, and vendor data from Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) and other sources. Chapter 5 is organized in five parts:

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

A. Contract and Procurement Data

BBC collected information on contracts and procurements that the Commonwealth awarded between July 1, 2019 and June 30, 2024 (the *study period*) from the Commonwealth's eVA system, which is an electronic procurement platform.¹ Those data served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses. We collected the most comprehensive data available on the prime contracts the Commonwealth awarded during the study period. We sought those data regardless of the businesses' statuses as small businesses, microbusinesses, or as minority-, woman-, or service-disabled veteran (SDV)-owned businesses.

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

- Contract or purchase order number;
- Prime contractor name;
- Prime contractor identification number;
- Contract title;
- Description of work;
- Location where the work took place;
- Award date;

¹ Some state agencies and HEIs use various other contract management systems in addition to eVA, but eVA was the primary source of contract and procurement data for the disparity study.

- Award amount (including change orders and amendments); and
- Amount paid-to-date.

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

2. Subcontract data. Not all state agencies and HEIs collect comprehensive data on the subcontracts associated with all of the prime contracts they award. Figure 5-1 presents information on the agencies that do collect comprehensive subcontract information, which was provided to BBC as part of the disparity study, along with the number of prime contracts for which those agencies submitted comprehensive subcontract data, and the volume of dollars those contracts represent.

**Figure 5-1.
Subcontract data
collection from
Commonwealth
agencies**

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

Organization	Number of prime contracts	Dollar value of prime contracts
State agencies		
Virginia Department of Transportation	274	\$991,703,012
Virginia Information Technologies Agency	26	\$2,326,902,313
Tier 2 HEIs		
Christopher Newport University	10	\$83,846,887
Tier 3 HEIs		
University of Virginia	25	\$573,958,493
Virginia Polytechnic Institute and State University	32	\$785,366,709
George Mason University	29	\$442,501,339
James Madison University	15	\$410,437,741
Total	506	\$5,913,515,098

To gather additional information on subcontracts for Commonwealth agencies that do not collect that information, BBC conducted surveys with prime contractors to collect data on the subcontracts associated with the projects the Commonwealth awarded to them during the study period and that we deemed to likely have included subcontract opportunities. We made that determination based on the work types involved in each project and project sizes, primarily including engineering, highway street and bridge construction, and non-residential building construction projects. We requested the following information from prime contractors about each subcontract associated with each relevant project state agencies awarded to them:

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

Figure 5-2 presents the volume of prime contract dollars for which BBC requested subcontract data as well as the volume of prime contract dollars for which BBC received those data. Response rates varied

by organization. Because BBC was unable to collect subcontract data on all relevant prime contracts each organization awarded during the study period, we weighted the data we received to simulate subcontract dollars associated with prime contracts likely to have included such opportunities.

Figure 5-2.
Subcontract data collection
from prime contractors

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

Organization	Associated contract dollars		Response rate
	Subcontract data requested	Subcontract data received	
State agencies	\$2,656,369,649	\$211,905,571	8.0 %
Tier 2 HEIs	\$962,012,514	\$112,095,793	11.7 %
Tier 3 HEIs	\$617,911,755	\$114,560,862	18.5 %
Total	\$4,236,293,918	\$438,562,226	10.4 %

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

4. Contracts and procurements included in study analyses. Figure 5-3 presents the number of contract elements and associated dollars BBC included in our analyses. We present that information separately for state agencies, tier 2 HEIs, and tier 3 HEIs.

B. Vendor Data

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

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority-, woman-, or SDV-owned);
- Race of owners (if minority-owned);
- Status as a certified Small, Women-owned, and Minority-owned Business (SWaM) business;
- Primary lines of work;
- Business size; and
- Year of establishment.

Figure 5-3.
Contract elements and associated dollars included in the disparity study

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

Source:
 eVA data.

Agency	Percent of in-scope dollars
State agencies	80.6 %
Tier 2 HEIs	85.3 %
Tier 3 HEIs	82.0 %
Total	81.4 %

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

- The Commonwealth’s contract and vendor data;
- Surveys the study team conducted with business owners and managers;
- Data from the United States Small Business Administration;
- The Commonwealth’s SWaM directory;
- Dun & Bradstreet (D&B) business listings and other business information sources; and
- Business websites and other secondary research.

C. RGMA

BBC used data from the Commonwealth to determine the RGMA—the geographical area in which the agency spends the substantial majority of its contract and procurement dollars—for the disparity study. As shown in Figure 5-4, overall, the Commonwealth awarded approximately 81.4 percent of relevant contract and procurement dollars to businesses located in the state of Virginia. State agencies (80.6%), tier 2 HEIs (85.3%), and tier 3 HEIs (82.0%) considered separately also awarded the vast majority of relevant contract and procurement dollars to businesses located in the state of Virginia. As a result, our analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on the entire state.

Figure 5-4.
Contract and procurement
dollars the Commonwealth
awarded to businesses
located in Virginia

Source:
eVA data.

Organization and industry	Number	Dollars (in thousands)
State agencies		
Construction	17,714	\$3,453,149
Professional services	36,805	\$8,717,919
Non-professional services and goods	188,572	\$4,938,491
Total	243,091	\$17,109,559
Tier 2 HEIs		
Construction	3,399	\$1,232,116
Professional services	5,678	\$452,878
Non-professional services and goods	22,661	\$806,804
Total	31,738	\$2,491,798
Tier 3 HEIs		
Construction	22,156	\$4,197,363
Professional services	33,833	\$1,420,063
Non-professional services and goods	362,336	\$1,866,486
Total	418,325	\$7,483,913

D. Subindustry Classifications

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

Figure 5-5.
Contract and procurement
dollars by
subindustry

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

Source:
eVA data.

Industry	Total (in thousands)		
	State agencies	Tier 2 HEIs	Tier 3 HEIs
Construction			
Nonresidential building construction	\$185,153	\$257,576	\$2,738,033
Plumbing and HVAC	\$657,376	\$316,154	\$196,627
Electrical work	\$545,161	\$175,301	\$160,526
Masonry, stonework, tile setting, and plastering	\$452,006	\$133,494	\$124,146
Highway, street, and bridge construction	\$551,359	\$49,064	\$69,128
Excavation, drilling, wrecking, and demolition	\$242,801	\$45,820	\$59,154
Roofing, siding, and sheet metal work	\$142,427	\$74,346	\$52,873
Concrete work	\$92,407	\$67,979	\$27,854
Water, sewer, and utility lines	\$74,185	\$20,363	\$26,683
Other special trade contractors	\$321,925	\$78,966	\$243,467
Other building construction	\$146,093	\$10,265	\$416,113
Other heavy construction	\$42,256	\$2,789	\$82,759
Total construction	\$3,453,149	\$1,232,116	\$4,197,363

**Figure 5-5
(continued).
Contract and procurement
dollars by
subindustry**

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

Source:
eVA data.

Industry	Total (in thousands)		
	State agencies	Tier 2 HEIs	Tier 3 HEIs
Professional services			
IT and data services	\$5,370,155	\$133,947	\$488,780
Engineering	\$532,166	\$208,674	\$415,039
Financial services and consulting	\$815,282	\$1,514	\$31,606
Business and management consulting	\$616,895	\$7,908	\$51,262
Human resources and job training services	\$356,709	\$486	\$6,761
Advertising, marketing, and public relations	\$217,912	\$54,974	\$38,673
Construction management	\$61,063	\$1,784	\$231,206
Environmental services	\$121,958	\$2,952	\$25,929
Architectural and design services	\$16,188	\$23,736	\$48,075
Testing and inspection	\$56,608	\$3,971	\$10,487
Transportation planning services	\$27,788	\$276	\$13
Landscape architecture	\$9,499	\$2,342	\$11,036
Other professional services	\$477,714	\$10,193	\$59,966
Other architecture and engineering	\$37,982	\$121	\$1,231
Total professional services	\$8,717,919	\$452,878	\$1,420,063
Non-professional services and goods			
Staffing services	\$1,294,749	\$30,360	\$64,961
Communications equipment	\$468,731	\$33,458	\$93,836
Furniture	\$129,377	\$50,021	\$180,444
Rebar and reinforcing steel	\$139,936	\$89,060	\$70,750
Cleaning and janitorial services	\$77,525	\$74,496	\$128,408
Industrial equipment and machinery	\$136,792	\$17,425	\$99,087
Automobiles and vehicle parts and supplies	\$205,316	\$10,700	\$20,080
Office equipment and supplies	\$163,644	\$17,523	\$54,211
Electrical equipment and supplies	\$57,365	\$15,073	\$130,265
Trucking, hauling, and storage	\$183,280	\$2,503	\$16,561
Printing, copying, and mailing	\$101,563	\$8,744	\$44,341
Security guard services	\$69,516	\$5,594	\$73,894
Landscaping services	\$99,185	\$8,356	\$27,907
Petroleum and petroleum products	\$112,505	\$6,330	\$14,658
Safety equipment	\$106,034	\$2,685	\$12,825
Facilities support services	\$105,774	\$83	\$6,602
Heavy construction equipment rental	\$63,756	\$14,230	\$29,066
Uniforms and apparel	\$41,395	\$11,538	\$20,531
Security systems services	\$28,786	\$3,948	\$25,773
Concrete, asphalt, sand, and gravel products	\$44,532	\$1,534	\$1,253
Other goods	\$401,553	\$97,370	\$239,539
Other construction materials	\$283,239	\$135,130	\$244,105
Other non-professional services	\$195,010	\$162,433	\$200,835
Other transit services	\$428,926	\$8,209	\$66,554
Total non-professional services and goods	\$4,938,491	\$806,804	\$1,866,486
GRAND TOTAL	\$17,109,559	\$2,491,798	\$7,483,913

BBC combined related subindustries that accounted for relatively small percentages of total contract and procurement dollars into nine “other” subindustries: other special trade contractors, other building construction, other heavy construction, other architecture and engineering, other professional services, other transit services, other non-professional services, other construction materials, and other goods. For example, the dollars state agencies awarded to contractors for carpentry represented less than 1 percent of the total dollars we examined as part of the study. So, we combined carpentry work with other special trade contractors that also accounted for relatively small percentages of total dollars into the “other special trade contractors” subindustry. There were also various contracts and procurements we classified into subindustries that we did not ultimately include in our analyses:

- Purchases and grants the Commonwealth made with or awarded to government agencies, utility providers, hospitals, or nonprofit organizations (state agencies: \$3.9 billion; tier 2 HEIs: \$255.8 million; tier 3 HEIs: \$242.5 million);
- Contracts and procurements that reflected “national markets”—that is, subindustries dominated by large national or international businesses—or subindustries where the Commonwealth awarded most of the dollars to businesses located outside the RGMA (state agencies: \$1.9 billion; tier 2 HEIs: \$214.1 million; tier 3 HEIs: \$1.1 billion);²
- Purchases that often include property purchases, leases, or other pass-through dollars (state agencies: \$952.6 million; tier 2 HEIs: \$19.3 million; tier 3 HEIs: \$135.5 million);³ or
- Types of work not typically included in disparity studies and that account for relatively small percentages of the Commonwealth’s contract and procurement dollars (state agencies: \$546.4 million; tier 2 HEIs: \$55.8 million; tier 3 HEIs: \$383.5 million).⁴

E. Review Process

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

² Examples of such work include computer manufacturing and proprietary software.

³ An example of such work is real estate consulting.

⁴ An example of an industry not typically included in disparity studies is legal services.

CHAPTER 6.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of small businesses and microbusinesses, as well as minority-, woman-, and service disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) ready, willing, and able to perform work on the construction, professional services, and non-professional services and goods contracts and procurements Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) awards.^{1, 2} Chapter 6 presents the analysis in three parts:

- A. Purpose;
- B. Methodology; and
- C. Results.

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

A. Purpose

BBC examined the availability of small and diverse businesses for Commonwealth prime contracts and subcontracts to use as benchmarks against which to compare the actual participation of those businesses in its work to assess whether any disparities exist between participation and availability. Assessing disparities between the participation and availability of small and diverse businesses allowed us to determine whether certain business groups were *substantially underutilized* during the study period, which is crucial in determining whether the use of *race- or gender-based measures* is appropriate and, if so, ensuring their use meets the *strict scrutiny* and *intermediate scrutiny standards* of constitutional review, respectively (for details, see Chapter 2). Moreover, this information is crucial for informing the Commonwealth's implementation of the Small, Women-owned, and Minority-owned Business (SWaM) Program. In addition, estimating availability is useful to the Commonwealth in setting overall aspirational goals for the participation of small and diverse businesses in the projects it awards as well as setting race- or gender-based contracting goals for the participation of those businesses in its projects, if the Commonwealth determines the use of such measures is appropriate.

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

² BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

B. Methodology

BBC used a *custom census* approach—which accounts for specific business and project characteristics such as work type, role, size, capacity, location, and interest—to estimate the availability of small businesses; microbusinesses; and minority-, woman-, and SDV-owned businesses for Commonwealth work. The availability analysis focused on specific areas of work, or *subindustries*, associated with the contracts and procurements the Commonwealth awarded between July 1, 2019 and June 30, 2024 (the *study period*), which serves as a proxy for the work it might award in the future. We began the analysis by identifying the specific subindustries in which the Commonwealth awarded most of its contracting dollars as well as the geographic area in which most of the businesses to which it awards those dollars are located (i.e., the *relevant geographic market area*, or *RGMA*). Based on the volume of dollars the organization spent with businesses in various geographical areas, we determined that the RGMA for the study should be the state of Virginia.³

1. Availability surveys. After identifying the RGMA, BBC conducted extensive surveys with 1,565 businesses in the marketplace to develop a representative and unbiased database of businesses located in the RGMA that perform types of work relevant to Commonwealth projects. The objective of the survey process was not to collect information from every relevant business located in the RGMA, but rather, to collect information from an unbiased subset of the relevant business population that appropriately represents the entire relevant business population in a statistically valid manner. BBC worked with Davis Research to conduct telephone and online surveys with business owners and managers to collect specific characteristics about their companies and identify local businesses potentially available for Commonwealth prime contracts and subcontracts.

a. Business directory. BBC began the survey process by compiling a *phone book* of all types of businesses—regardless of ownership characteristics—that perform work relevant to Commonwealth projects and are located in the RGMA, based primarily on information from Dun & Bradstreet (D&B) Marketplace. We compiled information about businesses based on 8-digit Standard Industry Classification (SIC) codes most related to the contracts and procurements the Commonwealth awarded during the study period. We obtained listings on 21,357 local businesses that perform work related to those work specializations. We did not have working phone numbers for 3,666 of those businesses, but we attempted surveys with the remaining 17,691 businesses.

b. Survey information. The study team conducted availability surveys with businesses listed in our directory to collect various pieces of information about each one, including:

- Status as a private sector business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for government organizations;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract the business is able to perform;

³ See Chapter 5 for more information about how BBC determined the RGMA for the study.

- Whether the business is able to work or serve customers in Virginia;
- Business size in terms of revenue and number of employees;
- Race of the owner(s);
- Gender of the owner(s); and
- SDV status of the owner(s).

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

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

After those exclusions and reconciliations, BBC compiled a database of 1,255 businesses we considered potentially available for Commonwealth work. Figure 6-1 presents the percentage of businesses in the availability database that were small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and SDV-owned businesses. As shown in Figure 6-1, 95.7 percent of the businesses in the database were small businesses and 64.5 percent were microbusinesses. In addition, 23.6 percent were minority-owned, 13.5 percent were White woman-owned, and 4.4 percent were SDV-owned. The businesses that were counted as small businesses, microbusinesses, and SDV-owned businesses were not exclusive of other business categories. For example, if a business was owned by a Black person who was also an SDV, that business would have been counted as both a Black-owned business and an SDV-owned business. In addition, all microbusinesses were automatically considered small businesses.

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

Business group	
Business size	
Small business	95.7 %
Microbusiness	64.5 %
Race and gender	
Minority	23.6 %
Asian	4.9 %
Black	10.8 %
Hispanic	6.8 %
Native American	1.1 %
White woman	13.5 %
Veteran status	
Service-disabled veteran	4.4 %

2. Calculating availability. BBC only considered a portion of the businesses in the availability database as potentially available for any given prime contract or subcontract (referred to generally as a

contract element). BBC identified the type of work, contract size, and contract role for each contract element, and then took the following steps to estimate the availability of small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and SDV-owned businesses for each one:

1. We identified businesses in the availability database that reported that they:
 - Perform work in that particular role (i.e., as a prime contractor or a subcontractor);
 - Perform that type of work; and
 - Can perform work of that size or larger.
2. We then counted the number of small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and SDV-owned businesses as well as all other businesses that met the criteria in step 1.
3. We translated the counts of businesses in step 2 into percentages for each relevant business group relative to all businesses we identified as available for the contract element.

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

On a contract a state agency awarded during the study period, the prime contractor awarded a subcontract worth \$456,123 for electrical work in Central Virginia. To determine the overall availability of minority-owned businesses for the subcontract, BBC identified businesses in the availability database that indicated they:

- a. Perform electrical work;
- b. Perform work as subcontractors;
- c. Can perform work in Central Virginia; and
- d. Are able to perform work of equal size or larger than \$456,123.

We found 73 businesses in the availability database that met those criteria, 19 of which were minority-owned. Thus, the availability of minority-owned businesses for the subcontract was 26.0 percent (i.e., $19/73 \times 100 = 26.0$).

Figure 6-2 provides an example of how we estimated availability for a subcontract associated with a project the Commonwealth awarded during the study period.

BBC repeated the above steps for each contract element the Commonwealth awarded within a particular project set (e.g., construction projects) and then multiplied the percent availability of small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and SDV-owned businesses for each contract element by the dollars associated with it. We then added results across all contract elements and divided by the total dollars the Commonwealth awarded as part of the project set, resulting in estimates of the percent of relevant project dollars one would expect the organization to award to small businesses; microbusinesses; and minority-, woman-, and SDV-owned businesses based on their availability for the specific types and sizes of the projects included in the set.

3. Markov Chain Monte Carlo (MCMC). With any survey effort where the survey sample does not represent the entire population and the response rate is less than 100 percent, there is some amount of random error or potential for unintended bias associated with the survey process itself. BBC used MCMC simulations to adjust our observed availability estimates to help account for any such issues as part of the availability survey process. For the simulations, we specified a *prior* for the MCMC model, which represented any initial knowledge we had about the population of local businesses potentially available for relevant projects the Commonwealth awarded. Such knowledge was available to us from the United States Census Bureau, which provides percentages of small and diverse businesses located in Virginia that work in the local construction, professional services, and non-professional services and goods

industries. We specified data from the United States Census Bureau as a prior in our model so it could better estimate business availability for each contract element included in the analysis.

Once we specified the prior, we ran four MCMC models each with six sequential chains of Monte Carlo simulations for each contract element in our analysis: one model for simulating the availability of small businesses, one for microbusinesses, one for minority- and woman-owned businesses, and one for SDV-owned businesses. Each chain included 4,000 simulations, so in total, we ran 24,000 Monte Carlo simulations for each model for each contract element.⁴ Essentially, the model generated estimated availability for each contract element if we had repeatedly run our availability survey process 24,000 times, resulting in less random error and mitigating any unintended bias in the survey process. The availability estimates we report in the next section and in subsequent analyses are the availability estimates we observed adjusted for results from the MCMC process.

C. Results

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

1. Overall. Figure 6-3 presents dollar-weighted estimates of the overall availability of small and diverse businesses for state agency work.^{5, 6} As shown in Figure 6-3, the availability of small businesses for state agency work is 88.5 percent, indicating that one might expect the organization to award approximately 88.5 percent of its project dollars to small businesses based on the availability of those businesses for that work. The overall availability of microbusinesses is 40.4 percent.

⁴ Across all the more than 693,000 contract elements included in the analyses, there were 2,431 unique sets of combinations of business and project characteristics (i.e., availability sets). For computational efficiency, we ran MCMC simulations on each unique availability set and then applied them to each appropriate contract element.

⁵ BBC examined study results for state agencies separately from results for HEIs. We present availability analysis results for all Commonwealth work (state agencies and HEIs considered together) in Appendix D.

⁶ BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a potential small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from D&B. BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

The overall availability of minority-owned businesses considered together is 23.3 percent. Availability results differed for the individual minority-owned business groups we studied:

- The availability of Asian-owned businesses is 10.5 percent.
- The availability of Black-owned businesses is 7.7 percent.
- The availability of Hispanic-owned businesses is 4.7 percent.
- The availability of Native American-owned businesses is 0.4 percent.

The overall availability of White woman-owned businesses for state agency work is 13.6 percent, and the overall availability of SDV-owned businesses for state agency work is 7.1 percent.

Figure 6-3.
Availability estimates for state agency work

Note:
Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	
Business size	
Small business	88.5 %
Microbusiness	40.4 %
Race and gender	
Minority	23.3 %
Asian	10.5 %
Black	7.7 %
Hispanic	4.7 %
Native American	0.4 %
White woman	13.6 %
Veteran status	
Service-disabled veteran	7.1 %

BBC also estimated the availability of small and diverse businesses for tier 2 and tier 3 HEI contracts and procurements.⁷ Tier 2 HEIs have a memorandum of understanding with the Commonwealth that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology. In contrast, tier 3 HEIs have complete autonomy in their contracting and procurement. As shown in Figure 6-4, the overall availability of different business groups for tier 2 HEI work is as follows:

- The overall availability of small businesses is 89.1 percent.
- The overall availability of microbusinesses is 45.4 percent.

⁷ Tier 2 HEIs are Christopher Newport University, Longwood University, Norfolk State University, Old Dominion University, Radford University, University of Mary Washington, Virginia Community College System, Virginia Military Institute, and Virginia State University. Tier 3 HEIs are the University of Virginia, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, James Madison University, George Mason University, and the College of William & Mary.

- The availability of minority-owned businesses considered together for all tier 2 HEI work is 17.7 percent. Availability results for that work differed for the individual minority-owned business groups we studied:
 - The availability of Black-owned businesses is 5.9 percent.
 - The availability of Hispanic-owned businesses is 5.9 percent.
 - The availability of Asian-owned businesses is 5.5 percent.
 - The availability of Native American-owned businesses is 0.4 percent.
- The overall availability of White woman-owned businesses is 11.9 percent.
- The overall availability of SDV-owned businesses is 3.2 percent.

The overall availability of different business groups for tier 3 HEI work is as follows:

- The overall availability of small businesses is 88.2 percent.
- The overall availability of microbusinesses is 38.5 percent.
- The availability of minority-owned businesses considered together for all tier 3 HEI work is 19.1 percent. Availability results for that work differed for the individual minority-owned business groups we studied:
 - The availability of Asian-owned businesses is 6.7 percent.
 - The availability of Hispanic-owned businesses is 6.5 percent.
 - The availability of Black-owned businesses is 4.9 percent.
 - The availability of Native American-owned businesses is 1.0 percent.
- The overall availability of White woman-owned businesses is 9.5 percent.
- The overall availability of SDV-owned businesses is 3.0 percent.

Figure 6-4.
Availability estimates for
HEI work

Note:

Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	HEI Tier	
	Tier 2	Tier 3
Business size		
Small business	89.1 %	88.2 %
Microbusiness	45.4 %	38.5 %
Race and gender		
Minority	17.7 %	19.1 %
Asian	5.5 %	6.7 %
Black	5.9 %	4.9 %
Hispanic	5.9 %	6.5 %
Native American	0.4 %	1.0 %
White woman	11.9 %	9.5 %
Veteran status		
Service-disabled veteran	3.2 %	3.0 %

2. Industry. BBC also examined the availability of small and diverse businesses separately for state agency construction, professional services, and non-professional services and goods work to assess whether the availability of those businesses differs by industry. As shown in Figure 6-5, small businesses exhibit greater availability for state agency professional services (90.8%) and construction (90.4%) work than for its non-professional services and goods work (83.3%). Microbusinesses exhibit greater availability for state agency professional services (41.3%) and non-professional services and goods (40.9%) work than for its construction work (37.6%). The availability of other business groups differs by industry:

- Minority-owned businesses considered together exhibit greater availability for state agency professional services work (30.2%) than for its construction (19.8%) and non-professional services and goods work (13.5%). The availability of individual minority-owned business groups differs by industry:
 - Hispanic-owned businesses exhibit the greatest availability for state agency construction work (9.8%) compared to Asian-owned businesses (4.7%), Black-owned businesses (4.3%), and Native American-owned businesses (1.0%).
 - Asian-owned businesses exhibit the greatest availability for state agency professional services work (17.1%) compared to Black-owned businesses (9.2%), Hispanic-owned businesses (3.6%), and Native American-owned businesses (0.3%).
 - Black-owned businesses exhibit the greatest availability for state agency non-professional services and goods work (7.3%) compared to Hispanic-owned businesses (3.1%), Asian-owned businesses (2.8%), and Native American-owned businesses (0.3%).
- White woman-owned businesses exhibit greater availability for state agency non-professional services and goods work (16.1%) than for its professional services (14.5%) and construction work (7.5%).
- SDV-owned businesses exhibit greater availability for state agency professional services work (10.6%) than for its non-professional services and goods (4.0%) and construction work (2.7%).

Figure 6-5.
Availability estimates for state agency construction, professional services,
and non-professional services and goods work

Business group	Industry		
	Construction	Professional services	Non-professional services and goods
Business size			
Small business	90.4 %	90.7 %	83.3 %
Microbusiness	37.6 %	41.3 %	40.9 %
Race and gender			
Minority	19.8 %	30.2 %	13.5 %
Asian	4.7 %	17.1 %	2.8 %
Black	4.3 %	9.2 %	7.3 %
Hispanic	9.8 %	3.6 %	3.1 %
Native American	1.0 %	0.3 %	0.3 %
White woman	7.5 %	14.5 %	16.1 %
Veteran status			
Service-disabled veteran	2.7 %	10.6 %	4.0 %

Note: Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

3. Contract role. Many diverse businesses are small businesses, and thus often work as subcontractors. Prime contracts are usually bigger in size than subcontracts, and project size is typically inversely related to the availability of small and diverse businesses for organization work (i.e., the larger the project, the less the availability of small and diverse businesses). For these reasons, it is instructive to examine availability estimates separately for state agency prime contracts and subcontracts. As shown in Figure 6-6, the availability of small businesses for state agency prime contracts (88.1%) is less than for its subcontracts (90.3%). The availability of microbusinesses for state agency prime contracts (39.8%) is also less than for its subcontracts (42.7%).

The availability of other business groups differs by contract role:

- The availability of minority-owned businesses considered together for state agency prime contracts (23.2%) is similar to their availability for subcontracts (23.8%). The availability of individual minority-owned business groups differs by contract role:
 - Asian-owned businesses exhibit the greatest availability for prime contracts (11.1%) compared to Black-owned businesses (7.6%), Hispanic-owned businesses (4.1%), and Native American-owned businesses (0.4%).
 - Asian-owned businesses also exhibit the greatest availability for subcontracts (8.2%) compared to Black-owned businesses (7.9%), Hispanic-owned businesses (7.2%), and Native American-owned businesses (0.5%).
- The availability of White woman-owned businesses for state agency prime contracts (14.4%) is greater than for its subcontracts (10.6%).

- The availability of SDV-owned businesses for state agency prime contracts (7.6%) is greater than for its subcontracts (5.3%).

Some groups exhibit similar or greater availability for prime contracts than for subcontracts. This result may be due to variations in availability for different industries, and the industry compositions of prime contracts as compared to subcontracts.

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

Note:
Numbers are rounded to the nearest one-tenth of a percent and thus may not sum exactly to totals.

Business group	Role	
	Prime contracts	Subcontracts
Business size		
Small business	88.1 %	90.3 %
Microbusiness	39.8 %	42.7 %
Race and gender		
Minority	23.2 %	23.8 %
Asian	11.1 %	8.2 %
Black	7.6 %	7.9 %
Hispanic	4.1 %	7.2 %
Native American	0.4 %	0.5 %
White woman	14.4 %	10.6 %
Veteran status		
Service-disabled veteran	7.6 %	5.3 %

4. Prime contract size. To assess whether prime contract size is related to the availability of small and diverse businesses for state agency work, BBC examined the availability of small and diverse businesses separately for three different size categories of prime contracts state agencies awarded during the study period:

- *Large* prime contracts, which are contracts worth more than \$2 million for construction, more than \$4.7 million for professional services, or more than \$1 million for non-professional services and goods;
- *Small* prime contracts, which are contracts worth less than \$2 million but more than \$400,000 for construction, less than \$4.7 million but more than \$400,000 for professional services, or less than \$1 million but more than \$200,000 for non-professional services and goods; and
- *Micro* prime contracts, which are contracts worth \$400,000 or less for construction, \$400,000 or less for professional services, or \$200,000 or less for non-professional services and goods.

As shown in Figure 6-7, the availability of small businesses for state agency micro prime contracts (93.8%) and small prime contracts (93.2%) is greater than for its large prime contracts (86.0%). The availability of microbusinesses for micro prime contracts (61.0%) is also greater than for small prime contracts (58.2%) and large prime contracts (32.3%). The availability of other business groups differs by prime contract size:

- The availability of minority-owned businesses considered together is greater for state agency small prime contracts (26.0%) than for its micro prime contracts (23.4%) and large prime contracts

(22.6%). The availability of individual minority-owned business groups differs by prime contract size:

- Asian-owned businesses exhibit the greatest levels of availability for large prime contracts (11.9%) compared to Black-owned businesses (6.2%), Hispanic-owned businesses (4.1%), and Native American-owned businesses (0.3%).
 - Black-owned businesses exhibit the greatest levels of availability for small prime contracts (11.3%) compared to Asian-owned businesses (10.5%), Hispanic-owned businesses (3.7%), and Native American-owned businesses (0.5%).
 - Black-owned businesses exhibit the greatest levels of availability for micro prime contracts (11.1%) compared to Asian-owned businesses (7.6%), Hispanic-owned businesses (4.1%), and Native American-owned businesses (0.7%).
- The availability of White woman-owned businesses for state agency micro prime contracts (15.5%) is greater than for its small prime contracts (14.9%) and large prime contracts (14.0%).
 - The availability of SDV-owned businesses for state agency large prime contracts (8.3%) is greater than for its small prime contracts (6.4%) and micro prime contracts (4.7%).

Some groups exhibit similar or greater availability for larger contracts than for smaller contracts. This result may be due to variations in availability for different industries and the industry compositions of each contract size category.

Figure 6-7.
Availability estimates for state agency large, small, and micro prime contracts

Note:

Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

Business group	Contract Size		
	Micro	Small	Large
Business size			
Small business	93.8 %	93.2 %	86.0 %
Microbusiness	61.0 %	58.2 %	32.3 %
Race and gender			
Minority	23.4 %	26.0 %	22.6 %
Asian	7.6 %	10.5 %	11.9 %
Black	11.1 %	11.3 %	6.2 %
Hispanic	4.1 %	3.7 %	4.1 %
Native American	0.7 %	0.5 %	0.3 %
White woman	15.5 %	14.9 %	14.0 %
Veteran status			
Service-disabled veteran	4.7 %	6.4 %	8.3 %

CHAPTER 7.

Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of small businesses and microbusinesses, as well as minority-, woman-, and service disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) in the construction, professional services, and non-professional services and goods contracts and procurements Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) awarded between July 1, 2019 and June 30, 2024 (the *study period*).^{1, 2} We measured participation in terms of *utilization*—the percentage of project dollars the Commonwealth awarded to those businesses during the study period. Chapter 7 presents the analysis in two parts:

- A. Purpose; and
- B. Results.

A. Purpose

Calculating the percentage of dollars the Commonwealth awarded small and diverse businesses during the study period is useful in determining whether certain business groups face barriers related to the organization’s contracting and procurement processes. Moreover, assessing whether any business groups are *substantially underutilized* relative to their availability for that work allows the Commonwealth to determine whether the use of *race- or gender-based measures* is appropriate and ensure that its use of such measures is tailored to those business groups for which compelling evidence of such barriers exist.

B. Results

BBC calculated the overall participation of small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and SDV-owned businesses located in the *relevant geographic market area (RGMA)* (i.e., local small and diverse businesses) in the construction, professional services, and non-professional services and goods projects the Commonwealth awarded during the study period

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

² BBC assessed results for small and diverse business groups regardless of certification status based on whether a business’ size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business’ ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC’s business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B’s business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

as well as separately for various subsets of those projects.^{3, 4} The businesses that were counted as small businesses, microbusinesses, and SDV-owned businesses were not exclusive of other business categories. For example, if a business was owned by a Black person who was also an SDV, that business would have been counted as both a Black-owned business and an SDV-owned business. In addition, all microbusinesses are automatically considered to also be small businesses.⁵

1. Overall. Figure 7-1 presents the overall participation of local small and diverse businesses in state agency work.⁶ As shown in Figure 7-1, state agencies awarded 59.0 percent of relevant project dollars to small businesses. The overall participation of microbusinesses in state agency work was 18.6 percent.

Overall, state agencies awarded 10.7 percent of relevant project dollars to minority-owned businesses considered together. Individual minority-owned business groups exhibited different levels of participation in state agency work:

- Asian-owned businesses (8.3%),
- Black-owned businesses (1.2%),
- Hispanic-owned businesses (1.1%); and
- Native American-owned businesses (0.1%).

In addition, state agencies awarded 4.1 percent of relevant project dollars to White woman-owned businesses and 0.8 percent to SDV-owned businesses.

³ The RGMA on which BBC focused our analyses was the state of Virginia. See Chapter 5 for more information on how we determined the RGMA.

⁴ BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a potential small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

⁵ The Commonwealth tracks the participation of small and diverse businesses in its contracting and procurement through its SWaM expenditure dashboard. The percentage of certified small business participation in Commonwealth contracts and procurements reported as part of the disparity study does not align with the percentage reported by the SWaM expenditure dashboard for various reasons. The Commonwealth has established a hierarchy for reporting participation by SWaM-certified businesses, and it does not count any single business in multiple categories (i.e., if a business is certified as a small business and a minority-owned business, the Commonwealth would report that participation as minority-owned business participation; in contrast, BBC would report that participation as both small business participation and minority-owned business participation). In addition, there are various differences in BBC and the Commonwealth's determination of discretionary spending. See Chapter 5 for information about the types of contracts and procurements that were not considered in-scope as part of the disparity study and the volumes of dollars included in each of those categories.

⁶ BBC examined study results for state agencies separately from results for HEIs. We present utilization analysis results for all Commonwealth work (state agencies and HEIs considered together) in Appendix D.

Figure 7-1.
Utilization results for Commonwealth projects

Note:
 Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

Business group	
Business size	
Small business	59.0 %
Microbusiness	18.6 %
Race and gender	
Minority	10.7 %
Asian	8.3 %
Black	1.2 %
Hispanic	1.1 %
Native American	0.1 %
White woman	4.1 %
Veteran status	
Service-disabled veteran	0.8 %

BBC also assessed the participation of small and diverse businesses for tier 2 and tier 3 HEI contracts and procurements.⁷ Tier 2 HEIs have a memorandum of understanding with the Commonwealth that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology. In contrast, tier 3 HEIs have complete autonomy in their contracting and procurement. As shown in Figure 7-2, the overall participation of different business groups for tier 2 HEI work was as follows:

- The overall participation of small businesses was 68.9 percent.
- The overall participation of microbusinesses was 14.3 percent.
- The participation of minority-owned businesses considered together for all tier 2 HEI work was 7.6 percent. Individual minority-owned business groups exhibited different levels of participation in that work:
 - Black-owned businesses (5.1%);
 - Asian-owned businesses (1.1%);
 - Hispanic-owned businesses (1.1%); and
 - Native American-owned businesses (0.1%).
- The overall participation of White woman-owned businesses was 7.7 percent.
- The overall participation of SDV-owned businesses was 0.6 percent.

The overall participation of different business groups for tier 3 HEI work was as follows:

⁷ Tier 2 HEIs are Christopher Newport University, Longwood University, Norfolk State University, Old Dominion University, Radford University, University of Mary Washington, Virginia Community College System, Virginia Military Institute, and Virginia State University. Tier 3 HEIs are the University of Virginia, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, James Madison University, George Mason University, and the College of William & Mary.

- The overall participation of small businesses was 74.9 percent.
- The overall participation of microbusinesses was 20.4 percent.
- The participation of minority-owned businesses considered together for all tier 3 HEI work was 3.3 percent. Individual minority-owned business groups exhibited different levels of participation in that work:
 - Hispanic-owned businesses (1.2%);
 - Asian-owned businesses (1.0%);
 - Black-owned businesses (1.0%); and
 - Native American-owned businesses (0.1%).
- The overall participation of White woman-owned businesses was 4.7 percent.
- The overall participation of SDV-owned businesses was 0.3 percent.

Figure 7-2.
Utilization results for HEI work

Note:

Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

Business group	HEI Tier	
	Tier 2	Tier 3
Business size		
Small business	68.9 %	74.9 %
Microbusiness	14.3 %	20.4 %
Race and gender		
Minority	7.6 %	3.3 %
Asian	1.1 %	1.0 %
Black	5.1 %	1.0 %
Hispanic	1.1 %	1.2 %
Native American	0.3 %	0.1 %
White woman	7.7 %	4.7 %
Veteran status		
Service-disabled veteran	0.6 %	0.3 %

2. Industry. BBC also examined the participation of small and diverse businesses separately for state agencies' construction, professional services, and non-professional services and goods work to assess whether the participation of those businesses differed by industry. As shown in Figure 7-3, the participation of small businesses was greater in state agency construction work (79.8%) than in its professional services (54.2%) and non-professional services and goods work (52.9%). Similarly, the participation of microbusinesses was greater in state agency construction work (32.8%) than its non-professional services and goods work (15.2%) and professional services work (14.9%).

The participation of other business groups differed by industry:

- The participation of minority-owned businesses considered together was greater in state agency professional services work (15.9%) than in its non-professional services and goods (7.4%) and construction work (2.5%). The participation of individual minority-owned business groups in state agency work differed by industry:

- Hispanic-owned businesses exhibited the greatest level of participation in construction work (1.4%) compared to Black-owned businesses (0.5%), Asian-owned businesses (0.4%), and Native American-owned businesses (0.2%).
- Asian-owned businesses exhibited the greatest level of participation in professional services work (14.5%) compared to Hispanic-owned businesses (0.8%), Black-owned businesses (0.5%), and Native American-owned businesses (0.1%).
- Black-owned businesses exhibited the greatest level of participation in non-professional services and goods work (3.0%) compared to Asian-owned businesses (2.9%), Hispanic-owned businesses (1.5%), and Native American-owned businesses (0.0%).
- White woman-owned businesses exhibited greater participation in state agency non-professional services and goods work (8.7%) than in its professional services (2.4%) and construction work (1.9%).
- SDV-owned businesses exhibited greater participation in state agency professional services work (1.3%) than in its non-professional services and goods work (0.3%) and construction work (0.1%).

Figure 7-3.
Utilization analysis results by industry

Business group	Industry		
	Construction	Professional services	Non-professional services and goods
Business size			
Small business	79.8 %	54.2 %	52.9 %
Microbusiness	32.8 %	14.9 %	15.2 %
Race and gender			
Minority	2.5 %	15.9 %	7.4 %
Asian	0.4 %	14.5 %	2.9 %
Black	0.5 %	0.5 %	3.0 %
Hispanic	1.4 %	0.8 %	1.5 %
Native American	0.2 %	0.1 %	0.0 %
White woman	1.9 %	2.4 %	8.7 %
Veteran status			
Service-disabled veteran	0.1 %	1.3 %	0.3 %

Note: Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

3. Contract role. Many diverse businesses are small businesses, and thus often work as subcontractors. Prime contracts are usually bigger in size than subcontracts, and project size is typically inversely related to the participation of small and diverse businesses for organization work (i.e., the larger the project, the less the participation of small and diverse businesses). For these reasons, it is instructive to examine utilization results separately for state agency prime contracts and subcontracts. As shown in Figure 7-4, the participation of small businesses was greater in state agency subcontracts (78.5%) than in its prime contracts (53.9%). Similarly, the participation of microbusinesses was greater in state agency subcontracts (38.1%) than its prime contracts (13.5%).

The participation of other business groups differed by contract role:

- The participation of minority-owned businesses considered together was slightly greater in state agency prime contracts (10.9%) than in its subcontracts (10.0%). The participation of individual minority-owned business groups in state agency work differed by contract role:
 - Asian-owned businesses exhibited the greatest level of participation in prime contracts (8.5%) compared to Hispanic-owned businesses (1.3%), Black-owned businesses (1.0%), and Native American-owned businesses (0.1%).
 - Asian-owned businesses exhibited the greatest level of participation in subcontracts (7.4%) compared to Black-owned businesses (2.0%), Hispanic-owned businesses (0.6%), and Native American-owned businesses (0.0%)
- The participation of White woman-owned businesses was greater in state agency prime contracts (4.2%) than in its subcontracts (3.6%).
- The participation of SDV-owned businesses was also greater in state agency prime contracts (0.8%) than its subcontracts (0.6%).

Figure 7-4.
Utilization analysis
results by contract role

Note:

Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

Business group	Role	
	Prime contracts	Subcontracts
Business size		
Small business	53.9 %	78.5 %
Microbusiness	13.5 %	38.1 %
Race and gender		
Minority	10.9 %	10.0 %
Asian	8.5 %	7.4 %
Black	1.0 %	2.0 %
Hispanic	1.3 %	0.6 %
Native American	0.1 %	0.0 %
White woman	4.2 %	3.6 %
Veteran status		
Service-disabled veteran	0.8 %	0.6 %

4. Prime contract size. To assess whether prime contract size is related to the participation of small and diverse businesses for state agency work, BBC examined the participation of small and diverse businesses separately for three different size categories of prime contracts state agencies awarded during the study period:

- *Large* prime contracts, which are contracts worth more than \$2 million for construction, more than \$4.7 million for professional services, or more than \$1 million for non-professional services and goods;
- *Small* prime contracts, which are contracts worth less than \$2 million but more than \$400,000 for construction, less than \$4.7 million but more than \$400,000 for professional services, or less than \$1 million but more than \$200,000 for non-professional services and goods; and

- *Micro* prime contracts, which are contracts worth \$400,000 or less for construction, \$400,000 or less for professional services, or \$200,000 or less for non-professional services and goods.

As shown in Figure 7-5, the participation of small businesses for state agency micro prime contracts (57.8%) was greater than for its small prime contracts (56.0%) and large prime contracts (52.7%). The participation of microbusinesses for micro prime contracts (20.0%) was greater than for small prime contracts (17.1%) and large prime contracts (11.6%).

The availability of other business groups differs by prime contract size:

- The participation of minority-owned businesses considered together was greater in state agency micro prime contracts (11.7%) than in its large prime contracts (11.3%) and small prime contracts (8.6%). The participation of individual minority-owned business groups in state agency work differed by prime contract size:
 - Asian-owned businesses exhibited the greatest level of participation in state agency large prime contracts (9.5%) compared to Hispanic-owned businesses (1.3%), Black-owned businesses (0.4%), and Native American-owned businesses (0.1%).
 - Asian-owned businesses exhibited the greatest level of participation in state agency small prime contracts (5.8%) compared to Black-owned businesses (1.6%), Hispanic-owned businesses (1.1%), and Native American-owned businesses (0.4%).
 - Asian-owned businesses exhibited the greatest level of participation in state agency micro prime contracts (6.0%) compared to Black-owned businesses (3.9%), Hispanic-owned businesses (1.4%), and Native American-owned businesses (0.4%).
- The participation of White woman-owned businesses was greater in state agency micro prime contracts (9.2%) than in its small prime contracts (6.4%) and its large prime contracts (2.9%).
- The participation of SDV-owned businesses was greater in state agency micro prime contracts (1.3%) and small prime contracts (1.3%) than its large prime contracts (0.6%).

Figure 7-5.
Utilization analysis
results by prime contract size

Note:

Numbers are rounded to the nearest one tenth of a percent and thus may not sum exactly to totals.

Business group	Contract Size		
	Micro	Small	Large
Business size			
Small business	57.8 %	56.0 %	52.7 %
Microbusiness	20.0 %	17.1 %	11.6 %
Race and gender			
Minority	11.7 %	8.6 %	11.3 %
Asian	6.0 %	5.8 %	9.5 %
Black	3.9 %	1.6 %	0.4 %
Hispanic	1.4 %	1.1 %	1.3 %
Native American	0.4 %	0.1 %	0.1 %
White woman	9.2 %	6.4 %	2.9 %
Veteran status			
Service-disabled veteran	1.3 %	1.3 %	0.6 %

CHAPTER 8.

Disparity Analysis

BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) awarded to small businesses and microbusinesses, as well as minority-, woman-, and service disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) during the study period (i.e., *utilization or participation*) with the percentage of contract and procurement dollars one might expect the Commonwealth to award to those businesses based on their availability for that work.^{1, 2} The analysis focused on construction, professional services, and non-professional services and goods work the Commonwealth awarded between July 1, 2019 and June 30, 2024 (the *study period*). Chapter 8 presents the analysis in two parts:

- A. Overview; and
- B. Results.

A. Overview

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

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

The disparity index indicates the proportion of the organization’s project dollars it awarded to a business group for every \$1.00 of that group’s availability for that work. A disparity index of \$1.00 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity index of less than \$1.00 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity index of less than \$0.80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been substantially underutilized relative to its availability. Many courts have considered substantial disparities as

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

² BBC assessed results for small and diverse business groups regardless of certification status based on whether a business’ size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business’ ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC’s business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B’s business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

inferences of discrimination against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-based measures*—to address corresponding barriers.³

B. Results

BBC measured overall disparities between the participation and availability of small and diverse businesses for all relevant contracts and procurements the Commonwealth awarded during the study period considered together. We also measured disparities separately for various subsets of contracts and procurements it awarded during the study period for small and diverse businesses. The businesses that were counted as small businesses, microbusinesses, and SDV-owned businesses were not exclusive of other business categories. For example, if a business was owned by a Black person who was also an SDV, that business would have been counted as both a Black-owned business and an SDV-owned business. In addition, all microbusinesses are automatically considered to also be small businesses. There is a red box at the disparity index level of \$0.80 and below, which indicates a substantial disparity. We provide detailed disparity analysis results in Appendix D.

1. Overall. Figure 8-1 presents disparity indices for small and diverse businesses for all relevant prime contracts and subcontracts state agencies awarded during the study period.⁴ As shown in Figure 8-1, small businesses exhibited a disparity index of \$0.67 for all relevant contracts and procurements state agencies awarded during the study period, indicating a disparity where they awarded \$0.67 to small businesses for every \$1.00 one might expect state agencies to award to those businesses based on their availability for state agency work. Microbusinesses exhibited a disparity index of \$0.46 for all state agency work considered together.

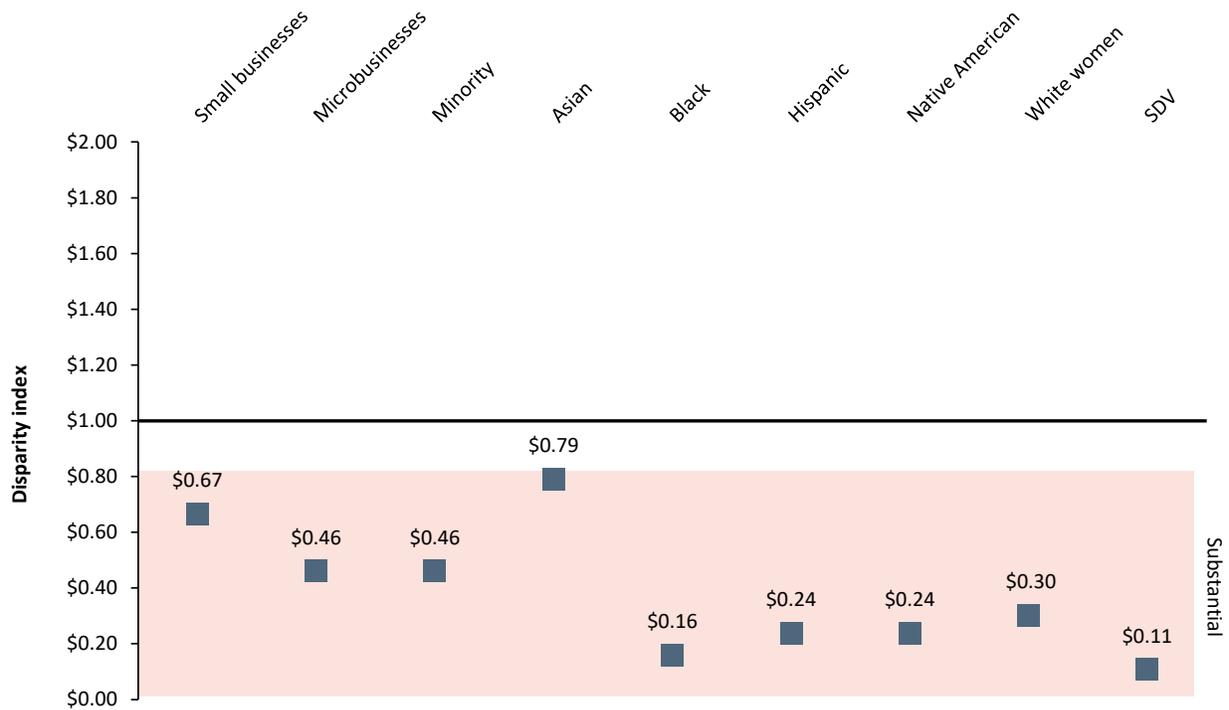
Minority-owned businesses considered together exhibited a disparity index of \$0.46 for all relevant contracts and procurements state agencies awarded during the study period. Asian-owned businesses (disparity index of \$0.79), Black-owned businesses (disparity index of \$0.16), Hispanic-owned businesses (disparity index of \$0.24), and Native American-owned businesses (disparity index of \$0.24) exhibited substantial disparities for state agency work.

White woman-owned businesses exhibited a substantial disparity (disparity index of \$0.30) for all relevant contracts and procurements state agencies awarded during the study period. SDV-owned businesses also exhibited a substantial disparity (disparity index of \$0.11) for state agency work.

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

⁴ BBC examined study results for state agencies separately from results for HEIs. We present disparity analysis results for all Commonwealth work (state agencies and HEIs considered together) in Appendix D.

Figure 8-1.
Overall disparity analysis results for state agency work



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

BBC also measured overall disparities of small and diverse businesses for tier 2 and tier 3 HEI contracts and procurements.⁵ Tier 2 HEIs have a memorandum of understanding with the Commonwealth that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology. In contrast, tier 3 HEIs have complete autonomy in their contracting and procurement. As shown in Figure 8-2, overall disparity indices of different business groups for tier 2 HEI work are as follows:

- Small businesses exhibited a substantial disparity with a disparity index of \$0.77.
- Microbusinesses exhibited a substantial disparity with a disparity index of \$0.32.
- Minority-owned businesses considered together exhibited a substantial disparity with a disparity index of \$0.43 for all tier 2 HEI work. There were some differences in disparities when considering each individual minority-owned business group separately:
 - Asian-owned businesses (disparity index of \$0.20), Hispanic-owned businesses (disparity index of \$0.18), and Native American-owned businesses (disparity index of \$0.65) exhibited substantial disparities for tier 2 HEI work.

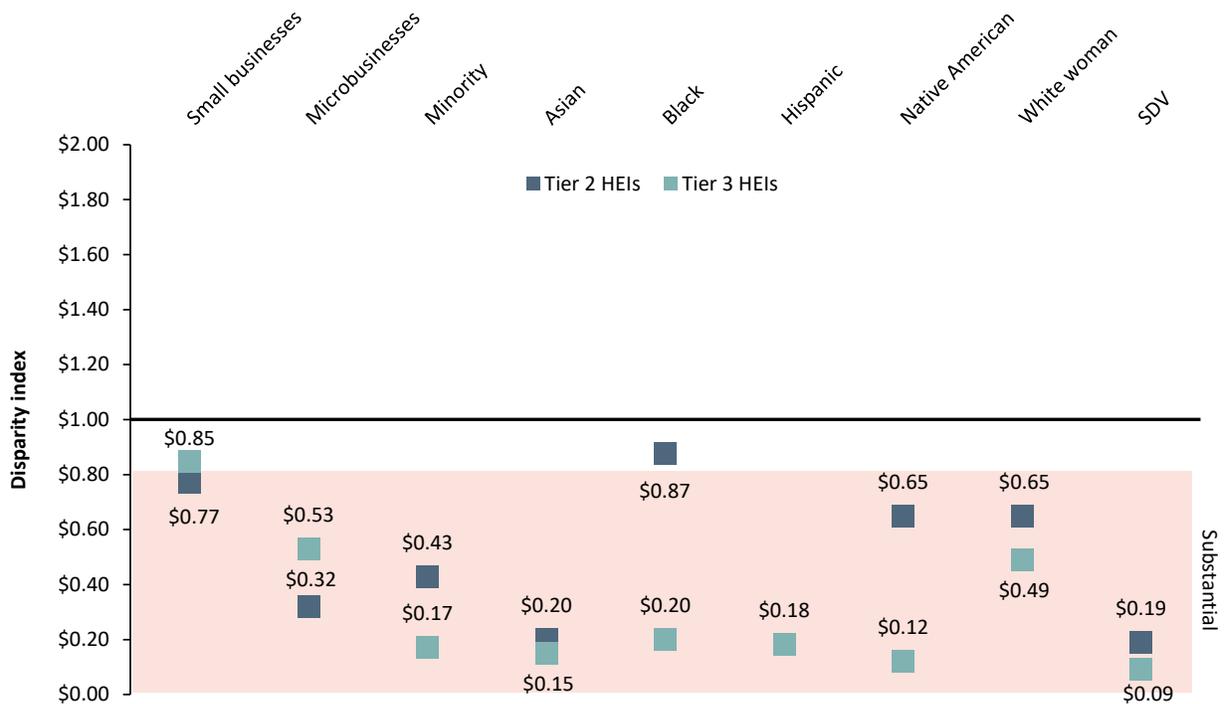
⁵ Tier 2 HEIs are Christopher Newport University, Longwood University, Norfolk State University, Old Dominion University, Radford University, University of Mary Washington, Virginia Community College System, Virginia Military Institute, and Virginia State University. Tier 3 HEIs are the University of Virginia, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, James Madison University, George Mason University, and the College of William & Mary.

- Black-owned businesses exhibited a disparity, though not a substantial disparity, for tier 2 HEI work (disparity index of \$0.87).
- White woman-owned businesses exhibited a substantial disparity with a disparity index of \$0.65.
- SDV-owned businesses exhibited a substantial disparity with a disparity index of \$0.19.

The overall disparity indices of different business groups for tier 3 HEI work are as follows:

- Small businesses exhibited a disparity, though not a substantial disparity (disparity index of \$0.85).
- Microbusinesses exhibited a substantial disparity (disparity index of \$0.53).
- Minority-owned businesses considered together exhibited a disparity index of \$0.17 for all tier 3 HEI work. Each individual minority-owned business group exhibited substantial disparities for tier 3 HEI work, though there were some differences in disparities when considering each individual minority-owned business group separately:
 - Asian-owned businesses exhibited a disparity index of \$0.15.
 - Black-owned businesses exhibited a disparity index of \$0.20.
 - Hispanic-owned businesses exhibited a disparity index of \$0.18.
 - Native American-owned businesses exhibited a disparity index of \$0.12.
- White woman-owned businesses exhibited a substantial disparity with a disparity index of \$0.49.
- SDV-owned businesses exhibited a substantial disparity with a disparity index of \$0.09.

Figure 8-2.
Overall disparity analysis results for HEI work



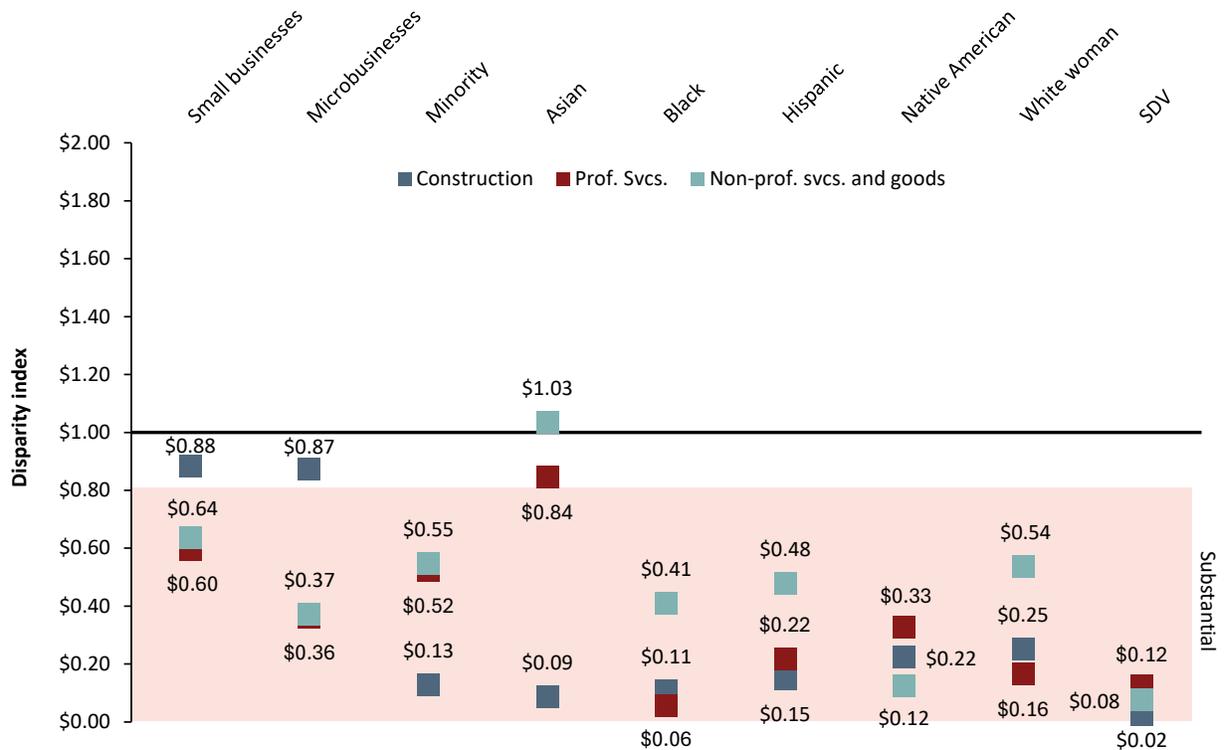
Note: For more detail see Figures D-30 and D-37 in Appendix D.

2. Industry. BBC examined disparity analysis results separately for the construction, professional services, and non-professional services and goods work state agencies awarded during the study period to determine whether outcomes for small and diverse businesses differed by industry. As shown in Figure 8-3, small businesses exhibited substantial disparities for state agency professional services (disparity index of \$0.60) and non-professional services and goods work (disparity index of \$0.64). Microbusinesses exhibited substantial disparities for state agency professional services (disparity index of \$0.36) and non-professional services and goods work (disparity index of \$0.37).

Disparity indices for other business groups differed by industry:

- Minority-owned businesses considered together exhibited substantial disparities for state agency construction (disparity index of \$0.13), professional services (disparity index of \$0.52), and non-professional services and goods work (disparity index of \$0.55). Disparity indices for individual minority-owned business groups varied by industry:
 - All minority-owned business groups exhibited substantial disparities for state agency construction work (Asian-owned businesses: disparity index of \$0.09; Black-owned businesses: disparity index of \$0.11; Hispanic-owned businesses: disparity index of \$0.15; Native American-owned businesses: disparity index of \$0.22).
 - Black-owned businesses (disparity index of \$0.06), Hispanic-owned businesses (disparity index of \$0.22), and Native American-owned businesses (disparity index of \$0.33) exhibited substantial disparities for professional services work. Asian-owned businesses exhibited a disparity for professional services work (disparity index of \$0.84), but that disparity was not substantial.
 - Black-owned businesses (disparity index of \$0.41), Hispanic-owned businesses (disparity index of \$0.48), and Native American-owned businesses (disparity index of \$0.12) exhibited substantial disparities for non-professional services and goods work. In contrast, Asian-owned businesses did not exhibit a disparity for non-professional services and goods work (disparity index of \$1.03)
- White woman-owned businesses exhibited substantial disparities for state agency construction (disparity index of \$0.25), professional services (disparity index of \$0.16), and non-professional services and goods work (disparity index of \$0.54).
- SDV-owned businesses exhibited substantial disparities for state agency construction (disparity index of \$0.02), professional services (disparity index of \$0.12), and non-professional services and goods work (disparity index of \$0.08).

Figure 8-3.
Disparity analysis results by industry



Note: For more detail see Figures D-11, D-12, and D-13 in Appendix D.

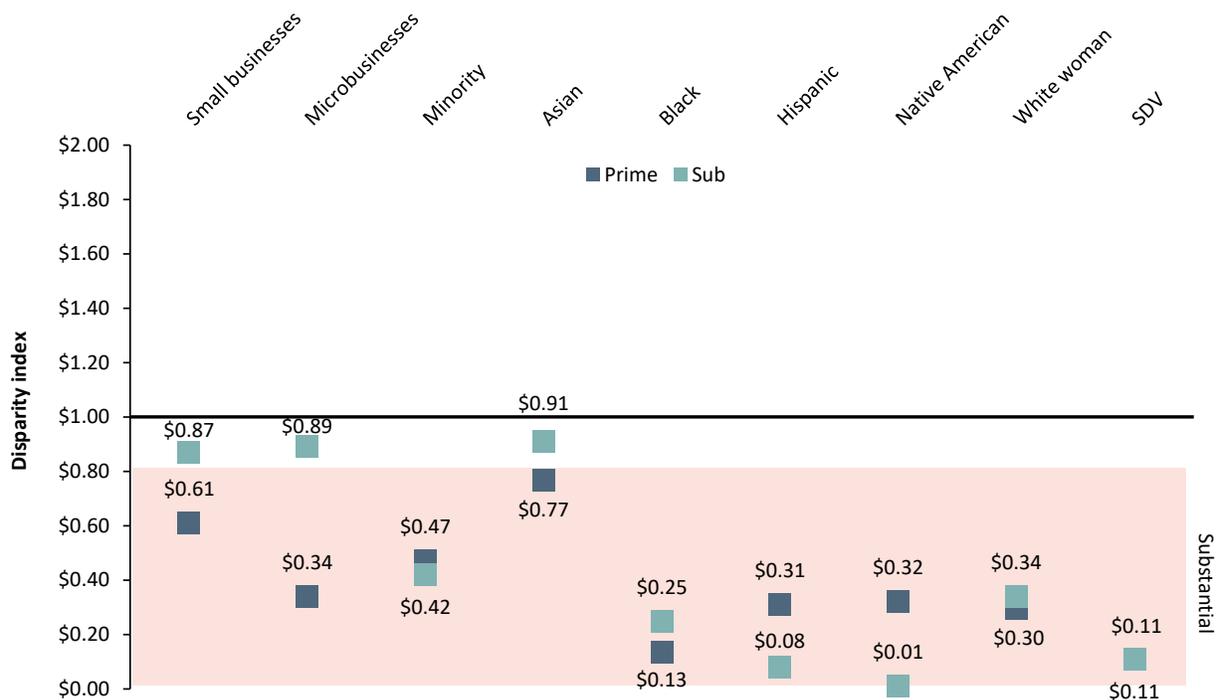
3. Contract role. Many diverse businesses are small businesses, and thus often work as subcontractors. Prime contracts are usually bigger in size than subcontracts, and project size is typically inversely related to the participation and availability of small and diverse businesses for organization work (i.e., the larger the project, the less the participation and availability of small and diverse businesses). For these reasons, it is instructive to examine disparity results separately for state agency prime contracts and subcontracts. As shown in Figure 8-4, small businesses exhibited a substantial disparity for state agency prime contracts (disparity index of \$0.61) but not for its subcontracts (disparity index of \$0.87). Microbusinesses exhibited substantial disparities for state agency prime contracts (disparity index of \$0.34) but not for its subcontracts (disparity index of \$0.89).

Disparity indices for other business groups differed by contract role:

- Minority-owned businesses considered together exhibited substantial disparities for state agency prime contracts (disparity index of \$0.47) and subcontracts (disparity index of \$0.42). Disparity indices for individual minority-owned business groups differed by contract role:
 - Asian-owned businesses (disparity index of \$0.77), Black-owned businesses (disparity index of \$0.13), Hispanic-owned businesses (disparity index of \$0.31), and Native American-owned businesses (disparity index of \$0.32) exhibited substantial disparities for state agency prime contracts.

- Black-owned businesses (disparity index of \$0.25), Hispanic-owned businesses (disparity index of \$0.08), and Native American-owned businesses (disparity index of \$0.01) exhibited substantial disparities for state agency subcontracts. Asian-owned businesses exhibited a disparity for subcontracts (disparity index of \$0.91), but that disparity was not substantial.
- White woman-owned businesses exhibited substantial disparities for state agency prime contracts (disparity index of \$0.30) and subcontracts (disparity index of \$0.34).
- SDV-owned businesses exhibited substantial disparities for state agency prime contracts (disparity index of \$0.11) and subcontracts (disparity index of \$0.11).

Figure 8-4.
Disparity analysis results by contract role



Note: For more detail see Figures D-14 and D-15 in Appendix D.

4. Prime contract size. BBC examined the participation of small and diverse businesses separately for three different size categories of prime contracts state agencies awarded during the study period:

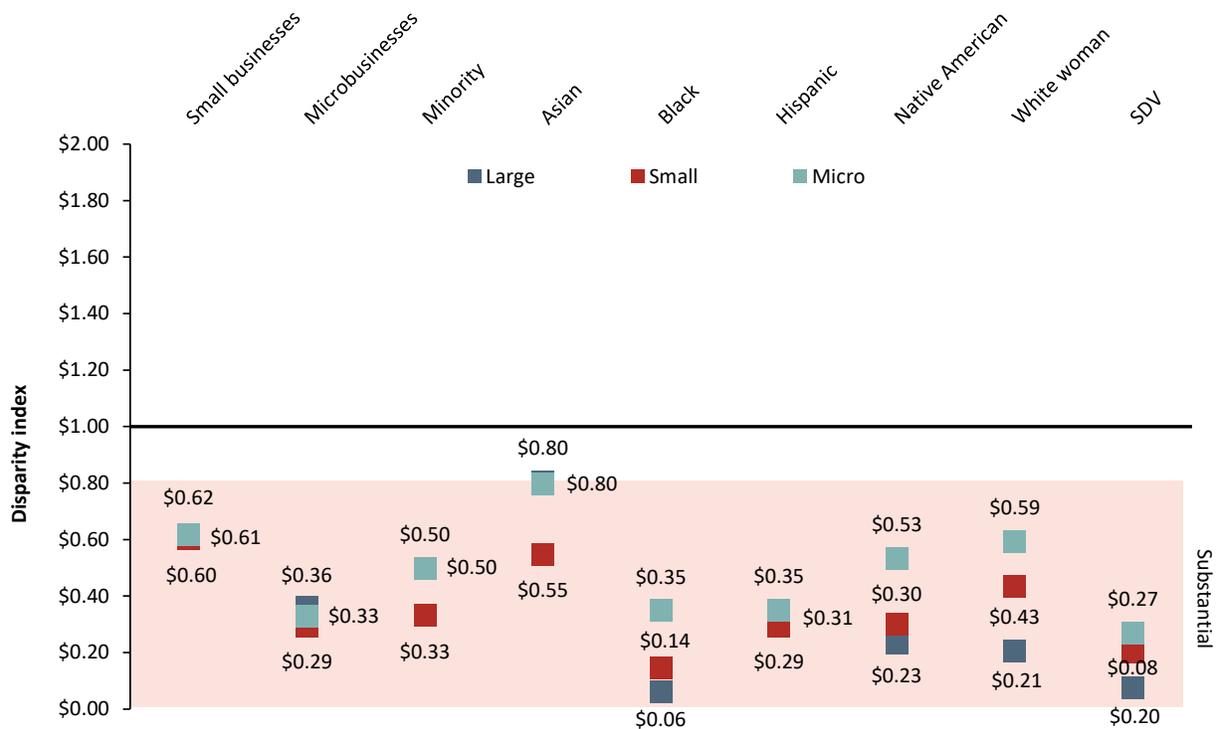
- *Large* prime contracts, which are contracts worth more than \$2 million for construction, more than \$4.7 million for professional services, or more than \$1 million for non-professional services and goods;
- *Small* prime contracts, which are contracts worth less than \$2 million but more than \$400,000 for construction, less than \$4.7 million but more than \$400,000 for professional services, or less than \$1 million but more than \$200,000 for non-professional services and goods; and
- *Micro* prime contracts, which are contracts worth \$400,000 or less for construction, \$400,000 or less for professional services, or \$200,000 or less for non-professional services and goods.

As shown in Figure 8-4, small businesses exhibited substantial disparities on state agency large (disparity index of \$0.61), small (disparity index of \$0.60), and micro prime contracts (disparity index of \$0.62). Microbusinesses also exhibited substantial disparities on state agency large (disparity index of \$0.36), small (disparity index of \$0.29), and micro prime contracts (disparity index of \$0.33).

Disparity results for other business groups differed by prime contract size:

- Minority-owned businesses considered together exhibited substantial disparities on state agency large (disparity index of \$0.50), small (disparity index of \$0.33), and micro prime contracts (disparity index of \$0.50). Disparity indices for individual minority-owned business groups differed by prime contract size:
 - Black-owned businesses (disparity index of \$0.06), Hispanic-owned businesses (disparity index of \$0.31), and Native American-owned businesses (disparity index of \$0.23) exhibited substantial disparities for large prime contracts. Asian-owned businesses exhibited a disparity for large prime contracts (disparity index of \$0.80), but that disparity was not substantial.
 - Asian-owned businesses (disparity index of \$0.55), Black-owned businesses (disparity index of \$0.14), Hispanic-owned businesses (disparity index of \$0.29), and Native American-owned businesses (disparity index of \$0.30) exhibited substantial disparities for small prime contracts.
 - Black-owned businesses (disparity index of \$0.35), Hispanic-owned businesses (disparity index of \$0.35), and Native American-owned businesses (disparity index of \$0.53) exhibited substantial disparities for micro prime contracts. Asian-owned businesses exhibited a disparity for micro prime contracts (disparity index of \$0.80), but that disparity was not substantial.
- White woman-owned businesses exhibited substantial disparities on state agency large (disparity index of \$0.21), small (disparity index of \$0.43), and micro prime contracts (disparity index of \$0.59).
- SDV-owned businesses exhibited substantial disparities on state agency large (disparity index of \$0.08), small (disparity index of \$0.20), and micro prime contracts (disparity index of \$0.27).

Figure 8-5.
Disparity analysis results by prime contract size



Note: For more detail see Figures D-16, D-17, and D-18 in Appendix D.

6. Comparisons to the 2020 Commonwealth of Virginia Disparity Study. BBC last conducted a disparity study for the Commonwealth in 2020. It is instructive to compare disparity indices for minority- and woman-owned businesses in state agency work between the 2020 and 2025 disparity studies to assess whether outcomes are improving for those businesses in state agency work over time. Figure 8-6 presents overall disparity indices for minority- and woman-owned business groups for all relevant state agency projects considered together from the 2020 disparity study and the 2025 disparity study.⁶

a. Methodological considerations. Since the 2020 disparity study was conducted, BBC made two relevant changes in methodology:

- The utilization analyses in the 2025 study focused only on businesses that had a location in the relevant geographic market area (RGMA). In the 2020 study, BBC included businesses outside of the RGMA as part of the utilization analysis.
- As part of the 2025 study, BBC used Markov Chain Monte Carlo (MCMC) simulations to improve the accuracy of the availability analysis to better account for random error or potential for unintended bias (see Chapter 6 for more details on MCMC analyses). The availability estimates reported in

⁶ BBC did not include disparity study results for small businesses, microbusinesses, or SDV-owned businesses as part of the 2020 disparity study.

Chapter 6 are the availability estimates we observed adjusted for results from the MCMC process. The 2020 disparity study did not include an MCMC analysis as part of the availability analysis.

To more accurately assess changes in disparity results for minority- and woman-owned businesses since 2020, BBC presents 2025 disparity results in Figure 8-6 based on availability estimates that have *not* undergone the MCMC analysis and utilization results that include businesses both within and outside the RGMA.

b. Results. As shown in Figure 8-6, minority-owned businesses exhibited smaller disparities in 2025 (disparity index of \$0.44) than in 2020 (disparity index of \$0.37). Disparity analysis results differed by individual minority-owned business group and study year:

- Asian-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.62) than in 2020 (disparity index of \$0.17).
- Black-owned businesses exhibited a larger disparity in 2025 (disparity index of \$0.20) than in 2020 (disparity index of \$0.49).
- Hispanic-owned businesses exhibited a larger disparity in 2025 (disparity index of \$0.31) than in 2020 (disparity index of \$0.62).
- Native American-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.31) than in 2020 (disparity index of \$0.05).

White woman-owned businesses exhibited a smaller disparity in 2025 (disparity index of \$0.39) than in 2020 (disparity index of \$0.50).

Figure 8-6.
Overall disparity indices from 2020 and 2025 disparity studies



CHAPTER 9.

Business Programs

Chapter 9 provides an overview of the business programs Commonwealth of Virginia state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) use to encourage the participation of small businesses and microbusinesses as well as minority-, woman-, and service disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) in Commonwealth contracting and procurement. BBC Research & Consulting (BBC) reviewed the Commonwealth's program measures in two parts:

- A. Program overview; and
- B. Program measures.

A. Program Overview

The Commonwealth's Department of Small Business and Supplier Diversity (SBSD) implements the Small, Women-owned, and Minority-owned Business (SWaM) Program to encourage the participation of small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses in Commonwealth contracting. The following types of certification are available for eligible businesses as part of the SWaM Program:¹

- Small business certification for businesses that, together with affiliates, have 250 or fewer employees, or average annual gross receipts of \$10 million or less over the previous three years;
- Microbusiness certification for businesses that, together with affiliates, have 25 or fewer employees, or average annual gross receipts of \$3 million or less over the previous three years;
- Minority-owned Business Enterprise certification for businesses that are at least 51 percent owned and controlled by one or more minorities who are United States citizens or legal resident aliens;
- Woman-owned Business Enterprise certification for businesses that are at least 51 percent owned and controlled by one or more women who are United States citizens or legal resident aliens; or
- SDV-owned business certification for businesses that are at least 51 percent owned and controlled by one or more SDVs who are certified as such by the Virginia Department of Veteran Services.

The SWaM Program is comprised entirely of *race- and gender-neutral measures*. Race- and gender-neutral measures are designed to increase the participation of certain groups of businesses in Commonwealth contracts and procurements, regardless of the race or gender of the owners. In contrast, *race- and gender-based measures* are designed to specifically encourage the participation of minority- and woman-owned businesses, respectively, in an organization's contracting (e.g., using minority- or

¹ In 2025, the Commonwealth added a category of certification for military families. To be eligible for this certification category, a business must be at least 51 percent owned and controlled by service members, veterans, or dependents of service members or veterans. Because this certification category was not active during the study period, it was not included as part of the disparity study.

woman-owned business participation goals in awarding individual projects). The Commonwealth does not currently use race- or gender-based measures as part of its implementation of the SWaM Program.

B. Program Measures

The Commonwealth uses various race- and gender-neutral measures to encourage the participation of small and diverse businesses in its contracting and procurement. Those measures include:

- Overall aspirational SWaM goal;
- SWaM expenditure dashboard;
- Subcontractor plans;
- Small and microbusiness set asides;
- Access to capital;
- Business development programs;
- Partnerships; and
- Outreach efforts.

1. Overall aspirational SWaM goal. The Governor sets an overall aspirational goal for the participation of SWaM-certified small businesses in Commonwealth contracts and procurements. The current overall aspirational goal was set in 2014 at 42 percent. For capital outlay construction work, the Commonwealth has also established a 50 percent subcontracting goal for SWaM-certified small businesses. Each state agency and HEI is expected to use various race- and gender-neutral measures to help the Commonwealth meet the overall aspirational goal each year and is required to submit annual SWaM Procurement Plans to SBSB detailing the strategies they will use to increase the participation of SWaM-certified small businesses in their contracting and procurement.

2. SWaM expenditure dashboard. SBSB maintains a SWaM Expenditure Dashboard as a centralized transparency and management tool to track and analyze how Commonwealth contracting and procurement supports SWaM-certified businesses. The dashboard aggregates spend data from state agencies and HEIs to show SWaM utilization by agency, category, fiscal year, and business type, and to measure progress toward the Commonwealth's 42 percent aspirational SWaM goal. Agencies use the dashboard to monitor performance, identify gaps, and inform their annual SWaM plans, while policymakers and the public use it to promote accountability, data-driven decision-making, and continuous improvement in inclusive contracting and procurement.

3. Subcontractor plans. To increase SWaM business participation in Commonwealth contracts and procurements, the Commonwealth requires that prime contractors submit *subcontracting plans* as part of their bids, quotes, or proposals for all contracts and procurements worth more than \$100,000. The subcontractor plans indicate which subcontractors prime contractors plan on using as part of the work, and which of those subcontractors are certified as SWaM businesses. Commonwealth agencies review subcontractor plans during the contract and procurement award process.

4. Small and microbusiness set asides. To further encourage the participation of small businesses and microbusinesses in Commonwealth work, the Commonwealth sets aside small purchases—

construction and non-professional services and goods contracts and procurements valued up to \$100,000 and professional services contracts valued up to \$80,000—for preferential award to certified small businesses and microbusinesses. The organization also sets aside contracts and procurements valued up to \$10,000 for preferential award to certified microbusinesses. Any business may bid on these set-aside contracts, and award of these contracts to certified small businesses and microbusinesses is contingent upon the price being fair and reasonable, and not exceeding 5 percent of the lowest responsive and responsible non-certified bidder.

5. Access to capital. The Virginia Small Business Financing Authority (VSBFA) offers loans that are available to certified SWaM businesses. The loans can be indirect, for which VSBFA provides collateral or otherwise guarantees loans that banks offer small businesses. Alternatively, the loans can be direct when banks are not willing to take on particular loans. For example, microbusinesses can borrow up to \$25,000 at relatively low interest rates, childcare facilities can obtain financing, and companies with highly specialized collateral, such as breweries, can qualify for loans. There are also grant programs, including the Small Business Investment Grant Fund that guarantees a 25 percent return on investment for those who invest in small businesses, primarily to family and friends of the owner.

6. Business development programs. SBSDB provides workshops, technical assistance, and networking events to SWaM-certified and other businesses in Virginia.

a. Workshops. SBSDB offers several workshops and webinars throughout the year, including SWaM Labs, which are held monthly and illustrate the benefits of certification to small businesses in addition to assisting business owners in submitting SWaM certification applications, as well as other SWaM certification application assistance workshops and certification information sessions. SBSDB also hosts workshops and webinars on a variety of other topics, including Contract Basics 101 workshops, Introduction to State Government Contracting workshops, and Big Opportunities – Bold Partnerships workshops, which focus on marketing to HEIs. In addition, SBSDB hosts specialized workshops in different regions of the state if there is a need among businesses in that region for help developing unique skills or information.

b. Technical assistance. The Commonwealth offers one-on-one business counseling to small business owners. Those sessions are focused on developing businesses’ growth plans, but SBSDB also shares other resources to help businesses find more contracting opportunities in Virginia. SBSDB also offers the Scaling4Growth Program, which is a six-month master’s in business administration course for SWaM-certified business owners. There are strict requirements for enrolling, and graduates receive assistance and mentorship for three years after the program.

c. Networking. SBSDB hosts a variety of events to help vendors form relationships with Commonwealth agencies and prime contractors, including an annual Construction Contractors Conference, a SWaM Tech Summit, and various business partnership networking events. The Virginia Association of State College and University Purchasing Professionals (VASCUPP) hosts an annual networking, educational, and professional development event called “SWaMfest.” In addition, most VASCUPP institutions hold SWaM vendor fairs and work with prime contractors to host pre-construction SWaM events.

d. Business One Stop. SBSDB operates a Business One Stop platform, which is a centralized online resource platform designed to help aspiring entrepreneurs and business owners plan, launch, register, and grow their businesses in the state. The platform provides a one-stop gateway to key information,

resources, and links, including business registration tools, guidance on required permits and licenses, connections to state and federal agencies, and access to business counseling and development support, so that users can more easily navigate the process of starting and operating a business in Virginia. Its purpose is to simplify and organize essential steps for business formation and expansion in a single place, making it easier for new and existing businesses to find the information and assistance they need.

e. Virginia Handbook for Success. SBSDB, along with VSBFA and the Virginia Innovation Partnership Corporation, developed the Virginia Handbook for Success, which is a comprehensive guide designed to help small businesses, startups, entrepreneurs, and innovators in the state access the full range of resources available to support planning, launching, growing, and scaling their businesses. The handbook compiles hundreds of programs, funding opportunities, support services, and step-by-step guidance tailored to different business stages, industries, and demographic groups and is periodically updated to reflect new and evolving opportunities across the Commonwealth.

7. Partnerships. SBSDB partners with various organizations to promote contracting and procurement opportunities to SWaM businesses. Some, like the Small Business Development Centers and the Procurement Technical Assistance Center, provide resources to small businesses. Others promote SBSDB events to their members, including the Hispanic, Asian, and African American Chambers of Commerce. SBSDB also works with the Federal Reserve to promote the Small Business Credit Survey in exchange for specialized reports about Virginia businesses.

8. Outreach efforts. SBSDB advertises its events through various channels. Partners send information about SBSDB events to their networks, SBSDB emails certified businesses through Constant Contact, and SBSDB makes frequent updates to its events page.

CHAPTER 10.

Analysis of the Business Community

BBC Research & Consulting (BBC) collected detailed information about businesses that are potentially available for the contracts and procurements Commonwealth of Virginia state agencies award and about the businesses that performed work for the organization during the study period. That information may be valuable to the Commonwealth in tailoring its implementation of the Small, Women-owned, and Minority-owned Business (SWaM) Program to the specific characteristics of businesses operating in the *relevant geographic market area (RGMA)*.¹ Moreover, developing an extensive understanding of the characteristics of the local business community beyond the race and gender of business owners will help the Commonwealth strengthen the *race- and gender-neutral* inclusion measures it uses and help it better meet the needs of economically disadvantaged businesses—including many businesses owned by minorities, women, and service-disabled veterans (SDVs)—in the marketplace.

A. Available Businesses

BBC conducted surveys with hundreds of local businesses to understand the different types of businesses potentially *available* for state agency contracts, as part of which we collected extensive information on the characteristics of each business. We used that information to provide the Commonwealth with a better understanding of the characteristics of the businesses in the marketplace that are ready, willing, and able to compete for and perform work on the contracts it awards.

1. General characteristics. Figure 10-1 presents descriptive characteristics of all businesses BBC considered potentially available for state agency contracts. We present the following information for all available businesses considered together as well as separately for non minority-/non woman-owned businesses and for minority- and woman-owned businesses:

- Percentage of businesses that are minority- or woman-owned;
- Median annual revenue;
- Median business age;
- Median *bid capacity* (i.e., largest contracts businesses report being able to perform);
- Percentage of businesses interested in prime contracting work;
- Percentage of businesses interested in subcontracting work; and
- Percentage of businesses that participated in state agency work.

¹ BBC identified the RGMA as the state of Virginia based on the locations of the businesses to which the Commonwealth awarded the vast majority of its contracting dollars during the study period. See Chapter 5 for more information about how we determined the RGMA.

As shown in Figure 10-1:

- Overall, a larger percentage of businesses potentially available for state agency contracts are non minority-/non woman-owned (62.9%) compared to minority- or woman-owned (37.1%).
- Non minority-/non woman-owned businesses generally earn more in annual revenue (median = \$1.1 million) than minority- and woman-owned businesses do (median = \$500,000) and that difference is statistically significant ($t = 5.65$; $p < 0.01$).
- Non minority-/non woman-owned businesses are generally older (median = 24 years old) than minority- and woman-owned businesses (median = 15 years old).
- Non minority-/non woman-owned businesses can perform contracts of the same size (median = \$750,000) that minority- and woman-owned businesses can perform (median = \$750,000).
- The majority of available businesses, regardless of the race or gender of the owner(s), are interested in prime contract work (non-minority/non-woman = 73.0%; minority and woman = 71.8%). Similarly, the vast majority of available businesses, regardless of the race or gender of the owners, are interested in subcontract work (non-minority/non-woman = 86.3%; minority and woman = 90.1%).
- Non minority-/non woman-owned businesses available for state agency contracts participated in Commonwealth work at a higher rate (24.6%) than did minority- and woman-owned businesses (16.8%), and that difference is statistically significant ($\chi^2 = 17.32$; $p < 0.01$).

Figure 10-1.
General characteristics of potentially available businesses

Characteristic	Business Group		
	All	Non minority-owned/ Non woman-owned	Minority-owned/ woman-owned
Ownership	—	62.9%	37.1%
Revenue (median)	\$831K	\$1.1M	\$500K
Age (median)	20	24	15
Capacity (median)	\$750K	\$750K	\$750K
Prime contractor (%)	72.6%	73.0%	71.8%
Subcontractor (%)	87.7%	86.3%	90.1%
Worked with the Commonwealth	21.7%	24.6%	16.8%

Notes: $n = 1,255$ for race/gender; $n = 1,156$ for capacity; $n = 911$ for prime contract interest; $n = 1,101$ for subcontract interest; $n = 1176$ for age; $n = 1047$ for revenue.

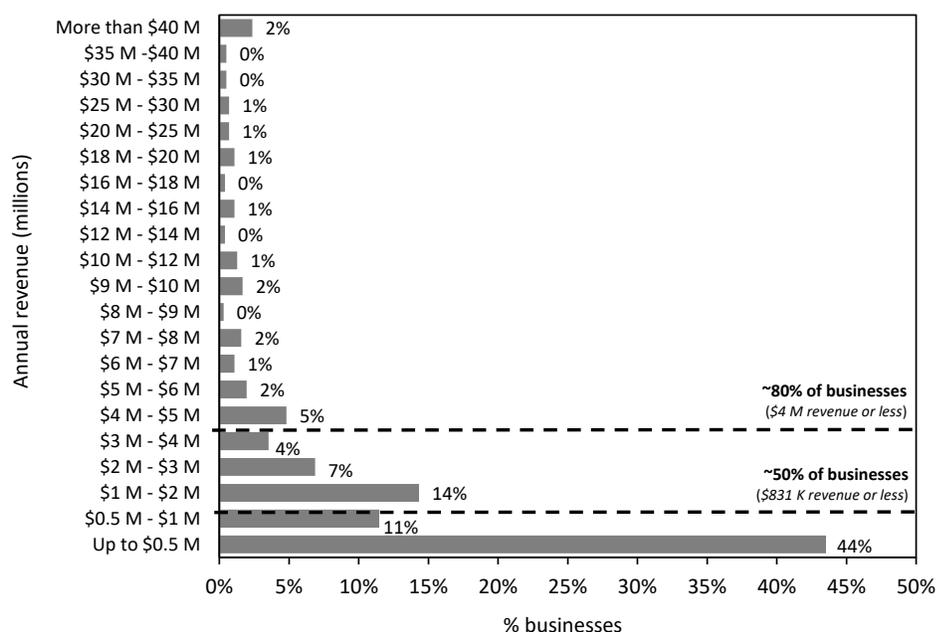
Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

2. Business size. An important aspect of most contracting inclusion programs is to support socially and economically disadvantaged businesses as part of organizations' contracting processes. A common indicator of economic disadvantage is business revenue, on which BBC collected information from businesses potentially available for state agency work. Furthermore, among available businesses,

minority- and woman-owned businesses tend to earn less in annual revenues than non minority-/non woman-owned businesses do, as presented in the General Characteristics section above. We explored annual revenues among businesses potentially available for state agency work further by examining the distributions of available businesses based on their annual revenues. We analyzed that information for all available businesses together and separately for minority- and woman-owned businesses.

a. All businesses. Figure 10-2 presents the distribution of the 1,020 available businesses for which BBC had annual revenue data.² The dashed lines represent the points at which 80 percent and 50 percent of businesses reported revenues of that amount or less. As shown in Figure 10-2, 80 percent of all the businesses BBC identified as available for state agency work reported annual revenues of \$4 million or less, and 50 percent reported revenues of \$831,000 or less.

Figure 10-2.
Distribution of potentially available owned businesses based on their reported raw revenues



Notes: n = 1,020.

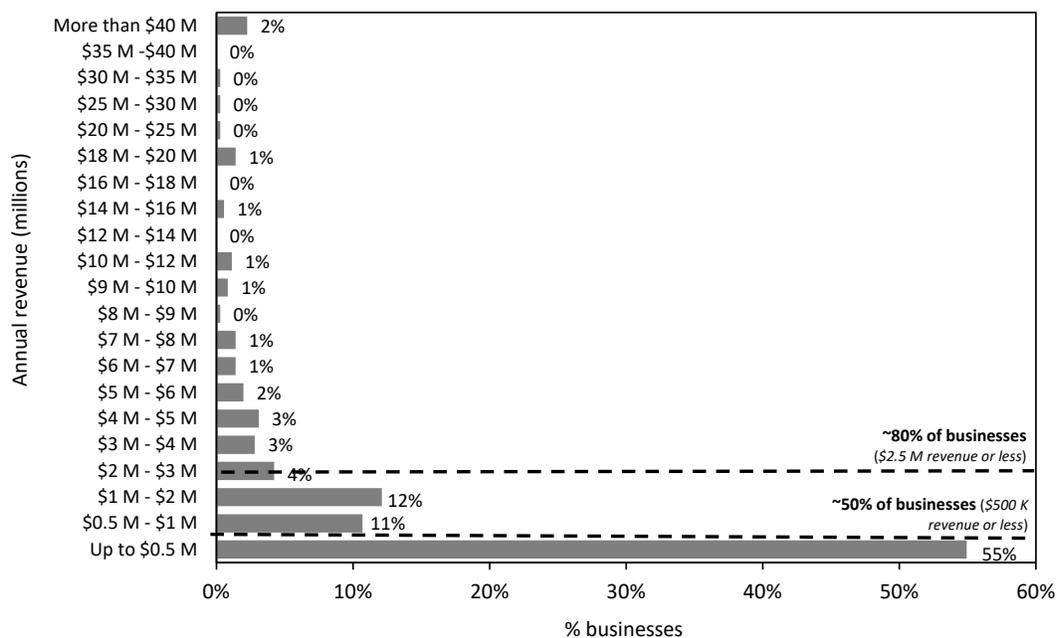
Numbers rounded to nearest whole percent and thus may not sum exactly to 100 percent.

b. Minority- and woman-owned businesses. BBC separately examined the distribution of the 355 available minority- and woman-owned businesses for which BBC obtained annual revenue data. As shown in Figure 10-3, available minority- and woman-owned businesses generally showed smaller annual revenues than all available businesses considered together. Approximately 80 percent of minority- and woman-owned businesses available for state agency work reported annual revenues of \$2.5 million or less (compared to \$4 million or less for all businesses), and approximately 50 percent of them reported annual revenues of \$500,000 or less (compared to \$831,000 or less for all businesses). Moreover, a larger percentage of minority- and woman-owned businesses reported annual revenues of

² BBC obtained business revenue data through availability surveys, revenue modeling, certification information from the Commonwealth’s SWaM business directory, and other publicly available resources.

\$500,000 or less (54.9%)—the smallest revenue category—than did all businesses considered together (43.5%), but that difference is not statistically significant ($t = 1.16; p < 0.24$).

Figure 10-3.
Distribution of potentially available minority- and woman-owned businesses based on their reported raw revenues



Notes: $n = 355$.
 Numbers rounded to nearest whole percent and thus may not sum exactly to 100 percent.

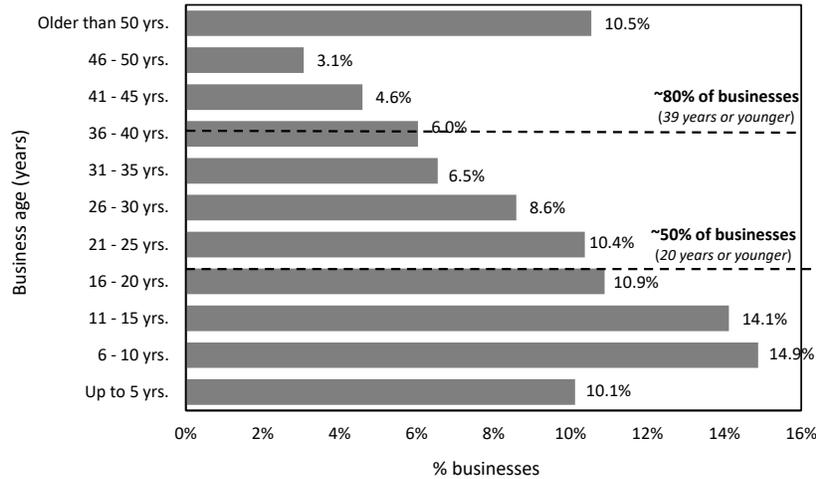
3. Business age. Businesses can vary considerably in age, and it is likely that younger businesses need more support to compete for or perform work on government contracts than older businesses. Among available businesses, minority- and woman-owned businesses tend to be younger than non minority-/non woman-owned businesses, as presented in the General Characteristics section above. To further explore the age of businesses potentially available for state agency contracts, BBC examined the distribution of available businesses based on how many years they reported being in business. We analyzed that information for all available businesses considered together and separately for available minority- and woman-owned businesses.

a. All businesses. Figure 10-4 presents the distribution of the 1,173 businesses for which BBC had business age information that we gathered as part of availability surveys or from publicly available sources. As shown in Figure 10-4, approximately 80 percent of businesses available for state agency work reported an age of 39 years or younger, and approximately 50 percent of them reported an age of 20 years or younger.

b. Minority- and woman-owned businesses. Figure 10-5 presents the distribution of the 375 minority- and woman-owned businesses for which BBC had business age information. Minority- and woman-owned businesses are generally younger than all businesses considered together. Approximately 80 percent of minority- and woman-owned businesses available for state agency work reported an age of 29 years or younger (compared to 39 years or younger for all businesses), and 50 percent of them

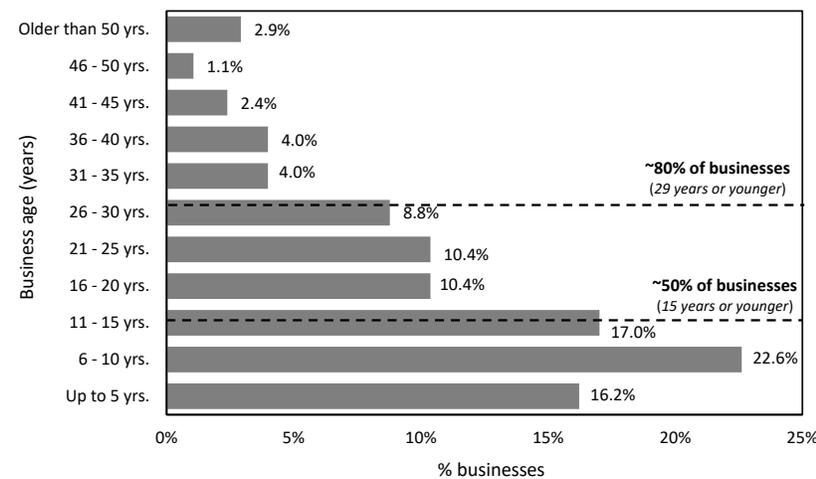
reported an age of 15 years or younger (compared to 20 years or less for all businesses). Moreover, a substantially larger percentage of minority- and woman-owned businesses reported an age of 5 years or younger (16.2%)—the youngest age category—than did all businesses considered together (10.1%), and that difference is statistically significant ($\chi^2 = 17.51$; $p < 0.01$).

Figure 10-4.
Distribution of potentially available businesses based on their reported ages



Notes: $n = 1,173$.
 Numbers rounded to nearest whole percent and thus may not sum exactly to 100 percent.

Figure 10-5.
Distribution of potentially available minority- and woman-owned businesses based on their reported ages

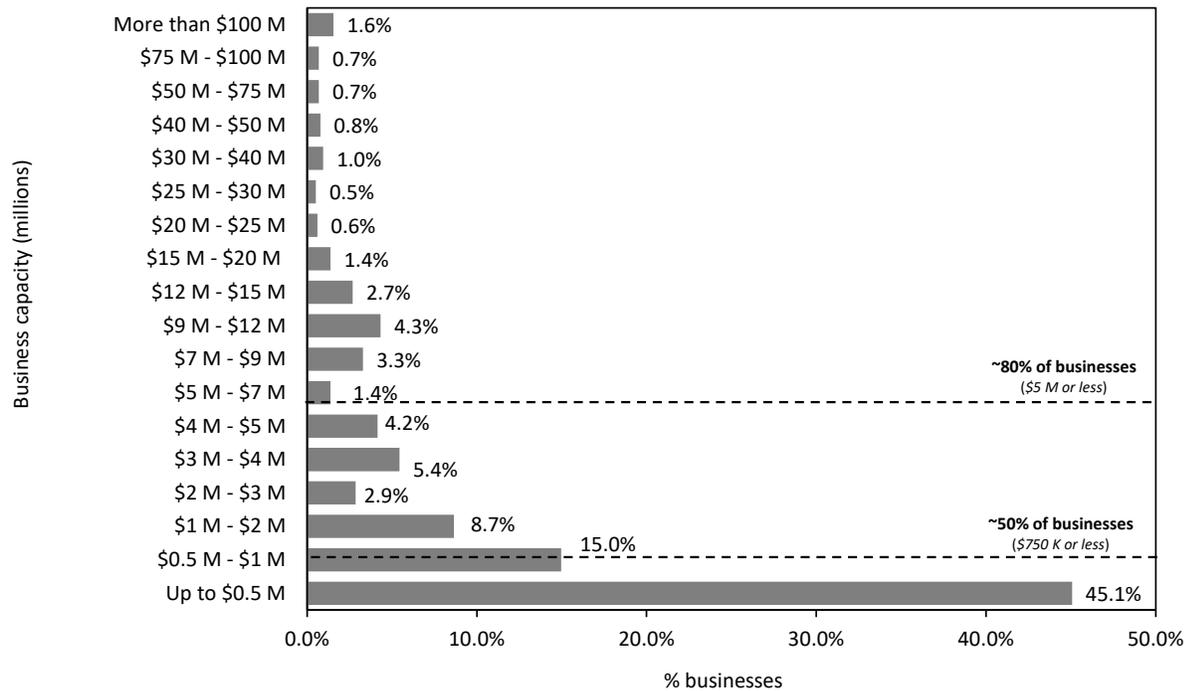


Notes: $n = 375$.
 Numbers rounded to nearest whole percent and thus may not sum exactly to 100 percent.

4. Business capacity. As part of availability surveys, potentially available businesses reported the largest prime contract, subcontract, or other piece of work for which they are able to compete or are able to perform (i.e., *capacity*). BBC observed a correlation of 0.55 between annual revenue and capacity, indicating that businesses with greater revenues tend to report greater capacities ($t = 20.57, p < 0.05$). However, among available businesses, minority- and woman-owned businesses can perform contracts that tend to be the same size as the contracts non minority-/non woman-owned businesses can perform, as presented in the General Characteristics section above. We examined the distributions of the businesses available for state agency contracts based on their capacities.

a. All businesses. Figure 10-6 presents the distribution of business capacity among the 1,156 businesses that provided that information as part of availability surveys. As shown in Figure 10-6, approximately 80 percent of businesses potentially available for state agency work reported that they could compete for or perform contracts worth \$5 million or less, and approximately 50 percent of them reported that they could compete for or perform contracts worth \$750,000 or less.

Figure 10-6.
Distribution of potentially available businesses based on their reported capacities

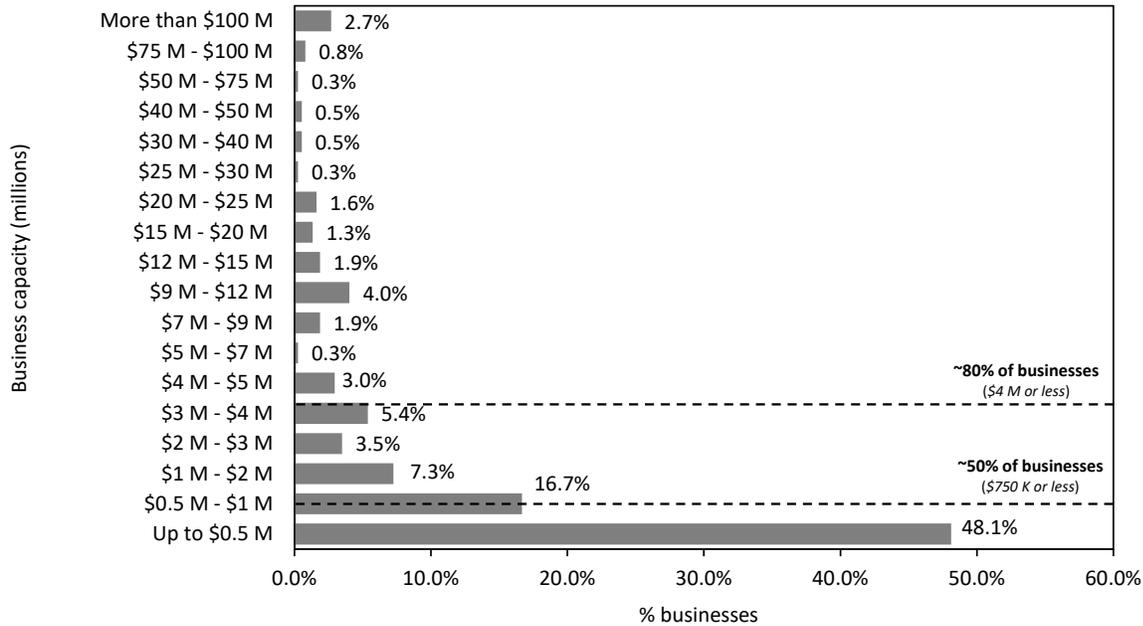


Notes: $n = 1,156$.

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

b. Minority- and woman-owned businesses. Figure 10-7 presents the distribution of the 439 minority- and woman-owned businesses that reported their capacity for state agency contracts. As shown in Figure 10-7, minority- and woman-owned businesses potentially available for state agency work generally report the same median capacity as all available businesses considered together. Approximately 80 percent of available minority- and woman-owned businesses reported capacities of \$4 million or less (compared to \$5 million or less for all available businesses), and approximately 50 percent of them reported capacities of \$750,000 or less (compared to \$750,000 or less for all available businesses).

Figure 10-7.
Distribution of potentially available minority- and woman-owned businesses based on their reported capacities



Notes: *n* = 439.
 Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

B. Utilized Businesses

BBC also assessed characteristics of the 3,765 businesses that participated in the 243,091 contracts state agencies awarded during the study period. Figure 10-8 presents descriptive characteristics of the businesses to which state agencies awarded work during the study period. We present the following information for all businesses that participated in state agency work considered together as well as separately for non minority-/non woman-owned businesses and for minority- and woman-owned businesses:

- Percentage of businesses that are minority- or woman-owned;
- Percentage of contracts awarded;
- Volume of contract dollars awarded;
- Average volume of contract dollars awarded to each business;
- Median annual revenue; and
- Percentage of businesses located in the RGMA.

Figure 10-8.
Characteristics of businesses to which state agencies awarded contracts during the study period

Characteristic	Business Group		
	All	Non minority-owned/ Non woman-owned	Minority-owned/ Woman-owned
Ownership	—	80.2%	19.8%
Contracts awarded (%)	—	64.9%	35.1%
Contract dollars awarded (%)	—	86.7%	13.3%
Dollars per business (avg.)	\$4.6M	\$4.8M	\$3.4M
Revenue (median)	\$2.2M	\$2.3M	\$1.8M
Location in Virginia	82.5%	62.7%	19.8%

Notes: $n = 3,765$ businesses; $n = 243,091$ contracts worth \$17.15 billion.
 Numbers rounded to nearest one-tenth of one percent and thus may not sum exactly to 100 percent.

As shown in Figure 10-8:

- Of the 3,765 businesses utilized during the study period, 80.2 percent of businesses were non minority-/ non woman-owned businesses and 19.8 percent were minority- and woman-owned businesses.
- During the study period, state agencies awarded 64.9 percent of its contracts to non minority-/non woman-owned businesses and 35.1 percent to minority- and woman-owned businesses.
- State agencies awarded 86.7 percent of the dollars associated with its contracts to non minority-/non woman-owned businesses and 13.3 percent to minority- and woman-owned businesses.
- On average, state agencies awarded \$3.4 million in contract dollars to each minority- and woman-owned business that participated in its work during the study period compared to 4.8 million to each non minority-/non woman-owned business, but that difference was not statistically significant ($t = 0.87$; $p < 0.39$).³
- On average, non minority-/non woman-owned businesses that participated in state agency contracts exhibited greater annual revenues (median = \$2.3 million) than minority- and woman-owned businesses that participated in state agency contracts (\$1.8 million), and that difference was statistically significant ($t = 2.53$; $p < 0.01$).⁴
- Of the 3,765 businesses utilized during the study period, 82.5 percent were located in Virginia. Of the businesses that received state agency contracts, 62.7 percent were non minority-/non woman-owned businesses located in Virginia and 19.8 percent were minority- and woman-owned businesses located in Virginia.

³ For average contract award amount, BBC transformed each raw data point by its natural log before conducting two-tailed t -tests.

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

1. Business concentration. During the study period, state agencies awarded 241,364 contracts and procurements in construction, professional services, and non-professional services and goods—totaling \$3.2 billion—to 3,626 different businesses. A common finding in disparity study research is that government organizations tend to award a disproportionate percentage of their contracts and contract dollars to relatively few businesses. BBC conducted a concentration analysis of the contracts and contract dollars state agencies awarded during the study period to assess whether they were awarded to a relatively large number of businesses or whether they were heavily concentrated among a relatively small number of businesses.

BBC began the analysis by identifying all contracts state agencies awarded during the study period that were worth less than \$1 million. We reasoned that there may only be certain vendors that have the capacity to win and perform contracts worth \$1 million or more, and most of those businesses are non minority-/non woman-owned businesses. Thus, by considering relatively large contracts in the analysis, we might have observed relatively high levels of business concentration, particularly for non minority-/non woman-owned businesses, when business concentration may in fact be much less for more typically sized state agency contracts.⁵ After limiting the dataset to contracts worth less than \$1 million, we ordered all businesses in descending order based on how many contracts and contract dollars state agencies awarded to them. We then assessed how many different businesses accounted for 80 percent and 50 percent of the total contracts and contract dollars state agencies awarded.

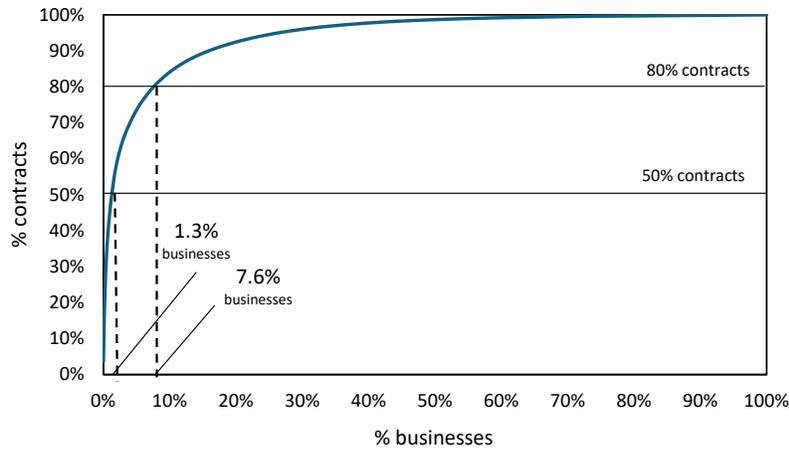
a. Contracts. Figure 10-9 presents a cumulative distribution of the 241,364 contracts worth less than \$1 million state agencies awarded to 3,626 different businesses during the study period. The elements of Figure 10-9 represent the following information:

- The **horizontal axis** presents the percentage of the different businesses to which state agencies awarded contracts during the study period.
- The **vertical axis** presents the percentage of contracts state agencies awarded to different businesses.
- The **curve** presents the cumulative percentage of different businesses that accounted for the contracts state agencies awarded during the study period after BBC ordered businesses from the one that was awarded the largest number of contracts during the study period to the one that was awarded the least number of contracts.
- The **horizontal dashed lines** indicate the number of contracts that represent 80 percent and 50 percent of the contracts state agencies awarded during the study period.
- The **vertical dashed lines** indicate the percentage of businesses that accounted for 80 percent and 50 percent of the contracts state agencies awarded during the study period.

As shown in Figure 10-9, during the study period, state agencies awarded approximately 80 percent of their contracts worth less than \$1 million (193,100 contracts) to just 7.6 percent of businesses (275 businesses). Furthermore, it awarded approximately 50 percent of those contracts (121,596 contracts) to just 1.3 percent of businesses (47 businesses).

⁵ Compared to when we limited the analysis to contracts worth less than \$1 million, including all contracts in the analysis did in fact indicate greater levels of business concentration regardless of whether we based the analysis on contracts or contract dollars.

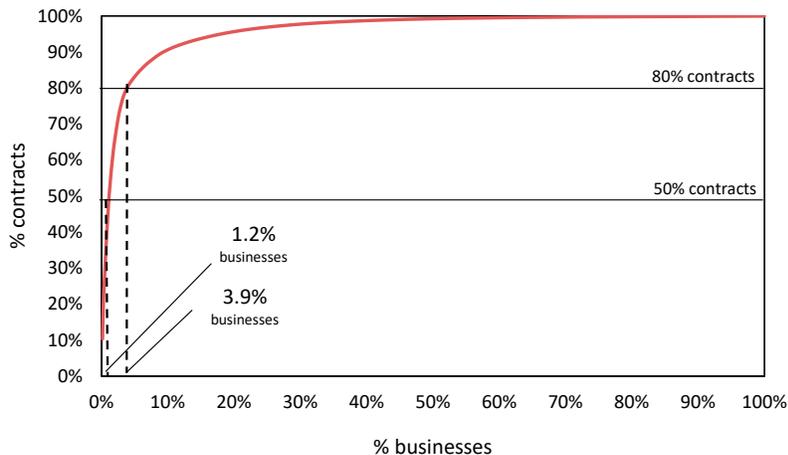
Figure 10-9.
Cumulative distribution of businesses based on the number of contracts worth less than \$1 million state agencies awarded to them



Note: $n = 241,364$ contracts.

BBC conducted the same analysis separately for the 85,136 contracts worth less than \$1 million state agencies awarded to 725 minority- and woman-owned businesses during the study period. Figure 10-10 presents those results. As with all businesses considered together, the concentration analysis indicated that the vast majority of the contracts worth less than \$1 million that state agencies awarded to minority- and woman-owned businesses were awarded to relatively few businesses. The organization awarded approximately 80 percent of them (68,197 contracts) to just 3.9 percent of minority- and woman-owned businesses (28 businesses), and approximately 50 percent of them (44,667 contracts) to just 1.2 percent of minority- and woman-owned businesses (nine businesses).

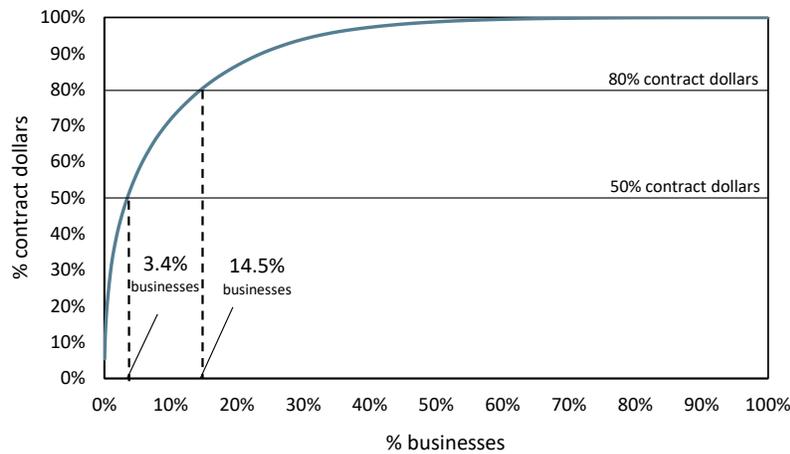
Figure 10-10.
Cumulative distribution of minority- and woman-owned businesses based on the number of contracts worth less than \$1 million state agencies awarded to them



Note: $n = 85,136$ contracts.

b. Contract dollars. Because contract sizes can vary so widely, BBC also assessed business concentration based on the contract *dollars* state agencies awarded during the study period. As with the contract-based concentration analysis, BBC limited the dollars-based analysis on contracts state agencies awarded during the study period that were worth less than \$1 million, which totaled \$3.2 billion. Figure 10-11 presents a cumulative distribution of the percentage of contract dollars state agencies awarded to all businesses during the study period. As shown in Figure 10-11, during the study period, state agencies awarded approximately 80 percent of those contract dollars (\$2.6 billion) to just 14.5 percent of businesses (527 businesses). Furthermore, the organization awarded approximately 50 percent of those contract dollars (\$1.6 billion) to just 3.4 percent of businesses (125 businesses).

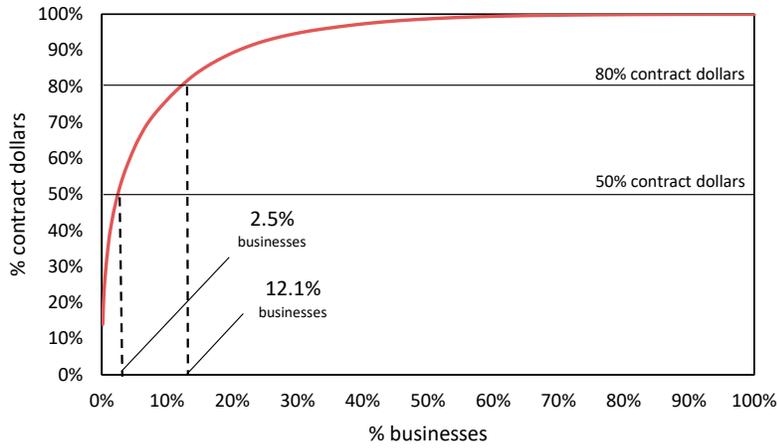
Figure 10-11.
Cumulative distribution of businesses based on the dollars associated with contracts worth less than \$1 million state agencies awarded to them



Note: $n = 241,364$ contracts.

BBC conducted the same analysis separately for the minority- and woman-owned businesses to which state agencies awarded contract dollars on contracts worth \$1 million or less during the study period, totaling \$615.7 million. Figure 10-12 presents those results. As with all businesses considered together, the analysis indicated that the majority of the total contract dollars state agencies awarded to minority- and woman-owned businesses on contracts worth less than \$1 million were awarded to relatively few businesses. Of the contract dollars state agencies awarded to minority- and woman-owned businesses, it awarded approximately 80 percent of those contract dollars (\$493 million) to just 12.1 percent of those businesses (88 businesses). Furthermore, it awarded approximately 50 percent (\$309.8 million) of those contract dollars to just 2.5 percent of those businesses (18 businesses).

Figure 10-12.
Cumulative distribution of minority- and woman-owned businesses based on the dollars associated with contracts worth less than \$1 million state agencies awarded to them



Note: $n = 85,136$ contracts.

CHAPTER 11.

Implications and Recommendations

The 2025 Commonwealth of Virginia Disparity Study provides substantial information state agencies and higher education institutions (HEIs) (collectively referred to as *the Commonwealth*) should use as it considers efforts to encourage the participation of small businesses and microbusinesses, as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses (collectively referred to as *small and diverse businesses*) in its contracts and procurements. Based on our analysis of Commonwealth policies and programs, qualitative information we collected from stakeholders, disparity study results, and best practices in the industry, BBC Research & Consulting (BBC) presents implications of key disparity study results and recommendations for specific contracting policies and programs the Commonwealth could consider refining or developing to help increase the participation of those businesses in its work.

A. Key Results and Implications

BBC analyzed contract and procurement dollars the Commonwealth awarded between July 1, 2019 and June 30, 2024 (*study period*) to calculate the *participation* (or, *utilization*) of small and diverse businesses in its work; estimate the *availability* of those businesses for that work; and assess whether any *disparities* exist between those measures.^{1, 2} We also conducted research on outcomes for minorities, women, and SDVs and the businesses they own in the Virginia marketplace to assess whether any barriers exist in the marketplace that make it more difficult for those businesses to perform Commonwealth work. That information will help the organization assess whether those businesses experience barriers as part of its contracting processes and what types of measures it could use to help address those barriers as part of its contracting processes and its implementation of the Small, Women-owned, and Minority-owned Business (SWaM) Program.

1. Disparities between participation and availability. The crux of the disparity study was to assess whether any disparities exist between the participation and availability of small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses located in the *relevant geographic market* area (RGMA) for Commonwealth work.³ A *substantial disparity* between participation and availability—that is, a disparity where participation is 80 percent or less of availability—for a particular business group is interpreted by courts as an *inference of discrimination* against that group in the marketplace and often serves as evidence that the organization could consider using race- or gender-based measures to address corresponding barriers for that group. As discussed in Chapter 8 of this report, all relevant small and diverse business groups showed substantial disparities for various

¹ BBC analyzed \$27.1 billion of relevant contracts and procurements the Commonwealth awarded during the study period.

² BBC uses the term “woman-owned business” to refer specifically to White woman-owned businesses. To avoid double counting, results for businesses owned by minority women are included with other businesses owned by minorities according to their corresponding race groups.

³ The RGMA for the 2025 Commonwealth of Virginia Disparity Study included the state of Virginia, based on the locations of the businesses that participated in Commonwealth work during the study period. Limiting study analyses to the RGMA ensures that study results are tailored specifically to the geographical region that best represents the Commonwealth’s contracting activity. See Chapter 5 for more information on how BBC determined the RGMA.

project sets BBC examined as part of the disparity study. Thus, disparity analysis results indicate inferences of discrimination for all the business groups we examined as part of the study.

An often observed characteristic of income and wealth data—which are very similar in nature to data on contract and procurement dollars—is that the underlying distributions are heavily skewed in the positive direction, usually caused by a small number of extreme values, or *statistical outliers*.^{4, 5} The presence of skewed distributions and statistical outliers can have substantial effects on measures of inequity, poverty, and disparities, sometimes masking evidence of disparities or inequities that truly exist for the rest of the population.^{6, 7} For that reason, as standard practice, researchers identify extreme values—that is, *statistical outliers*—when working with such data and use well-established procedures to account for them.^{8, 9, 10, 11}

In accordance with best practices in social science, BBC assessed whether any small or diverse businesses to which the Commonwealth awarded work during the study period represented statistical outliers based on the contract dollars awarded to them during the study period and what impact any such outliers had on disparity analysis results. That assessment indicated that two Asian-owned businesses met the criterion of being a statistical outlier. After accounting for the dollars the Commonwealth awarded to that firm during the study period, disparity analysis results did not change appreciably. Generally, the same groups exhibited substantial disparities for the same contract sets even after accounting for the statistical outliers. Thus, the results presented throughout the report are unadjusted for the statistical outliers we identified.

2. Barriers in the marketplace. Barriers in the marketplace likely affect the ability of minorities and women to start businesses in relevant industries and operate them successfully. Any difficulties they face in starting and operating businesses in the region may reduce their availability for Commonwealth work and their ability to successfully compete for and perform that work. The United States Supreme Court and other federal courts have held that analyses of conditions in an RGMA for minority- and woman-owned businesses are instructive in determining whether organizations' use of race- and gender-based programs as part of their contracting processes are appropriate and justified. They have held that evidence of marketplace barriers for minorities, women, and minority- and woman-owned businesses helps to establish a *compelling government interest* for organizations to take remedial action

⁴ <https://thedocs.worldbank.org/en/doc/248311593193853901-0050022020/render/lecture12final.pdf>

⁵ Alvarez, E. and Garcia-Fernandez, R.M., et al. 2014. "The effect of outliers on the economic and social survey on income and living conditions." *International Scholarly and Scientific Research & Innovation*, 8(10): 3276–3280.

⁶ Cowell, F.A., and Flachaire, E. (2007) "Income distribution and inequality measurement: The problem of extreme values." *Journal of Econometrics*, 141(2): 1044-1072.

⁷ Hlasny, V. and Verme, P. (2018). "Top incomes and inequality measurement: A comparative analysis of correction methods using the EU SILC data." *Econometrics*, 6(30).

⁸ Cowell, F.A. and Victoria Feser, M.P. 2002. "Welfare ranking in the presence of contaminated data," *Econometrica*, 70: 1221-1233.

⁹ Gravelle, H. and Sutton, M. 2006. "Income, relative income, and self-reported health in Britain 1979-2000," *Center for Health Economics Research Paper*, 10.

¹⁰ Grubbs, F.E. (1969). "Procedures for detecting outlying observations in samples," *Technometrics*, 11(1): 1-21.

¹¹ Blaine, Bruce E. (2018). "Winsorizing." *The SAGE Encyclopedia of Educational Research, Measurement, and Evaluation*, 1817-1818.

to address those barriers and can help organizations *narrowly tailor* the use of such measures to the business groups for which evidence of barriers exist.

BBC's analyses of marketplace conditions in Virginia indicate that minorities, women, minority- and woman-owned businesses face various barriers in the region in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence that those barriers exist even after accounting for various other factors such as age, income, education, and familial status. Those results may help the Commonwealth in establishing a compelling government interest in using race- or gender-based measures and narrowly tailor the use of those measures.

B. Guidance

The disparity study provides substantial information the Commonwealth should examine as it considers potential refinements to its implementation of the SWaM Program and other efforts to further encourage the participation of small and diverse businesses in its contracts and procurements. BBC presents several recommendations specific to the Commonwealth's contracting and procurement processes for the organization's consideration.

1. Certification. The Commonwealth's Department of Small Business and Supplier Diversity (SBSD) certifies small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses, as part of its SWaM Program. Results from the disparity study show that the participation of *SWaM-eligible* small businesses—that is, businesses in Virginia that BBC determined meet the qualifications to be SWaM-certified small businesses—in Commonwealth work during the study period was 64.3 percent, which exceeds the Commonwealth's overall 42 percent aspirational goal for the participation of small businesses.¹² However, the participation of small businesses that were actually *certified* as such was much lower, at 37.8 percent.¹³ While this result indicates that the Commonwealth is effective in encouraging the participation of small businesses in its work, it may also suggest that businesses are unaware of the SWaM Program, that certification is a barrier to some businesses that would qualify, or perhaps that businesses may not see benefits to obtaining SWaM certification. The Commonwealth could consider additional measures to ensure that its certification processes are

¹² BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

¹³ The Commonwealth tracks the participation of small and diverse businesses in its contracting and procurement through its SWaM expenditure dashboard. The percentage of certified small business participation in Commonwealth contracts and procurements reported as part of the disparity study does not align with the percentage reported by the SWaM expenditure dashboard for various reasons. The Commonwealth has established a hierarchy for reporting participation by SWaM-certified businesses, and does not count any single business in multiple categories (i.e., if a business is certified as a small business and a minority-owned business, the Commonwealth would report that participation as minority-owned business participation; in contrast, BBC would report that participation as both small business and minority-owned business participation). In addition, there are various differences in BBC and the Commonwealth's determination of discretionary spending. See Chapter 5 for information about the types of contracts and procurements that were not considered in-scope as part of the disparity study and the volumes of dollars included in each of those categories.

accessible, efficient, and aligned with the Commonwealth's broader inclusion objectives. In particular, the Commonwealth could consider whether SWaM certification requirements accurately reflect the realities and capacities of small businesses operating in the Virginia marketplace and consider how it might adjust them to be tailored to local businesses.

a. Education and awareness. One possible explanation for the difference between SWaM-eligible small business participation and SWaM-certified small business participation is that businesses are unaware of the SWaM Program altogether, or that they are unaware of the benefits the program provides to certified businesses. SBSB currently offers several types of workshops and events related to education and awareness around SWaM certification, including SWaM Labs, which are held monthly and illustrate the benefits of certification to small businesses in addition to assisting business owners in submitting SWaM certification applications, as well as other SWaM certification application assistance workshops and certification information sessions. To reach even more businesses across the state, the Commonwealth could consider dedicating additional resources to marketing and communication around the SWaM Program. The Commonwealth could consider more partnerships with state and local trade organizations and other public organizations and offering events more frequently and in a larger range of geographical areas across the state. The Commonwealth might also consider tailoring more events to specific industries or business groups to further maximize their value and provide opportunities to foster more extensive connections among participants. The Commonwealth could also consider making continued use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

This section contains several recommendations the Commonwealth could consider to further support small and diverse businesses in its marketplace, including mechanisms to directly encourage the participation of SWaM-certified businesses in Commonwealth work. If the Commonwealth chooses to implement any of these measures, it could advertise the introduction of those measures and the value those measures provide to certified businesses to the business community in Virginia to further encourage SWaM-eligible businesses to pursue certification.

b. Small business criteria. Currently, to be certified as a small business as part of the Commonwealth's SWaM Program, a business must, together with affiliates, have 250 or fewer employees or \$10 million or less in annual receipts. The "or" condition included as part of the Commonwealth's small business certification criteria allows for a wide array of businesses to qualify for the certification. In fact, 95.7 percent of businesses that were potentially available for Commonwealth work met this criteria, and 91.4 percent of businesses that participated in Commonwealth work met this criteria.¹⁴ The Commonwealth could consider re-evaluating its certification criteria to ensure that only businesses that are truly small meet the agency's definition and thus can benefit from program measures reserved for small businesses. For example, the Commonwealth could consider replacing the "or" condition in its certification criteria

¹⁴ BBC assessed results for small and diverse business groups regardless of certification status based on whether a business' size or ownership characteristics aligned with the corresponding certification criteria for that group. To estimate a business' ability to qualify as a small business or microbusiness, BBC used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

with an “and” condition (i.e., to be certified as a small business as part of the Commonwealth’s SWaM Program, a business must, together with affiliates, have 250 or fewer employees *and* \$10 million or less in annual receipts).

If the Commonwealth adjusts certification criteria, it could consider allowing currently certified businesses to remain certified until their certifications expire. Once those businesses are required to recertify, those businesses would then need to meet the updated requirements. In addition, if the Commonwealth chooses to introduce updated aspirational goals for the participation of small businesses and also chooses to adjust the certification criteria for small businesses, it should assess the availability of small businesses using the adjusted criteria when setting an updated aspirational small business goal.

2. Small business support. The Commonwealth already uses a variety of race- and gender-neutral program measures to encourage the participation of all small businesses in its contracts and procurements. To address the disparities small businesses and microbusinesses experience in its work, the Commonwealth could also explore additional program measures targeted toward small businesses and microbusinesses, with measures tailored to each size tier. We provide recommendations for additional program measures it might consider to encourage the participation of small businesses and microbusinesses, many of which are minority-, woman-, and SDV-owned businesses, in its work.

a. Refine set-aside program. As part of the SWaM Program, the Commonwealth sets aside small purchases—construction and non-professional services and goods contracts and procurements valued at up to \$100,000 and professional services contracts valued at up to \$80,000—for preferential award to certified small businesses and microbusinesses. The organization also sets aside contracts and procurements valued up to \$10,000 for preferential award to certified microbusinesses. However, any business may bid on these set-aside contracts, and award of these contracts to certified small businesses and microbusinesses is contingent upon the price being fair and reasonable, and not exceeding 5 percent of the lowest responsive and responsible non-certified bidder. To ensure that small business set-asides are effectively encouraging the participation of small businesses and microbusinesses, the Commonwealth could consider limiting bidding on eligible contracts to certified small businesses and microbusinesses, regardless of whether larger businesses are able to submit lower bids.

In addition, the Commonwealth could reassess its small and microbusiness set-aside thresholds and, in doing so, could consider the bid capacities and annual revenues of the businesses that are available for Commonwealth work (see Chapter 10 for more details). For example, the Commonwealth could set aside contracts as follows:

- Set aside construction and professional services contracts up to \$100,000 and non-professional services and goods contracts up to \$50,000 for microbusinesses; and
- Set aside construction and professional services contracts worth more than \$100,000 but less than \$500,000 for small businesses, and non-professional services and goods contracts worth more than \$50,000 but less than \$250,000 for small businesses.

If the Commonwealth chooses to raise the size thresholds of the contracts it sets aside, it does not need to designate every contract under those thresholds as set asides. Rather, it can assess the availability of certified small businesses and microbusinesses on a contract-by-contract basis and select certain

contracts for the program. The considerations outlined above are one example of how the Commonwealth could consider adjusting the set-aside program parameters. Doing so will allow the Commonwealth to better address economic disadvantages that small businesses and microbusinesses face in the marketplace by better tailoring its efforts to those businesses that need the most support.

b. Small business contracting goals. In addition to the implementation of MBE and woman-owned business enterprise (WBE) contracting goals, the Commonwealth could consider setting contracting goals for *small business* participation on the individual contracts and procurements it awards. In contrast to MBE and WBE goals, which are race- and gender-based measures, small business subcontracting goals would apply to *all* small businesses, regardless of their ownership status, and would not need to meet the requirements of the *strict scrutiny* standard of constitutional review. To use small business contract goals, the Commonwealth would set a goal that a percentage of work on a contract, as measured in contract dollars, be performed by certified small businesses. For example, for a contract greater than \$100,000, the Commonwealth could set a goal that 25 percent of the work on that contract be performed by certified small businesses. Bidders would have to either be certified themselves as small businesses or would have to commit scopes of work to subcontractors certified as small businesses that collectively account for 25 percent of the total bid amount. If a bidder fails to meet the goal through work commitments, it would have to submit good faith efforts (GFE) documentation describing the efforts it took to achieve 25 percent small business participation as part of its bid and why it failed to do so.

3. Business development. Some study participants described barriers that small and diverse businesses face in learning about and performing Commonwealth work and indicated a need for additional business development offerings to address these barriers. The Commonwealth could consider dedicating additional resources to business development opportunities specifically tailored to helping small and diverse businesses learn about opportunities with the Commonwealth and build their capacities to perform work for the organization. Such efforts could include expanding networking and outreach, technical assistance offerings, and a mentor-protégé program.

a. Networking and outreach. In our qualitative data collection, study participants described how important networking and relationship-building events can be for business success. Some state agencies and HEIs operate outreach events designed to support small and diverse businesses in building relationships and to inform them of procurement policies. For example, some HEIs host “How To Do Business” sessions for businesses to learn about upcoming work opportunities with the organizations. In addition, SBSB hosts a variety of networking events to help vendors form relationships with Commonwealth agencies and prime contractors. Yet, some study participants highlighted a need for more information about these programs, or for more targeted networking and outreach events tailored to the businesses that need the most support. The Commonwealth could consider expanding its outreach to new businesses, including the advertisement of the technical assistance programs it offers, and continue to host networking events. Additionally, the Commonwealth could expand its relationships with partners across the state—such as non-profit organizations, trade associations, community lenders, and business development groups—to ensure that more members of the business community are able to access and participate in its programs. Expanding networking and outreach opportunities with the Commonwealth could help build further trust between the organization and small and diverse businesses, and could ensure that, as the organization considers additional contracting inclusion

measures, interested businesses have the foundational knowledge and relationships they need to be able to participate in these programs.

b. Technical assistance. SBSB currently conducts various trainings and technical assistance programs, such as virtual and in-person one-on-one business counseling, as well as more specialized technical assistance offerings (for more information, see Chapter 9). As part of the qualitative evidence gathering process, business owners expressed a desire for additional technical assistance support, including business start-up support, business administration assistance, and bid and proposal support.

i. Business incubators. Virginia already has a number of organizations that support entrepreneurs and startups, including the Virginia Small Business Development Center, the Virginia Accelerator Network, the Virginia Innovation Partnership Authority, and various regional incubators. However, these efforts are not coordinated statewide, and access to services varies by region. The Commonwealth could strengthen and formalize its startup support ecosystem by directing the Virginia Innovation Partnership Authority to lead a coordinated, statewide business incubator network. Under this approach, the Commonwealth would align and support regional incubators, universities, and private sector partners under shared goals and performance measures, while allowing programs to continue operating locally. A statewide network would provide clear, tiered support for businesses at different stages of growth and create stronger connections between technical assistance, mentorship, and existing state-supported capital programs, improving access and consistency for entrepreneurs across Virginia.

ii. Business administration assistance. The Commonwealth offers various business administration assistance programming but could consider expanding that programming to additional topics and geographical regions to reach more businesses across the state. For example, the Commonwealth could consider additional programs focused on bonding, bookkeeping, business plan development and refinement, financial literacy, and other topics. It could host those programs on its own or in conjunction with HEIs or other local partners throughout the region.

iii. Bid and proposal support. Business owners who provided qualitative feedback as part of the study expressed that they find the bid and proposal submission process to be burdensome and difficult to navigate for small businesses. Commonwealth agencies and HEIs could consider offering hands-on bid and proposal assistance for small businesses and microbusinesses to help them navigate organization requirements and understand how to prepare successful bids and proposals.

In addition, business owners expressed frustration related to the lack of feedback on the outcome of submitted bids and proposals, including feedback on why bids or proposals were unsuccessful. The Commonwealth could consider implementing a process to automatically notify bidders or proposers when an award is made, and as part of such, offer an opportunity for unsuccessful bidders or proposers to connect with a Commonwealth representative to receive feedback on their submission. Doing so may help small and diverse businesses gain a better understanding of ways they can improve future bids or proposals.

c. Mentor Protégé Program (MPP). As part of legislation enacted in the 2022 General Assembly Session, SBSB established and administered a pilot mentorship program. After completion of the pilot program, SBSB received direction from the General Assembly to not continue or establish that program unless directed to do so in legislation. The Commonwealth could consider developing an established, ongoing MPP to introduce new businesses to established businesses, prime contractors, and Commonwealth

decisionmakers; provide guidance to growing businesses; and increase the capacities of these businesses to perform Commonwealth work as prime contractors or prime consultants themselves. Such a program could include:

- Mentorship from businesses that successfully compete for and perform Commonwealth contracts in the same industries as protégés;
- An emphasis on teaching protégés how to navigate Commonwealth processes to work as prime contractors;
- Compensation for the time and resources required for mentors to participate in the program;
- Incentives for mentors to include their protégés on project teams for future opportunities, such as bid discounts or set-asides; and
- Key performance indicators (KPIs) to ensure that mentors are making genuine efforts to support the growth of protégés and that protégés are benefiting from their relationships with mentors.

Several organizations operate incentivized MPPs, which help to ensure mentor-protégé relationships are mutually beneficial, that could serve as models for the Commonwealth to consider. For example:

- The Michigan Department of Transportation (MDOT) operates an MPP for small consulting businesses. Key elements of this program include:
 - *Set-aside contracts*: The agency sets aside select contracts each year for exclusive competition among mentor-protégé pairings. As part of their bids or proposals for those contract opportunities, project teams must submit mentorship plans that are assessed as part of bid and proposal evaluation processes.
 - *Non-exclusivity*: Mentors cannot require their proteges to bid exclusively with them on set-aside contracting opportunities. Mentors can team with multiple protégés, and protégés can team with multiple mentors.
 - *Project cost reimbursement*: Time required to execute mentorship plans can be billed to MDOT.
- The Colorado Department of Transportation (CDOT) operates an MPP for small construction and consulting businesses. Key elements of the program include:
 - *Relationship building*: The agency supports emerging businesses in developing relationships with prime contractors or consultants that successfully perform CDOT work.
 - *Financial compensation*: Mentors receive annual stipends for their participation in the program.
 - *Project team incentives*: Consultant teams receive an extra evaluation point for including protégés (past or present) on their teams and two points if prime consultants are graduates of the MPP and include protégés on their project teams.

4. Procurement policies. The Commonwealth could consider refining its contract and procurement policies in ways that make Commonwealth work more accessible to a greater number of businesses, including small and diverse businesses.

a. Unbundle large contracts. As presented in Chapter 10, only 50 percent of the businesses potentially available for state agency work indicated that they have the capacity to compete for or perform contracts valued at more than \$750,000, and only 20 percent indicated that they could compete for or

perform contracts valued at more than \$5 million. However, BBC found that more than half of the project dollars the Commonwealth awarded during the study period were associated with projects valued at \$20 million or greater. To further encourage the participation of small and diverse businesses in Commonwealth work, the organization could consider making additional efforts to unbundle relatively large prime contracts into smaller contract elements and also encourage prime contractors to unbundle relatively large subcontract opportunities into smaller elements. The Commonwealth could provide ongoing training and specific guidance to procurement staff and contract managers to help them identify opportunities to unbundle contracts into smaller, more accessible pieces, including:

- Reviewing multi-phase or large projects to assess whether any portions could be unbundled into smaller opportunities;
- Assessing whether multi-year contracts for certain services, such as janitorial services, could be unbundled into shorter-termed contracts or could be awarded as task-order contracts; and
- Assessing whether supportive services contracts could be unbundled by certain geographical areas or other factors.

Such initiatives would likely increase opportunities for small and diverse businesses. Additionally, breaking up or right-sizing large prime contracts into multiple projects could benefit businesses that typically perform work as subcontractors, giving them more opportunities to perform work as prime contractors while easing some of the burdens associated with prime contract work, such as financing, bonding, insurance, and workforce development requirements.

b. De-concentrate awards. One of the fundamental objectives of a contracting inclusion program is to diversify the pool of businesses to which an organization is awarding work. However, BBC found that the vast majority of the contracts and procurements—as well as the associated dollars—the Commonwealth awarded during the study period were awarded to a relatively small number of businesses. The Commonwealth could consider exploring different ways to engage with businesses that have not participated in its work in the past. Some of those efforts could include:

- Continuing to work with local organizations to engage directly with businesses that have not previously participated in Commonwealth work and providing those businesses with information about the advantages and the process for doing so;
- Setting aside contract opportunities for exclusive competition among businesses that have not previously participated in Commonwealth work; and
- Expanding the use of the multiple award contracts—at the prime contract or subcontract level—to multiple businesses where there is a rotation schedule so all the businesses receive comparable amounts of work over the life of the contract.

Being new to the Commonwealth's contracting processes should not replace being *qualified* to perform work on the contracts and procurements it awards. The Commonwealth should still strongly emphasize and assess businesses' qualifications as part of contract awards, but it could consider taking steps to identify qualified businesses that may not have worked with the organization in the past.

5. Monitoring and data collection. The Commonwealth currently maintains comprehensive data on the participation of certified SWaM businesses in Commonwealth work, which it reports as part of its

SWaM Expenditure Dashboard. The Commonwealth should continue to collect this information, as well as consider how it can monitor the success of its contracting inclusion methods in greater depth and detail. We present several recommendations surrounding monitoring and data collection for the Commonwealth to consider.

a. Subcontractor data collection. The Commonwealth currently requires state agencies and HEIs to collect data on the SWaM-certified subcontractors that participate in the projects they award. While some state agencies and HEIs go further to collect comprehensive subcontract data on *all* subcontractors that participate in the projects they award, regardless of certification status, this practice is not required and is not consistent across Commonwealth agencies. Gathering data on all subcontractors, regardless of SWaM certification status, would improve the Commonwealth's monitoring of the participation of small and diverse businesses in its work and would help the Commonwealth identify future subcontracting opportunities for those businesses as part of its projects. The Commonwealth could consider enforcing the collection of *comprehensive* subcontract data on all the projects it awards at the time of bid, including:

- Subcontractor names, addresses, phone numbers, and email addresses;
- Subcontractor work types or roles on projects; and
- Dollar amounts committed to subcontractors.

For each bid and proposal opportunity, the Commonwealth could require bidders and proposers to report whether they plan to work with subcontractors on the project, and if they are planning to do so, provide the above information about each subcontractor, regardless of certification status, as part of their bid and proposal submissions. In addition to collecting subcontract data at the time of bid, the Commonwealth could consider collecting subcontract payment data for all subcontractors, regardless of certification status, with each invoice prime contractors submit. Doing so would help to ensure that the prime contractors are actually working with the subcontractors with which they indicated they would work at the time of bid.

b. SWaM Program compliance. Achieving the Commonwealth's SWaM participation goals requires consistent accountability across both state organizations and private contractors. The Commonwealth could consider strengthening its compliance mechanisms for state agencies and HEIs, as well as for prime contractors, to ensure that stated commitments translate into measurable and transparent outcomes.

i. Agency compliance. As part of SWaM Program compliance, state agencies and HEIs must submit annual SWaM Procurement Plans to SBSD detailing the strategies they will use to encourage the participation of SWaM-certified small businesses in their contracting and procurement. Despite this practice, some state agencies and HEIs consistently fail to meet their goals or make meaningful efforts to do so. The Commonwealth could consider various measures to increase buy-in from state agencies and HEIs to work toward the common goal of encouraging the participation of small and diverse businesses in Commonwealth work. For example, the State of Indiana established a Governor's Commission on Supplier Diversity to explore opportunities and implement different measures to encourage the participation of small and diverse businesses in the state's procurement practices. The Commission meets quarterly, comprises various organization and business representatives, and provides oversight of the state's supplier diversity initiatives. The Commonwealth could consider establishing a similar

commission, comprising state agency representatives, HEI representatives, and business owners. The commission could establish a cadence for regular meetings to discuss issues related to meeting the Commonwealth's supplier diversity objectives, including each agency's strategy for achieving the overall aspirational goal, barriers they face in achieving the goal, and possible strategies they could implement to improve goal attainment.

In addition, HEIs are required to report information on SWaM contractor spend to SBSB for inclusion in the Commonwealth's SWaM Expenditure Dashboard, which the organization uses as a centralized transparency and management tool to track and analyze how Commonwealth contracting and procurement supports SWaM-certified businesses. However, some HEIs report an overall figure for total spend to SBSB in lieu of detailed transactional spend. While HEIs have varying degrees of autonomy in their procurement practices, the same autonomy should not apply to their reporting practices. The Commonwealth could consider establishing a policy to require that HEIs adapt their reporting processes to report spend on a transactional level to improve the Commonwealth's ability to accurately report SWaM spend at the state level and increase transparency in the Commonwealth's spend.

ii. Prime contractor compliance. The Commonwealth could also develop a framework for assessing prime contractor compliance with subcontracting plans throughout the life of a contract. The Commonwealth requires that prime contractors submit subcontracting plans as part of their bids, quotes, or proposals for all contracts and procurements worth more than \$100,000. Prime contractors are required to submit monthly subcontractor participation reports through the Commonwealth's eVA subcontractor payment reporting tool, and, if participation varies from the subcontractor plan, must provide written explanation explaining the reasons why a variance exists. However, in practice, many prime contractors do not submit this information and do not face penalties for not having done so. Ultimately, this results in agencies reporting possibly inaccurate information to SBSB on SWaM spend as part of their reporting processes. In addition, as part of the qualitative evidence gathering process, some businesses shared that they have been listed as part of a prime's subcontracting plan, but then never actually receive that work after the bid is successful.

The Commonwealth could institute a more stringent policy to ensure that state agencies regularly monitor the participation of the subcontractors that the prime contractor included in its bid or proposal at the time of award and ensure that they receive the work the prime contractor committed to them. If there is a shortfall in committed subcontractor participation on the contract, the prime contractor should be required to provide satisfactory reasons why that was the case, and if it fails to do so, the organizations should be prepared to invoke financial or other consequences (e.g., withholding final payment)—and actually do so.

c. KPIs. The primary metric most organizations use to assess the effectiveness of their contracting inclusion efforts is to monitor and report the volume and percentage of contract and procurement dollars they spend with small and diverse businesses relative to all the contract dollars they award. Considering the sheer amount of dollars organizations tend to award each year, it would likely require them to award substantial volumes of work to small and diverse businesses to meaningfully increase the overall percentage of dollars they award to those businesses in aggregate. Although doing so is important, focusing exclusively on the volume and percentage of dollars an organization awards to small and diverse businesses may incentivize organizations to repeatedly award work to the small and diverse businesses that are already relatively successful or encourage them to pursue large projects they might

not be ready to perform. In addition, focusing exclusively on the volume and percentage of dollars an organization awards to small and diverse businesses can obscure some of the value that contracting inclusion programs provide. For example, the contract dollars the Commonwealth awards to microbusinesses may not have a substantial impact on the overall percentage of dollars awarded to SWaM businesses in general. However, the dollars spent with those businesses would likely have an immense impact on their success and development.

In addition to the overall volume and percentage of dollars the Commonwealth awards to small and diverse businesses, the organization might consider tracking other KPIs that better reflect all the value that the SWaM Program provides. Doing so might also encourage internal staff to support more businesses in the marketplace that need it most. Examples of such metrics include:

- The number of distinct small and diverse businesses to which the Commonwealth awards work;
- The number of contracts and procurements the Commonwealth awards to small and diverse businesses;
- The volume of work the Commonwealth awards to businesses that have never worked with the Commonwealth in the past;
- The number of distinct businesses to which the Commonwealth awards work which have never worked with the Commonwealth in the past;
- Various characteristics of the small and diverse businesses to which the Commonwealth awards work, including business size, location, age, and average contract size; and
- Success stories of individual businesses that the SWaM Program has helped.

6. Race- and gender-based measures. The Commonwealth currently only uses race- and gender-neutral program measures as part of its implementation of the SWaM Program, which are designed to encourage small business participation in Commonwealth work, regardless of the race/ethnicity or gender of business owners. However, disparity study results as well as qualitative evidence collected as part of the disparity study indicate that the Commonwealth could consider whether race- and gender-based measures would help address the disparities that minority- and woman-owned businesses in particular face as part of the organization's contracting and procurement processes. If the Commonwealth decides to implement race- or gender-based measures, then it must ensure that its use of those measures meets the requirements of the *strict scrutiny* standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring that their use is *narrowly tailored* (see Chapter 2 for more information). Additionally, prior to using such measures, the Commonwealth must consider whether it has maximized its use of race- and gender-neutral measures, including fully leveraging existing race- and gender-neutral measures and considering whether additional measures might be sufficient to address disparities without the use of race or gender classifications.

One way the Commonwealth could increase the participation of minority- and woman-owned businesses in its contracting is through the use of narrowly tailored MBE and WBE subcontracting goals. To do so, the Commonwealth would set MBE and WBE participation goals on individual projects based on the availability of minority-owned businesses and woman-owned businesses for the types of work involved in each project, and, as a condition of award, bidders would have to meet those goals by making

subcontracting commitments with MBEs and WBEs as part of their bids, quotes, or proposals or by demonstrating they made GFEs to do so.¹⁵ Examples of GFEs could include emailing certified MBE and WBE subcontractors to notify them about the bid opportunity, advertising subcontract opportunities online, and hosting meetings for subcontractors where they answer questions about the bid opportunity. The Commonwealth could evaluate GFEs using a points system where each effort or engagement with an MBE or WBE counts for points, and prime contractors must receive a certain number of points for their GFEs to be considered sufficient.

7. Overall aspirational goals. Currently, the Commonwealth has an overall aspirational goal for the participation of SWaM-certified small businesses in Commonwealth contracts and procurements. This goal, originally set in 2014, is set at 42 percent of discretionary spend. For capital outlay construction work, the Commonwealth has also established a 50 percent subcontracting goal for SWaM-certified small businesses. As part of its implementation of the SWaM Program, the Commonwealth could update its overall aspirational goal for the participation of small businesses and establish separate annual overall aspirational goals for the participation of microbusinesses, as well as minority-, woman-, and SDV-owned businesses in its contracting. The Commonwealth could follow a common two-step process to develop overall aspirational goals for the participation of small businesses and microbusinesses, as well as minority-, woman-, and SDV-owned businesses in its contracts and procurements, which would consist of establishing base figures for each business group and considering adjustments to those base figure based on information about local marketplace conditions and other factors that might impact the ability of those businesses to compete for and perform work on its contracts.

a. Base figures. To determine its base figures, the Commonwealth could consider the availability of SWaM-eligible businesses—that is, businesses in Virginia that meet the qualifications to be SWaM-certified small businesses; microbusinesses; or minority-, woman-, or SDV-owned businesses—for Commonwealth work (regardless of whether they are already certified as SWaM businesses).

b. Goal adjustments. To determine whether adjustments to the base figures are warranted to account for any characteristics of the marketplace that might affect the ability of small businesses and microbusinesses, as well as minority-owned, woman-owned, and SDV-owned businesses to compete for or participate in Commonwealth work, the Commonwealth could consider the following factors:

- Past participation of small businesses, microbusinesses, MBEs, WBEs, and SDV-owned businesses in its work;
- Information on barriers related to employment, business ownership, education, training, and unions;
- Information on barriers related to financing, bonding, and insurance; and
- Other relevant information.

If the Commonwealth decides to adjust the base figures, it would have to decide which factors to consider and the direction and magnitude of any adjustments. For example, one factor the Commonwealth could consider for an adjustment to the overall aspirational goals is the past

¹⁵ If bidders are MBEs or WBEs themselves, then the Commonwealth could consider allowing them to count their own portions of their bids toward meeting contracting goals.

participation of certified businesses in its work, especially given the difference between the participation of certified SWaM businesses and SWaM-eligible businesses. The participation of SWaM-certified businesses in Commonwealth work during the study period was much lower than the respective availability of SWaM-eligible businesses for that work. Given those differences, the Commonwealth could consider adjusting each business goal using the average of the availability of those business groups that are SWaM-eligible businesses and their participation in Commonwealth work during the study period. This adjustment is one option the Commonwealth could consider – if the Commonwealth chooses to pursue alternative adjustment options, it would have to decide which factors to consider and the direction and magnitude of any adjustments.

APPENDIX A.

Definitions of Terms

Appendix A defines terms useful to understanding the 2025 Commonwealth of Virginia Disparity Study report.

Business

A business is a for-profit enterprise, including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, and any other business structures. The definition includes the headquarters of the entity as well as all its other locations, if applicable.

Commonwealth of Virginia (Commonwealth)

The Commonwealth comprises various agencies, departments, higher education institutions, and offices to oversee the functions and management of Virginia. It also operates the Small, Women-owned, and Minority-owned Business Program, including the associated certification process.

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate a compelling governmental interest in remedying any identified discrimination in order to implement race-based measures. That is, an agency that uses race-based measures as part of a contracting program has the initial burden of showing evidence of barriers or discrimination—including statistical and anecdotal evidence—that supports the need for such measures. The agency must assess such discrimination within its own relevant geographic market area.

Construction

Construction refers to the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. “Buildings, structures, or other real property” includes bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, channels, and other structures.

Consultant

A consultant is a business that performs professional services work.

Contract

A contract is a legally binding relationship between the seller of goods or services and a buyer. The study team sometimes uses the term contract interchangeably with *procurement* or *project*.

Contract Element

A contract element is either a prime contract or subcontract.

Contract Goals

Contract goals are often a race- or gender-based effort whereby organizations set percentage goals for the participation of minority- or woman-owned businesses in individual contracts or procurements they award. (Certain contract goals may be race- and gender-neutral in nature, such as goals for the participation of small businesses, microbusinesses, or service-disabled veteran-owned businesses.) As a condition of award, prime contractors have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified minority- or woman-owned businesses, or, if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so. The use of contract goals as they apply to minority- and woman-owned businesses must meet the strict scrutiny and intermediate scrutiny standards of constitutional review, respectively.

Contractor

A contractor is a business that performs construction work.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Department of Small Business and Supplier Diversity (SBSD)

SBSD is the Commonwealth of Virginia agency responsible for the administration of the Small, Women-owned, and Minority-owned Business Program.

Disparity

A disparity is an appreciable difference between an actual outcome and some benchmark where the actual outcome is less than the benchmark. In this report, the term disparity refers specifically to a difference between the participation of a specific group of businesses in an organization's contracting and procurement and the estimated availability of the group for that work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in an organization's work and the estimated availability of the group for that work.

Disparity Index

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

Dun & Bradstreet (D&B)

D&B is the leading global provider of lists of business establishments and other business information for specific industries within specific geographical areas (for details, see www.dnb.com).

Good Faith Efforts (GFEs)

GFEs are genuine and meaningful steps bidders take to meet a contract goal, even if they were unsuccessful in doing so. Bidders may submit a waiver detailing their GFEs in lieu of meeting program requirements, and the organization reviews those efforts when evaluating the bid. Failure to demonstrate sufficient GFEs may render a bidder's bid non-responsive.

Higher Education Institution (HEI)

HEIs are state-supported colleges and universities established under Title 23, Chapter 1 of the Virginia State Statute. For the purposes of this study, HEIs refer to those universities with tier 2 or tier 3 procurement authority established through the Virginia Association of State College and University Purchasing Professionals. (See *tier 2 purchasing authority* and *tier 3 purchasing authority*.)

Industry

An industry is a broad classification of businesses providing related goods or services (e.g., construction or professional services).

Inference of Discrimination

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

Intermediate Scrutiny

Intermediate scrutiny is the legal standard government organizations' use of gender-based measures must meet in order to be considered constitutional. It is more rigorous than the rational basis standard, which applies to business measures unrelated to race/ethnicity or gender, but less rigorous than the strict scrutiny standard, which applies to business measures related to race/ethnicity. In order for programs to meet intermediate scrutiny, they must serve important government objectives, and they must be substantially related to achieving those objectives.

Marketplace Conditions

Marketplace conditions refer to various factors that potentially affect outcomes for certain workers and businesses operating in that marketplace (e.g., minorities, women, service-disabled veterans, and the businesses they own). The study team assessed conditions in the Virginia marketplace in four primary areas: human capital, financial capital, business ownership, and business success.

Microbusiness

A microbusiness is a business that, together with affiliates, has 25 or fewer employees and annual gross receipts of \$3 million or less averaged over the previous three years. Businesses do not have to be certified by the Commonwealth of Virginia's Department of Small Business and Supplier Diversity or any other organization to be considered microbusinesses.

Minority

A minority is an individual who identifies with one of the following racial groups: Asian, Black, Hispanic, Native American, or other non-White racial groups.

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify with one of the following racial groups: Asian, Black, Hispanic, Native American, or other non-White racial groups. The study team considered businesses owned by minority men or minority women as minority-owned businesses. A business does not have to be certified as such by the Commonwealth of Virginia's Department of Small Business and Supplier Diversity or any other organization to be considered a minority-owned business.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate its use of race-based measures is narrowly tailored. There are several factors a court considers when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative, race-neutral measures;
- The degree to which the use of such measures is limited to those groups that suffer barriers or discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;

- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.

Non-professional Services and Goods

A non-professional services and goods business engages in providing goods, supplies, or services that typically do not require a specific educational background, license, or high degree of expertise and training to perform. Examples of goods and services industries include cleaning and janitorial services and supplies; office equipment and supplies; printing, copying, and mailing services; safety equipment; security systems; security guard services; uniforms and apparel; automobiles; and vehicle repair services.

Passive Participation

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

Participation

See *utilization*.

Prime Consultant

Prime consultants are businesses that perform professional services work directly for end users, such as the Commonwealth of Virginia.

Prime Contract

Prime contracts are contracts between prime contractors or prime consultants and end users, such as the Commonwealth of Virginia.

Prime Contractor

Prime contractors are construction businesses or goods and services vendors that perform work directly for end users, such as the Commonwealth of Virginia.

Procurement

See *contract*.

Professional Services

Professional services refers to professional, scientific, or technical services that require a high degree of expertise and training. Frequently—but not always—individuals who perform professional services are required to have a license or specific educational background. Examples of professional services include legal counsel; accounting, bookkeeping, and payroll services; computer services; consulting services; research services; advertising services; photographic services; and other professional, scientific, and technical services.

Project

Projects refer to construction, professional services, or non-professional services and goods endeavors the Commonwealth of Virginia bids out. Projects could include one or more prime contracts and corresponding subcontracts.

Qualitative Information

Qualitative information includes personal accounts of experiences—including any incidents of discrimination—and perceptions related to the marketplace that individual interviewees, public meeting participants, focus group participants, and other stakeholders shared with the study team.

Race- and Gender-based Measures

Race- and gender-based measures are contracting measures designed to increase the participation of minority- and woman-owned businesses, specifically, in government work. Businesses owned by individuals who identify with particular race groups might be eligible for such measures, whereas others would not. Similarly, businesses owned by individuals who identify as women might be eligible for such measures, whereas businesses owned by individuals who identify as men would not. An example of race- and gender-based measures is an organization's use of minority- or woman-owned business contract goals in awarding individual contracts or procurements.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures designed to address potential barriers for businesses regardless of the race or gender of the owners. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, and establishing programs to assist start-ups.

Rational Basis

Government organizations that operate contracting inclusion programs that rely solely on race- and gender-neutral measures to encourage the participation of businesses in their work must show a rational basis for their programs. Showing a rational basis requires organizations to demonstrate their contracting programs are rationally related to legitimate government interests. It is the lowest threshold for evaluating the legality of government contracting programs.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which organizations award most of their contracting dollars are located. Case law related to contracting inclusion programs and disparity studies requires analyses to focus on the RGMA. The RGMA for the disparity study is the state of Virginia.

Service-Disabled Veteran (SDV)

An SDV is a veteran who: 1) served on active duty in the United States military ground, naval, or air service; 2) was discharged or released under conditions other than dishonorable; and 3) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.

Service-Disabled Veteran (SDV)-owned Business

An SDV-owned business is a business owned by SDVs. A business does not have to be certified as such by the Commonwealth of Virginia's Department of Small Business and Supplier Diversity or any other organization to be considered an SDV-owned business.

Small Business

A small business is a business that, together with affiliates, has 250 or fewer employees or annual gross receipts of \$10 million or less averaged over the previous three years. Businesses do not have to be certified by the Commonwealth of Virginia's Department of Small Business and Supplier Diversity or any other organization to be considered small businesses.

Small, Women-owned, and Minority-owned Business (SWaM)-certified Business

A SWaM-certified business is a business that is certified as a small business, microbusiness, minority-owned business, woman-owned business, or service-disabled veteran-owned business by the Commonwealth of Virginia's (the Commonwealth's) Department of Small Business and Supplier Diversity or a successor department of the Commonwealth.

Small, Women-owned, and Minority-owned Business (SWaM)-eligible Business

A SWaM-eligible business is a business in Virginia that meets the qualifications to be a SWaM-certified small business, microbusinesses, or minority-, woman-, or SDV-owned business, regardless of whether it is certified as such. To estimate a business' ability to qualify as a small business or microbusiness, BBC Research & Consulting (BBC) used a combination of primary and secondary data collection as well as data modeling. As part of BBC's business surveys, business representatives were asked to report business size in terms of revenue and number of employees, and to disclose any affiliates, parent companies, or subsidiaries. For non-certified utilized businesses with which BBC did not conduct a business survey, we relied on business size and company structure information from Dun & Bradstreet (D&B). BBC used a predictive regression model to correct for gaps and errors in D&B's business size information. For businesses that have affiliates, parent companies, or subsidiaries, BBC used business size for the entire corporate structure, in terms of revenue and number of employees, to determine business eligibility as a potential small business or microbusiness, rather than on the structure of ownership interests.

Small, Women-owned, and Minority-owned Business (SWaM) Program

The SWaM Program includes myriad race- and gender-neutral efforts the Commonwealth of Virginia uses to encourage the participation of small businesses and microbusinesses as well as minority-, woman-, and service-disabled veteran-owned businesses in its contracting and procurement.

Statistically Significant Difference

A statistically significant difference is a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference (that is, there is a 0.05 or 0.10 probability, respectively, that chance could correctly account for the difference).

Strict Scrutiny

Strict scrutiny is the legal standard a government agency's use of race-based measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of measures that might impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, an organization must:

- Have a compelling governmental interest in remedying past identified discrimination or its present effects; and
- Establish that the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

An organization's use of race-based measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard for it to be considered constitutional.

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The study period for the disparity study was July 1, 2019 through June 30, 2024. The Commonwealth of Virginia had to have awarded contracts or procurements during the study period for them to be included in our analyses.

Subcontract

Subcontracts are contracts between prime contractors or prime consultants and other businesses providing goods or services to the prime contractors or prime consultants as part of larger projects.

Subcontracting Participation Plan

A subcontracting participation plan is a plan bidders and offerors must include as part of their bids, quotes, or proposals for Commonwealth of Virginia projects worth more than \$100,000. These plans detail the participation of small businesses, microbusinesses, minority-owned businesses, woman-owned businesses, and service-disabled veteran-owned businesses as subcontractors on their teams.

Subcontractor

Subcontractors are businesses that provide goods or services to prime contractors as part of larger projects.

Subindustry

Subindustries are specific classifications for businesses providing related goods or services within particular industries (e.g., highway and street construction is a subindustry of construction).

Substantial Disparity

Substantial disparities are disparities of \$0.80 or less, indicating that the actual participation of a specific business group in agency work is 80 percent or less of the group's estimated availability. Substantial disparities are considered inferences of discrimination in the relevant geographic market area against particular business groups. Government organizations sometimes use substantial disparities as

justification for the use of race- or gender-based measures to address barriers affecting certain groups of minority- or woman-owned businesses.

Tier 2 Purchasing Authority

Higher education institutions that are members of the Virginia Association of State College and University Purchasing Professionals with tier 2 purchasing authority include Christopher Newport University, Norfolk State University, Old Dominion University, Radford University, Longwood University, the University of Mary Washington, Virginia Military Institute, Virginia State University, and the Virginia Community College System. Tier 2 institutions have a memorandum of understanding with the Commonwealth of Virginia that allows them contracting and procurement autonomy in two of the following three areas: procurement, capital outlay construction, and technology.

Tier 3 Purchasing Authority

Higher education institutions that are members of the Virginia Association of State College and University Purchasing Professionals with tier 3 purchasing authority include the University of Virginia, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, James Madison University, George Mason University, and the College of William and Mary. Tier 3 institutions have complete autonomy in their contracting and procurement.

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts or procurements the Commonwealth of Virginia awarded to a specific group of businesses during the study period. The study team uses the term utilization synonymously with *participation*.

Vendor

Vendors are businesses that supply goods either to prime contractors or prime consultants or to end users, such as the Commonwealth of Virginia.

Virginia Association of State College and University Purchasing Professionals (VASCUPP)

VASCUPP was established in 1992 under the objective of identifying opportunities for cooperative procurements and cost savings for higher education institutions in Virginia. VASCUPP members have tier 2 or tier 3 delegated purchasing authority.

Woman-owned Business

Woman-owned businesses are businesses owned by White women. Businesses do not have to be certified by the Commonwealth of Virginia's Department of Small Business and Supplier Diversity or any other organization to be considered woman-owned businesses. (The study team considered businesses owned by women of color as minority-owned businesses.)

APPENDIX B.

Legal Analysis and Framework

A. Introduction

In this appendix, Holland & Knight LLP discusses recent cases involving local and state government minority-, women-, and disadvantaged-owned business enterprise (MBE/WBE/DBE) programs, and social and economic disadvantaged business programs, which are instructive to the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Commonwealth of Virginia.

The appendix reviews the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson (Croson)*.¹ *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña, (Adarand I)*, which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds.² The Supreme Court's decisions in *Adarand I* and *Croson* and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes, discusses, and includes significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and its implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. The Commonwealth of Virginia is in the United States Court of Appeals for the Fourth Circuit. In particular, this analysis discusses and references Fourth Circuit Court of Appeals decisions, which followed the *Croson* decision and applied the strict scrutiny standard, that are instructive to the study, including the decisions in *H.B. Rowe Co., Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation (NCDOT), et al. (H.B. Rowe)* and district court decisions in the Fourth Circuit regarding MBE/WBE/DBE programs.³

In addition, the analysis includes and references recent federal cases from other jurisdictions that have considered the validity of the Federal DBE Program and its implementation by state departments of transportation (DOTs) and local or state government agencies and the validity of local and state DBE programs, focusing on the application by those courts of the strict scrutiny standard and disparity studies, including: *Mid-America Milling Company LLC and Bagshaw Trucking Inc. v. United States Department of Transportation (USDOT), et al. (MAMCO)*; *Associated General Contractors of America (AGC), San Diego Chapter, Inc. v. California Department of Transportation (Caltrans), et al.*; *Western States Paving Co. v. Washington State DOT*; *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, USDOT, et al.*; *Mountain West Holding Co. v. Montana, Montana DOT, et al.*; *M.K. Weeden Construction v. Montana, Montana DOT, et al.*; *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads (Sherbrooke Turf)*; *Geyer Signal, Inc. v. Minnesota DOT*;

¹ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

² *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

³ 615 F.3d 233 (4th Cir. 2010).

Adarand Constructors, Inc. v. Slater (Adarand VII); United States v. Taylor; Geod Corporation v. New Jersey Transit Corporation; South Florida Chapter of the AGC. v. Broward County Florida; Midwest Fence Corp. v. USDOT, Federal Highway Administration (FHWA), Illinois DOT, Illinois State Toll Highway Authority (Midwest Fence), et al.; Dunnet Bay Construction Co. v. Illinois DOT (Dunnet Bay); and Northern Contracting, Inc. v. Illinois DOT.^{4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18}

The appendix also discusses recent cases regarding the Federal DBE Program, notes instructive guidance regarding the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program, and provides an analysis of the implementation of the Federal DBE and ACDBE Programs by local and state governments.^{19, 20} The Federal DBE Program was continued and reauthorized by the 2015 Fixing America's Surface Transportation Act (FAST Act).²¹ In October 2018, Congress passed the Federal Aviation Administration (FAA) Reauthorization Act.²² In November 2021, Congress passed the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for

⁴ *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et al.* 2024 WL 4267183 (Sept. 23, 2024); U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFVT.

⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013)

⁶ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005)

⁷ *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, U.S. DOT, et al.*

⁸ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*

⁹ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*

¹⁰ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

¹¹ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹² *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (*Adarand VII*).

¹³ 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁴ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *Geod Corporation v. New Jersey Transit Corporation, et seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

¹⁵ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁶ *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

¹⁷ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *DunnetBay Construction Co. v. Illinois DOT*, et. al. 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹⁸ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹⁹ 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (Federal DBE Program). See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (MAP-21, SAFETEA, and SAFETEA-LU), and the United States Department of Transportation (USDOT or DOT) regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

²⁰ 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

²¹ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

²² Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

MBE/WBE/DBEs, and in May 2024, Congress passed legislation that reauthorized the FAA’s ACDBE Program.^{23, 24}

The analysis references, discusses, and analyzes recent court decisions that involved challenges to MBE/WBE/DBE programs and social and economic disadvantaged business programs in other jurisdictions, which are instructive to the study.

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

The appendix notes in Section C.4. below significant pending and very recent cases instructive and informative to the study and MBE/WBE/DBE and socially and economically disadvantaged business type programs. We can provide more detail on these cases if requested.

For example, in a significant and instructive pending case listed in C.4 below, on May 28, 2025, the Plaintiffs and federal Defendants (USDOT) in *MAMCO* filed a Joint Motion for Entry of a proposed Consent Order to end the case. The proposed Consent Order provides in part that the Defendants have determined the race- and sex- based presumptions in the Federal DBE Program are unconstitutional and requests the court hold that the Federal DBE Program that uses DBE contract goals based on race- and sex-based presumptions is unconstitutional. See, Section C.4. below discussing *MAMCO*. The court granted intervention by a group of Intervenor DBEs in support of the Federal DBE Program and in opposition of the proposed Consent Order and granted certain Motions by Amici Curiae to file briefs in opposition to and in support of the proposed Consent Order.

In addition, the appendix points out in Sections C.5., C.6., C.7., C.8., C.9, and C.10. references to January 2025 Executive Orders issued by the President, a February 2025 Attorney General Memorandum, and Title VI Complaints against the State of New York MWBE program and Wisconsin Department of Administration (DOA) for Supplier Diversity Program, which have been filed recently with the United States Department of Justice (USDOJ) requesting investigations, a July 29, 2025 USDOJ Memorandum to all federal agencies regarding “the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) programs,” a September 5, 2025 Indiana DOT Request for Waiver of Race and Gender Conscious Requirements of the Federal DBE Program signed by 16 states attorneys general, and the Interim Final Rule published by USDOT on October 3, 2025, which is effective immediately.

²³ Pub. L. 117-58, H.R. 3684, §11101(e), November 15, 2021, 135 Stat 443-449.

²⁴ Pub. L. 117-58, H.R. 3684, §11101(e), November 15, 2021, 135 Stat 443-449; Pub L. 118-63, §730 (a), May 16, 2024, 138 Stat 1272.

B. United States Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co. (Croson)*, 488 U.S. 469 (1989). In *Croson*, the United States Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.²⁵ J.A. Croson Co. (Croson) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more MBEs. In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond’s “set-aside” action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the “strict scrutiny” standard, generally applicable to any race-based classification, which requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination and that any program adopted by a local or state government must be “narrowly tailored” to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”²⁶ The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.²⁷ The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.²⁸

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.²⁹ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general

²⁵ 488 U.S. 469 (1989).

²⁶ 488 U.S. at 500, 510.

²⁷ 488 U.S. at 480, 505.

²⁸ 488 U.S. at 507-510.

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

population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”³⁰

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”³¹ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”³²

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”³³ The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”³⁴

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”³⁵ “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”³⁶

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”³⁷

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

The cases interpreting *Crosby* and *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the

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

³¹ 488 U.S. at 502.

³² *Id.*

³³ 488 U.S. at 509.

³⁴ *Id.*

³⁵ 488 U.S. at 509.

³⁶ *Id.*

³⁷ 488 U.S. at 492.

constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program and ACDBE Program by recipients of federal funds.

3. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*, 143 S. Ct. 2141 (June 29, 2023). In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Supreme Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the admissions systems used by Harvard College and the University of North Carolina. The Majority decision of the Court referenced, cited, and applied the Supreme Court decisions in *Crosby* and *Adarand*, including the strict scrutiny standard, to the university admissions systems in these cases. The Majority decision in the *SFFA* case did not specifically rule on or address the constitutionality of MBE/WBE/DBE contracting programs by local or state governments or the implementation of the Federal DBE or ACDBE Programs by local or state governments, airports, transit or transportation authorities, or other government agencies.

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

It is noteworthy that subsequent to the Supreme Court decision in *SFFA v. Harvard et al.*, Attorneys General from 13 states sent a letter, dated July 13, 2023, to “Fortune 100 CEOs” in which, among other statements, they urged businesses, to “immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices.” The Virginia Attorney General was not among the state Attorneys General signing the July 13, 2023 letter.

On July 19, 2023, Attorneys General from 20 states sent a letter to “Fortune 100 CEOs” in which they responded to and opposed the statements in the July 13, 2023 letter sent by the Attorneys General from the 13 states. This letter provides that the “*SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses.” In addition, the letter provides that “*SFFA* acknowledges that our society has a compelling interest in ‘remediating specific, identified instances of past discrimination that violated the Constitution or a statute.’ *SFFA*, slip op. at 15.” The Virginia Attorney General was not among the state Attorneys General signing the July 19, 2023 letter.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE and ACDBE Programs

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local government MBE/WBE/DBE programs. The recent decisions involving these state and local government MBE/WBE/DBE programs, the Federal DBE Program and its implementation by state and local governments, and socially and economically disadvantaged business programs are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local and state government recipients of federal financial assistance (USDOT funds) based on 49 Code of Federal Regulations (CFR) Part 26 and 49 CFR Part 23.

The analysis also discusses the application of intermediate scrutiny and rational basis standards as applied to gender discrimination and socially and economically disadvantaged business type programs.

The Congressional Acts noted above are informative as they are based on recent Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal DBE Program, which set forth Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence. Congress passed legislation in November 2021 (HR 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021) that reauthorized the Federal DBE Program and its implementation by local and state governments based on evidence and findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

USDOJ in January 2022 issued a report that updated its 1996 report, titled “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,” which “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.” The “Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs” is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This “updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs” is available on the Department of Justice’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.³⁸

Although, as referenced above, several federal courts of appeal have upheld the constitutionality of the Federal DBE Program, it is noteworthy that a federal district court in *MAMCO*, which is noted below in Section C.4. (viii), has recently considered a challenge to the Federal DBE Program.³⁹ Plaintiffs sought a preliminary and permanent injunction, and a declaratory judgment, that the Federal DBE Program, including Sections 11101(e)(2) and (3) of the Infrastructure Act and corresponding federal regulations, is unconstitutional because it violates the Equal Protection Clause of the United States Constitution. Plaintiffs’ Motion for Preliminary Injunction was granted that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined the USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups regarding its contracts impacted by DBE goals. Currently the case is pending with the most recent filings including a Joint Motion for Entry of a Consent Order proposed by the USDOT and the Plaintiffs requesting the court hold the Federal DBE Program unconstitutional in its requirement for presumptions of groups being eligible as DBEs, and an Intervention by Intervenor DBEs that are supporting the Federal DBE Program, *See*, Section C.4. (viii), below.

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

³⁹ 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024); 2024 WL 4267183 (Sept. 23, 2024), U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFV

1. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁴⁰ The strict scrutiny analysis comprises two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.⁴¹

a. The compelling governmental interest requirement. The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.⁴² State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.⁴³ Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.⁴⁴

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state and local governments, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁴⁵ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁴⁶

⁴⁰ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁴¹ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁴² *Id.*

⁴³ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁴⁴ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁴⁵ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and affirming, 84 F. Supp. 3d 705, 2015 WL 1396376.

⁴⁶ *Id. But, see, Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. DOT*, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024)(Holding USDOT evidence insufficient to support Federal DBE Program). In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense (DOD) program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Court after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious DOD regulations. The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁴⁷ The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).⁴⁸

As noted above, a federal district court in Kentucky in *MAMCO* (see section C.4. (viii) below), granted Plaintiffs’ Motion for Preliminary Injunction that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups. The court considered in part the evidence presented by the federal defendants, including certain evidence presented to Congress, in connection with determining if the strict scrutiny standard was satisfied by the Federal DBE Program. The Plaintiffs and USDOT have filed a Joint Motion for Entry of a Consent Order that includes holding unconstitutional the Federal DBE Program’s use of race- and sex-based rebuttable presumptions for certain groups. The United States Magistrate Judge has entered an Order granting intervention by Intervenor DBEs to support the Federal DBE Program (see section C.4. (viii) below). This case is pending, at the time of this report, and the Preliminary Injunction remains in place.

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

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and

district court in *Rothe* on August 10, 2007 issued its order denying plaintiff Rothe’s Motion for Summary Judgment and granting Defendant United States’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See also the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). In the 2016 decision in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). *But, see, Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.*, 2023 WL 4633481 (E.D. Tenn. July 19, 2023)(Holding unconstitutional the rebuttable presumption of groups included in the Section 8(a) program).

⁴⁷*Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁴⁸ See, *e.g.*, *Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.⁴⁹

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies, precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.⁵⁰
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.⁵¹
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.⁵²
- **Infrastructure Investment and Jobs Act of 2021, FAA Reauthorization Act of 2018, FAST Act, and the Moving Ahead for Progress in the 21st Century Act (MAP-21).** In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act of 2021, the FAA Reauthorization Act, FAST Act, and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in “federally-assisted surface transportation markets,” in airport-related markets, and that the continuing barriers “merit the continuation” of the Federal DBE Program and the Federal ACDBE Program.⁵³ Congress also found in the Infrastructure Investment and Jobs Act of 2021, the FAA Reauthorization Act of 2018, the FAST Act, and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination, which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁵⁴

⁴⁹ *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁵⁰ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

⁵¹ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵² *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

⁵³ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁵⁴ *Id.* at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

i. Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁵⁵ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁵⁶ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁵⁷

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.⁵⁸ It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.⁵⁹ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁶⁰

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁶¹ "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or

⁵⁵ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁵⁶ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁷ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁸ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁹ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁰ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶¹ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

the locality's prime contractors."⁶² Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁶³

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁶⁴ Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁶⁵ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.⁶⁶

To successfully rebut the government's evidence, the courts hold that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.⁶⁷ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.⁶⁸ Conjecture and unsupported criticisms of the government's

⁶² See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*; 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶³ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁴ *Adarand Constructors, Inc. v. Peña*, ("Adarand III"), 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁶⁵ *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁶⁶ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁶⁷ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶⁸ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

methodology are insufficient.⁶⁹ The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.⁷⁰

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"⁷¹ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."⁷²

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark."⁷³ The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.⁷⁴ Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.⁷⁵ It has been further held by the courts that the statistical evidence be "corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.⁷⁶

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact."⁷⁷ In so acting, a governmental entity

⁶⁹ *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁷⁰ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁷¹ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

⁷² *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

⁷³ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁴ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁵ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁷⁶ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁷⁷ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

must demonstrate it had a compelling interest in “remediating the effects of past or present racial discrimination.”⁷⁸

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.⁷⁹

ii. Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local government recipient level.⁸⁰ “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”⁸¹

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.⁸² The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.⁸³ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁸⁴

Other considerations regarding statistical evidence include:

⁷⁸ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

⁷⁹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

⁸⁰ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁸¹ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

⁸² *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸³ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁴ *Western States Paving*, 407 F.3d at 1001.

Availability analysis. A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.⁸⁵ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered.⁸⁶ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”⁸⁷

Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.⁸⁸

Disparity index. An important component of statistical evidence is the “disparity index.”⁸⁹ A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”⁹⁰

Two standard deviation test. The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.⁹¹

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in

⁸⁵ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁶ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁷ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸⁸ See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

⁸⁹ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

⁹⁰ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

⁹¹ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

evidence,” but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.⁹²

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works of Colorado, Inc. v. City and County of Denver (Concrete Works)* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.⁹³ The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.⁹⁴ The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.”⁹⁵ In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.”⁹⁶

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.⁹⁷ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.⁹⁸

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.⁹⁹ Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹⁰⁰

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government metropolitan statistical area (MSA) construction industry, not discrimination by the municipality itself.¹⁰¹ The court found that the district court’s conclusion was directly contrary to

⁹² *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹³ *Id.* at 973.

⁹⁴ *Id.*

⁹⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

⁹⁶ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

⁹⁷ *Id.* at 973.

⁹⁸ *Id.*

⁹⁹ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 974.

the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.¹⁰²

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹⁰³ “[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*”¹⁰⁴ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹⁰⁵ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹⁰⁶

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹⁰⁷ The Tenth Circuit ruled that the local government can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹⁰⁸

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹⁰⁹

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business

¹⁰² *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁰³ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁰⁶ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹⁰⁹ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.¹¹⁰

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiable) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion."¹¹¹

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹¹²

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.¹¹³ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹¹⁴ It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."¹¹⁵

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and

¹¹⁰ *Id.* at 977.

¹¹¹ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹¹² *Id.* at 979-80.

¹¹³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹¹⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁵ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹¹⁶

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.¹¹⁷

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹¹⁸

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;

¹¹⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), affirmed, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹¹⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

¹¹⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181(10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹¹⁹

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”¹²⁰ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹²¹

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik (Drabik II)*, stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹²²

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District* also found that race- and ethnicity-based measures should be employed as a last resort.¹²³ The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”¹²⁴ The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state and local government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the

¹¹⁹ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²⁰ *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

¹²¹ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹²² *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730, 738 (6th Cir. 2000).

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

¹²⁴ 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

particular state or local government recipient's contracting and procurement market.¹²⁵ The cases considering challenges to a state government's implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard.

In *Northern Contracting* (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. The Illinois DOT (IDOT) here is acting as an instrument of federal policy, and Northern Contracting, Inc. (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."¹²⁶ The Seventh Circuit distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit held that IDOT's application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹²⁷ The Seventh Circuit analyzed IDOT's compliance with the federal regulations regarding the calculation of the availability of DBEs, the adjustment of its goal based on local market conditions, and its use of race-neutral methods set forth in the federal regulations.¹²⁸ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹²⁹ Accordingly, the Seventh Circuit affirmed the district court's decision upholding the validity of IDOT's DBE program.¹³⁰

The 2015 and 2016 Seventh Circuit decisions in *Dunnet Bay* and *Midwest Fence* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹³¹ The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹³²

The court found *Dunnet Bay* had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹³³ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and

¹²⁵ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

¹²⁶ 473 F.3d at 722.

¹²⁷ *Id.* at 722.

¹²⁸ *Id.* at 723-24.

¹²⁹ *Id.*

¹³⁰ *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹³¹ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹³² *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹³³ *Id.*

Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹³⁴

It is noteworthy that there appears to be a split in approach regarding implementation of the Federal DBE Program by state and local governments between the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE Program, and the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹³⁵ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*¹³⁶, which upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).¹³⁷

The court in *Dunnet Bay* held the Plaintiff lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.¹³⁸ The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.¹³⁹

Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity-, and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity-, and gender-neutral efforts to remedy identified discrimination.¹⁴⁰ And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.¹⁴¹

¹³⁴ 840 F.3d 932 (7th Cir. 2016).

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

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

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

¹³⁸ *Id.*

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

¹⁴⁰ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3^d Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁴¹ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n(CAEP I)*, 6 F.3d at 1008-1009 (3^d Cir. 1993).

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”¹⁴²

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial, and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state to acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁴³

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁴⁴

Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts),

¹⁴² *Croson*, 488 U.S. at 509-510.

¹⁴³ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179(10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁴⁴ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

the courts require evaluation of additional factors as listed above.¹⁴⁵ For example, to be considered narrowly tailored, courts have held that an MBE/WBE- or DBE-type program should include: (1) built-in flexibility; (2) good faith efforts provisions; (3) waiver provisions; (4) a rational basis for goals; (5) graduation provisions; (6) remedies only for groups for which there were findings of discrimination; (7) sunset provisions; and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.^{146, 147, 148, 149, 150, 151, 152, 153}

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.¹⁵⁴

These decisions regarding state DOTs, transit and transportation authorities, and recipients of federal financial assistance implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country are instructive to the legal framework and analysis and the study.

It should be noted that, as pointed out above and in Section C viii below, the *MAMCO* case, pending in district court in Kentucky, granted a preliminary injunction holding the Federal DBE Program's

¹⁴⁵ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁴⁶ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality ("AGC of Ca.")*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁴⁷ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁴⁸ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁴⁹ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass'n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964.

¹⁵² See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁵³ *Coral Constr.*, 941 F.2d at 925.

¹⁵⁴ *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); see, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

requirement of race and gender based presumptions unconstitutional, and the Interim Final Rule published by USDOT on October 3, 2025, which is effective immediately, amended and eliminated the race and gender based presumptions from the federal regulations. See, Section C viii below.

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Fourth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁵⁵ The courts, including the Fourth Circuit, have applied “intermediate scrutiny” to classifications based on gender.¹⁵⁶ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁵⁷

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

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁵⁸

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

¹⁵⁵ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); See generally, *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁵⁶ *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, generally, *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) (citing *Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *Contractors Association of Eastern Pennsylvania, Inc., et al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3^d Cir. 1996); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)).

¹⁵⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); .); see also, *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3^d Cir. 1996) *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

¹⁵⁸ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3^d Cir. 1996); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁵⁹

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.¹⁶⁰ The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁶¹

The Fourth Circuit in *H.B. Rowe* found that the disparity analysis demonstrated women-owned businesses won far more than their expected share of subcontracting dollars during the study period.¹⁶² Therefore, the court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects.¹⁶³ The court held the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires.¹⁶⁴

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁶⁵

The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender-based programs in connection with a challenge to the MBE program involved in that case.¹⁶⁶ The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.¹⁶⁷

The Tenth Circuit in *Concrete Works* stated as follows in connection with the type of evidence involving the participation of woman-owned business enterprises:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”).

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F.Supp 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”)

¹⁶¹ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁶² 615 F.3d 233 at 254.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 255.

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

¹⁶⁶ *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642, 644-45 (7th Cir. 2001).

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

Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”¹⁶⁸ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.¹⁶⁹ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁷⁰

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.¹⁷¹ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.¹⁷² But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁷³ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁷⁴ This evidence, the Court held, was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

Therefore, the Court in *CAEP I* affirmed the grant of summary judgment invalidating the gender preference for construction contracts.¹⁷⁵ The Third Circuit noted that it saw no impediment to the City re-enacting the gender preference if it could provide probative evidence of discrimination.¹⁷⁶

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁷⁷ When applying rational basis review under the Equal Protection Clause of the

¹⁶⁸ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁶⁹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁷⁰ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁷¹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; (4th Cir. 2010);

Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.¹⁷⁸

Courts, including in Virginia and the Fourth Circuit Court of Appeals, in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”¹⁷⁹ So long as a government legislature had a reasonable basis for adopting the classification, the law would pass constitutional muster.¹⁸⁰

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”¹⁸¹ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an

Price-Cornelison v. Brooks, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); see, e.g., *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (Va. 1986).

¹⁷⁸ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); see, *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (Va. 1986).

¹⁷⁹ See, e.g., *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007), citing *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (1986); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017).

¹⁸⁰ *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); see e.g. *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); see, *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *Finn v. Virginia Retirement SVS*, 259 Va. 144, 155, 524 S.E. 2d 125, 131 (Va. 2000); *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (Va. 1986).

¹⁸¹ *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); see e.g., *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia, et. al.*, 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc. et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017); *Gray v. Commonwealth of Virginia*, 247 Va. 290, 306-309, 645 S.E. 2d 448, 458-460 (Va. 2007); *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (Va. 1986).

imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.”¹⁸²

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”¹⁸³ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁸⁴

Under the federal standard of review, a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”¹⁸⁵

An informative example of the application of the rational basis standard is the Third Circuit in the *CAEP I* ruling regarding the City’s 2 percent preference for businesses owned by “handicapped” persons.¹⁸⁶ The district court struck down this preference under the rational basis test, based on the belief, according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by “handicapped” persons, and therefore that the City could not rely on testimony of discrimination against “handicapped” individuals.¹⁸⁷ The Court in *CAEP I* stated, however, that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose.”¹⁸⁸

The Third Circuit noted that the Supreme Court affirmed the permissiveness of this test in *Heller v. Doe*, indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.”¹⁸⁹ Moreover, “the burden is on the one attacking the legislative

¹⁸² *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); see e.g. *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc, et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017).

¹⁸³ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); see e.g., *Contractors Association of Eastern Pennsylvania, Inc., et. al. v. City of Philadelphia*, et. al., 91 F. 3d 586 (3d Cir. 1996); *Contractors Association of Eastern Pennsylvania, Inc, et. al. v. City of Philadelphia*, 6 F. 3d 990 (3d Cir. 1993); *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017).

¹⁸⁴ *Id.*; see, *Gray v. Commonwealth of Virginia*, 274 Va. at 308, 645 S.E. 2d at 459; *Carter v. Carter*, 232 Va. 166, 171-72, 349 S.E.2d 95, 98 (Va. 1986).

¹⁸⁵ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

¹⁸⁶ 6 F.3d *Id.* at 1011 (3d Cir. 1993).

¹⁸⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993), citing 735 F.Supp. at 1308.

¹⁸⁸ *Id.*, citing, *Cleburne*, 473 U.S. at 440.

¹⁸⁹ 6 F.3d at 1011, citing, 509 U.S. 312-43 (1993)

arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”¹⁹⁰

The City of Philadelphia in *CAEP I* stated it sought to minimize discrimination against businesses owned by “handicapped” persons and encourage them to seek City contracts. The Court in *CAEP I* agreed with the district court that these were legitimate goals, but unlike the district court, the Third Circuit held that the 2 percent preference was rationally related to this goal.¹⁹¹

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States (Firstline)* is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation, and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (FAR).¹⁹²

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (TSA) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”¹⁹³

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.¹⁹⁴ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”¹⁹⁵

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors ...” Consequently, the court held one rational method by which the government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.¹⁹⁶ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns ... the maximum practicable opportunity to participate as subcontractors ...”¹⁹⁷

i. Veterans preferences. The Commonwealth of Virginia considers the utilization of service-disabled veteran (SDV)-owned businesses in its contracting and procurement programs. The rational basis

¹⁹⁰ *Id.* at 1011; see, e.g., *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (quotation marks and citation omitted).

¹⁹¹ 6 F.3d at 1011.

¹⁹² 2012 WL 5939228 (Fed. Cl. 2012).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

standard has been applied by courts to preferences, bonuses, or benefits based on the status as a veteran in connection with legislation by state governments.

For example, in *Hooper v. Bernalillo County Assessor (Hooper)*, the Supreme Court in an instructive case addressed the constitutionality of a veterans preference statute.¹⁹⁸ In *Hooper*, a New Mexico statute exempted from the state's property tax the taxable value of property of veterans who served on active duty during the Vietnam War, but limited the exemption to veterans who were New Mexico residents before 1976.¹⁹⁹ The Court considered whether the New Mexico statute that grants a tax exemption limited to those Vietnam veterans who resided in the state before 1976, violated the Equal Protection Clause of the Fourteenth Amendment.²⁰⁰ The Court held that the New Mexico statute's residence requirement violates the guarantees of the Equal Protection Clause, applying a rational basis standard analysis.²⁰¹

The Court in *Hooper* noted that when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose.²⁰² The distinction New Mexico made between veterans who established residence before 1976 and those veterans who arrived in the State thereafter, the Court found, bears no rational relationship to one of the State's objectives: encouraging Vietnam veterans to move to New Mexico. *Id.* at 619. The legislature set this eligibility date long after the triggering event occurred.²⁰³

The Court found that one component of the second purpose rationale of the statute—rewarding veterans who resided in the State before 1976, for their military service—to support the statute's distinction between resident veterans was legitimate; the Court observed that “[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.”²⁰⁴ The various preferences for veterans are grounded in a “[d]esire to compensate in some measure for the disruption of a way of life ... and to express gratitude”²⁰⁵ Consistent with this policy, the State may award certain benefits to all its bona fide veterans, because it is then making neither an invidious nor irrational distinction among its residents.²⁰⁶ Resident veterans, as a group, may well deserve preferential treatment, and such differential treatment vis-à-vis non-veterans does not offend the Equal Protection Clause.²⁰⁷

Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence, the Court said the New Mexico statute's distinction between

¹⁹⁸ *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

¹⁹⁹ *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985)

²⁰⁰ *Id.* at 614.

²⁰¹ *Id.* at 624.

²⁰² *Id.* at 618.

²⁰³ *Id.*

²⁰⁴ *Id.* at 620 (*internal citations omitted*).

²⁰⁵ *Id.*, quoting, *Russell v. Hodges*, 470 F.2d 212, 218 (CA2 1972).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

resident veterans was not rationally related to the State's asserted legislative goal.²⁰⁸ The statute was not written to require any connection between the veteran's prior residence and military service. *Id.* The veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State at any time in the future, regardless of where he resided before, during, or after military service.²⁰⁹

The Court found the New Mexico statute creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the state after 1976 as in a sense "second-class citizens."²¹⁰ This discrimination on the basis of residence was not supported by any identifiable state interest; the statute is not written to benefit only those residents who suffered dislocation within the State's borders by reason of military service.²¹¹ The Court stated it has made clear that the Constitution will not tolerate a state benefit program that "creates fixed, permanent distinctions ... between ... classes of concededly bona fide residents, based on how long they have been in the State." *Id.* The Court held that neither the Equal Protection Clause, nor the Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit.²¹²

The Court held that the New Mexico veterans' tax exemption statute violated the guarantees of the Equal Protection Clause of the Fourteenth Amendment, ruling the statute did not satisfy the rational basis standard analysis.

In another instructive case regarding a civil rights action where a plaintiff challenged the constitutionality of giving a preference to veterans in civil service examinations, a district court held that provisions of the Pennsylvania Veterans' Preference Act granting a 10-point bonus to the score of any veteran receiving a passing grade on a state civil service examination were not violative of equal protection.²¹³ The court also held the bonus preference did not discriminate against women by reason of "acute" disproportion between men and women in the armed forces, and even if provisions did discriminate against women, the court said they may be justified as a recognition that experience, discipline, and loyalty that veterans gain in military service is conducive to better performance of public duties.²¹⁴ The court denied the request for declaratory and injunctive relief.²¹⁵

The court in *Feinerman v. Jones*, in considering the analysis to apply to a veteran preference, stated that an essential element of any analysis involving the equal protection clause requires a determination of the appropriate standard to be used by which to gauge the constitutionality of a given statute. The Court stated the traditional equal protection standard looks to the reasonableness of the classification in light of its possible intended purposes.²¹⁶ The classification must bear some rational relationship to a legitimate end and will be set aside as violative of the Equal Protection clause only if based on reasons

²⁰⁸ *Id.* at 622.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 623.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Feinerman v. Jones*, 356 F.Supp. 252 (1973) (M.D. Penn. 1973).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*, citing, *Shapiro v. Thompson*, 394 U.S. 618(1969).

totally unrelated to that goal.²¹⁷ Under this test, the Court said, the party challenging the constitutionality of a statute has the burden of proving that the statute denies him equal protection, and it will not be set aside if it is reasonably related to some permissible legislative or administrative purpose.²¹⁸

Since the abstract right to be fairly considered for public employment, according to the court, did not involve a “fundamental right” or “fundamental interest,” the “rational basis” test must be applied to test the validity of the Veterans' Preference Act.²¹⁹ The plaintiff has the burden of overcoming the presumption of constitutionality and of proving that veterans' preference is arbitrary and not reasonably related to some permissible legislative or administrative purpose.²²⁰

The Veterans' Preference Act, which awards a 10-point bonus to all veterans who have scored a passing grade on civil service tests, the court found, was typical of the many state and federal statutory provisions giving veterans' preference in public employment. Plaintiff contended that such a bonus for veterans was unconstitutional in that it denied equal protection of the law by creating two classes, veterans and non-veterans, extending to the former benefits which it denied to others.²²¹

The court found that there are three underlying justifications in most of these cases upholding the various Veterans' Preference Acts: (1) As a recognition that the experience, discipline, and loyalty which veterans gain in military service is conducive to the better performance of public duties; (2) As a reward for those veterans who, either involuntarily or through enlistment, have served their country in time of war; and (3) As an aid in the rehabilitation and relocation of the veteran whose normal lifestyle has been disrupted by military service.²²²

In adopting the Veterans' Preference Act, the court found the state legislature expressly recognized the first two reasons set out above as justifying giving preference to veterans. Section 2 of the Act provides that credit will be given to a veteran on appointment “for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country.”²²³ Similarly, in a case challenging the validity of granting a bonus to veterans under a prior veterans' preference provision, the court stated its purpose in this manner: “As a basis for appointment it is not unreasonable to select war veterans from candidates for office and to give them a certain credit in recognition of the discipline, experience and service represented by their military activity. No one should deny that these advantages are conducive to the better performance of public duties, where discipline, loyalty, and public spirit are likewise essential.”²²⁴

The court sustained the validity of granting a 15-point bonus to veterans taking appointment examinations, so long as the applicants initially received a passing grade. At the same time, however, the court struck down a provision of the statute granting 15 percent credit to all veterans taking the

²¹⁷ *Id. citing, McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969).

²¹⁸ *Id. citing, McGowan v. Maryland*, 366 U.S. 420 (1961).

²¹⁹ *Id.* at 258.

²²⁰ *Id.* at 259.

²²¹ *Id.* at 259.

²²² *Id.* at 259 *citing, Koelfgen v. Jackson*, 355 F.Supp. 243 (D.Minn. 1972).

²²³ *Id.*

²²⁴ *Id.* at 259 *quoting, Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, at 573, 3 A.2d 701, at 704 (1938).

examinations, regardless of whether they achieved a passing grade.²²⁵

4. Pending cases (at the time of this report) and informative recent decisions. There are recent court decisions and pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and federal programs with minority- and woman-owned business and social and economic disadvantaged business programs that may potentially impact and are informative and instructive to the study, including the following:

a. *Christian Bruckner et al. v. Joseph R. Biden Jr. et al.*, United States District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Dismissed, 2023 WL 2744026 (March 31, 2023). This was a challenge to the Federal DBE Program. Federal Defendants’ Motion to Dismiss was Granted and Plaintiffs’ Motion for Preliminary Injunction Denied on March 31, 2023. Judgment entered on April 3, 2023. Case did not reach merits.

b. *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration (SBA)* 993 F.3d 353, 2021 WL 2172181 (6th Cir. May 27, 2021). The President signed the American Rescue Plan Act of 2021 (ARPA). H.R. 1319, 117th Cong. (2021). As part of ARPA, Congress appropriated \$28.6 billion to a Restaurant Revitalization Fund (RRF) and tasked the Administrator of the SBA with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. Under the ARPA, the Administrator prioritized awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

The Court stated that the government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a “generalized assertion that there has been past discrimination in an entire industry.” Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government “show[s] that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of [a] local ... industry,” then the government can act to undo the discrimination. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the discriminatory disbursement of RRF was not narrowly tailored to further that interest.

c. *Greer’s Ranch Café v. Guzman*, 2021 WL 2092995 (N.D. Tex. 5/18/21), United States District Court for the Northern District of Texas. Similar to *Vitolo*, above, Greer sought monetary relief under the \$28.6 billion RRF created by ARPA and administered by the SBA. The court held that Plaintiffs were likely to succeed on the merits of their claim that Defendants’ use of race-based and sex-based preferences in the administration of the RRF violated the Equal Protection Clause of the Constitution. The court granted Plaintiffs’ motion for a temporary restraining order (TRO), and enjoined Defendants to process Plaintiffs’ application for an RRF grant.

d. *Faust v. Vilsack*, 2021 WL 2409729, United States District Court, E.D. Wisconsin (June 10, 2021). The court granted Plaintiffs’ motion for a TRO holding the federal government’s use of racial classifications in awarding funds under the United States Department of Agriculture (USDA) loan-forgiveness program

²²⁵ *Id.*

was unconstitutional. The court held, “Defendants have not established that the loan forgiveness program ... is narrowly tailored and furthers compelling government interests.”

e. *Wynn v. Vilsack*, 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, United States District Court for the Middle District of Florida. This is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, 2021) case in the district court in Wisconsin. The court granted the Plaintiffs’ Motion for Preliminary Injunction holding the federal Defendants (the United States Secretary of Agriculture) enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of ARPA. The court held the government did not satisfy the strict scrutiny standard as it did not establish a compelling government interest or that the program was narrowly tailored.

f. *Ultima Services Corp. v. USDA, SBA, et al.*, 2023 WL 4633481 (July 19, 2023), United States District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW. The court declared that Defendants’ use of the rebuttable presumption of social disadvantage to certain minority groups to qualify them for inclusion in the federal Section 8(a) Program violated Ultima’s Fifth Amendment right to equal protection of the law. The court ordered that Defendants were enjoined from using the rebuttable presumption of social disadvantage in administering the SBA’s 8(a) Program, holding the federal defendants did not satisfy the strict scrutiny standard as they did not establish a compelling government interest for their use of the rebuttable presumption and that presumption was not narrowly tailored to serve the asserted interest.

g. *Nuziard, et al. v. the Minority Business Development Agency (MBDA), et al.*, 721 F. Supp. 3d 431 (N.D. Tex. 2004), appeal dismissed, 2024 WL 5279784 (5th Cir. 2024); 2023 WL 3869323 (June 5, 2023), United States District Court for the Northern District of Texas, Fort Worth Division, Case No. 4:23-cv-00278. On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (Infrastructure Act), creating the newest federal agency: the MBDA. Plaintiffs alleged this agency is dedicated to helping only certain businesses based on race or ethnicity. The court granted the Plaintiffs’ Motion for Preliminary Injunction in June 2023, and Motion for summary Judgment in March 2024, holding the MBDA statute is unconstitutional, finding the federal defendants did not produce sufficient evidence of a compelling government interest, that the MBDA’s racial presumption is not narrowly tailored, and thus the MBDA did not satisfy the strict scrutiny standard.

h. *Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et al.*, 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024); 2024 WL 4267183 (Sept. 23, 2024), United States District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFV. Plaintiffs filed this suit challenging the Federal DBE Program. Plaintiffs sought a preliminary and permanent injunction, and a declaratory judgment, that the Federal DBE Program, including Sections 11101(e)(2) and (3) of the Infrastructure Act and corresponding federal regulations, is unconstitutional because it violates the Equal Protection Clause of the United States Constitution. Plaintiffs’ Motion for Preliminary Injunction was granted that enjoined enforcement of the Federal DBE Program as applied to the Plaintiffs in each state they bid or operate in. The court enjoined USDOT from mandating the use of race- and gender-based rebuttable presumptions for certain groups regarding its contracts impacted by DBE goals. The parties filed a joint motion to stay the case for 90 days as USDOT is considering its position whether or not to defend the Federal DBE Program in light of the Executive Orders issued by the President on January 21, 2025 prohibiting DEI, affirmative action and preference

programs based on race or gender. A motion to intervene was filed by certain groups seeking to join the case and support and defend the Federal DBE Program. Plaintiffs opposed the motion. The motion to intervene (referred to as Intervenor DBEs) was granted by the United States Magistrate Judge on May 21, 2025.

On May 28, 2025, Plaintiffs and Defendants filed a motion for entry of a proposed consent order as a final order and judgment in the case. The proposed consent order states that the parties are aware of the order filed by the Magistrate Judge granting the Intervenor DBEs' motion to intervene as Defendants in this case, and that Plaintiffs and USDOT make no representation as to the position of the Intervenor-Defendants.

The proposed consent order provides in part that the Defendants have determined the Federal DBE Program's use of race-and sex- based presumptions is unconstitutional. The proposed consent order requests the court hold that Defendants may not approve any federal, state, or local USDOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race-or sex-based presumption.

In June 2025, 21 states filed a Motion for Leave to file a brief Amici Curiae in support of the Joint Motion for Entry of the proposed Consent Order. Also, two non-DBE contractors filed a response to the Joint Motion for Entry of Consent Order by seeking intervention to have the consent order and a permanent injunction apply equally to them. In addition, in June 2025, a multistate coalition of 22 state attorneys general filed an Amicus Curiae brief opposing the proposed consent order. And, in June 2025, a group of Local Governments, Local Government Agencies, and Local Government Officials filed a Motion for Leave to File a Brief as Amici Curiae in Support of Intervenor's Opposition to Joint Motion for Entry of consent order.

The court in July 2025 denied the motion by the two non-DBE contractors to intervene and granted certain motions to file briefs as Amici Curiae. The attorney general of Virginia is not among the attorneys general of the states that filed the motions in support of or in opposition to the proposed consent order. The case is pending at the time of this report.

i. *Landscape Consultants of Texas, Inc. et. al. v. City of Houston, Texas, et. al.*, United States District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:23-cv-3516. Challenge to the Houston MBE Program. Pending.

j. *Mechanical Contractors Assoc. of Memphis, Inc. v. Shelby County, Tennessee, et al.*, United States District Court for the Western District of Tennessee, Case No. 2:24 -cv- 02420 -JTF, Complaint filed November 6, 2024. Challenge to the County MBE Program. Pending.

k. *Aerospace Solutions, LLC v. Abott in his official capacity as Governor of the state of Texas, et al.*, United States District Court for the Western District of Texas, Civ. Action No. 1:24-cv-1383, Complaint filed November 13, 2024. Challenge to the Texas HUB Program. Pending.

l. *Landscape Consultants of Texas Inc. v. Harris County Texas et al.*, United States District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:25cv479. Complaint filed February 5, 2025. Challenge to the County MBE Program. Pending.

m. *Holman v. Vilsack*, 117 F.4th 906 (6th Cir. 2024), petition for certiorari docketed, May 7, 2025. A White farmer brought action against the USDA Secretary seeking a declaration that the provision of ARPA providing emergency assistance in the COVID-19 pandemic's wake in the form of debt relief for "socially disadvantaged" farmers and ranchers who were Black, American Indian/Alaskan Native, Hispanic, Asian, and Hawaiian/Pacific Islander, violated the Fifth Amendment's equal protection guarantee. A United States District Court in Tennessee, 2021 WL 2877915, granted the farmer's motion for a preliminary injunction enjoining the government from implementing the provision. Subsequently, the provision was repealed and the parties stipulated to the case's dismissal. The Plaintiff moved for attorney fees and costs as a prevailing party under the Equal Access to Justice Act (EAJA). The District Court denied the motion, and Plaintiff appealed to the Sixth Circuit.

The Sixth Circuit Court of Appeals, in a 2-to-1 decision, held that the government's litigation position was substantially justified, precluding EAJA award, despite granting the preliminary injunction. Instructive is the court's analysis of the government's position regarding satisfying the strict scrutiny standard to remedy past discrimination as "substantially justified," and applying the *Croson* and *Vitolo* cases.

Plaintiff/appellant has filed for writ of certiorari to the U.S. Supreme Court, which was docketed on May 7, 2025.

This list of pending cases and informative recent decisions is not exhaustive, but in addition to the cases cited previously and discussed *infra* may potentially have an impact on the study and implementation of MBE/WBE/DBE programs, related legislation, implementation of the Federal DBE Program by state and local governments and public authorities and agencies, and other types of programs impacting participation of MBE/WBE/DBEs.

For example, there are other recent cases similar to *Faust v. Vilsack*, 21-cv.-548 (E.D. Wis.) and *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) cited and discussed above, including a class action filed in *Miller v. Vilsack*, 2021 WL 11115194, 4:21-cv-595 (N.D. Tex. 2021), and separate lawsuits seeking to enjoin USDA officials from implementing a loan-forgiveness program for farmers and ranchers under Section 1005 of ARPA by asserting eligibility to participate in program based solely on racial classifications violated equal protection. *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.).

Many of these cases had granted the federal Defendants Motions to Stay pending resolution of the class action challenge to Section 1005 of the American Rescue Plan Act of 2021 in the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class action litigation. As a result of the federal government's later repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties in many of these cases filed Stipulations of Dismissal, and the cases in September 2022 have been dismissed by the Courts.

5. January 2025 Executive Orders (EOs). At the time of this report, the President has issued multiple Executive Orders involving the prohibition and elimination of DEI programs and preferences

and affirmative action programs concerning federal contractors and subcontractors in connection with federally funded projects. These EOs include a January 21, 2025 EO No. 14173, eliminating EO No.11246. EO No. 11246 required federal contractors to take affirmative action to ensure applicants and employees are treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

On January 21, 2025, the president issued EO No. 14173 entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” The EO instructs federal agencies to take administrative and legal action against DEI programs, which it defines as systems of race- and sex-based preferences. The EO is directed at both public- and private-sector conduct. The EO "instructs the Office of Federal Contract Compliance Programs to immediately cease: "(A) Promoting 'diversity;' (B) Holding Federal contractors and subcontractors responsible for taking 'affirmative action;' and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin." It also instructs the Attorney General to submit a report containing recommendations for "enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including [diversity equity and inclusion]." That report is due on May 21, 2025.

On January 20, 2025, the President issued the EO titled "Ending Radical and Wasteful Government DEI Programs and Preferencing" that terminates "all discriminatory programs, including illegal DEI" and "diversity, equity, inclusion, and accessibility" (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government" and terminates all "equity action plans," " equity" actions, initiatives, or programs, equity-related grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.

Certain of these EOs and their application are being challenged in court in cases pending at the time of this report. It is not clear if these EOs specifically may impact local and state government programs that implement contracting goals and do not involve federal funds or financial assistance.

6. February 5, 2025 Attorney General Memorandum. On February 5, 2025, the United States Attorney General issued a Memorandum titled “ Ending Illegal DEI And DEIA Discrimination and Preferences”. The Memorandum provides: “To fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.”

This Attorney General Memorandum “is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex.”

The Attorney General Memorandum provides that by March 1, 2025, “consistent with Executive Order 14173, the Civil Rights Division and the Office of Legal Policy shall jointly submit a report to the Associate Attorney General containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA”

It is not clear at the time of this report whether this Memorandum and any report issued by the Attorney General will impact or potentially apply to certain local and state government programs that use contracting goals for contractors and do not involve federal funds or financial assistance.

Thus, this Appendix report does not address these EOs and the Attorney General Memorandum. There have been challenges in court to these EO, for which cases are pending.

A federal district court in the District of Maryland has entered a nationwide preliminary injunction against the EOs that target DEI type programs. See, *Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, 2025 WL 573764 (D. Md. Feb. 21, 2025). This order was based on finding EO 14173 void for vagueness and violates the First Amendment.

In addition, there is a February 13, 2025 letter from 16 state Attorneys General regarding: "Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives." The letter provides guidance supporting "the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as 'DEI' or 'DEIA' initiatives) in creating and maintaining legally compliant and thriving workplaces." The letter appears to be in response to the recent EOs. The Attorney General of the State of Minnesota is one of the signatories to the February 13, 2025 letter.

7. Title VI Complaints against the State of New York MWBE Program and Wisconsin Department of Administration (DOA) for Supplier Diversity Program. Title VI Complaints have been filed with USDOJ by Contractors for Equal Opportunity, a nationwide association of companies alleged to have been negatively impacted by race discrimination in government contracting programs. A separate civil rights complaint under Title VI of the Civil Rights Act of 1964 was filed against both the New York Department of Economic Development (DED) and the Wisconsin DOA for their alleged respective discriminatory Minority and Women-Owned Business Enterprise Program (MWBE Program) and Supplier Diversity Program. DED and DOA are recipients of federal funds, and therefore, the Complaints allege, are subject to the nondiscrimination provisions of Title VI. The complaints state they are being filed with USDOJ because DED and DOA receive federal grants from multiple federal agencies.

The complaints ask USDOJ to open an investigation into a state-based supplier and procurement program they allege discriminates against small businesses based on race. The complaints allege that many states operate similar programs, which are similar to the Federal DBE Program. If that federal program is unconstitutional, then the complaints allege, these state-based counterparts are similarly unconstitutional. The complaints request that USDOJ investigate these programs and determine that they are operating in violation of Title VI. Each state agency operating such a program, the complaints allege, receives federal funds and is therefore bound by Title VI and subject to USDOJ's jurisdiction.

The complaints allege that DED and DOA cannot offer any justification to defend their MWBE and Supplier Diversity type programs, which illegally discriminate by enforcing a percentage goal utilization rate for minority- and women-owned businesses in state procurement and contracting. The complaints allege that under *SFFA* (which was a Title VI case), programs like these must pass several independent tests, which DED and DOA cannot satisfy.

First, the complaints allege that DED's and DOA's programs are illegal because they do not remedy "specific, identified instances of past discrimination that violated the Constitution or a statute." Second, the complaints allege, DED or DOA cannot "articulate a meaningful connection between the means they

employ and the goals they pursue.” For example, DED and DOA, the complaints allege, employ the same type of “overbroad” and “imprecise” racial categories employed by Harvard and North Carolina.

Third, the complaints allege, DED’s and DOA’s programs use race as a “negative.” White business owners cannot bid on equal footing with minority-owned firms, which the complaints allege have a preference and exclusive access to resources based on race.

Fourth, the complaints allege DED’s and DOA’s programs further “stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.” Fifth, DED’s and DOA’s programs allegedly have no “logical end point. Under *SFFA*, the complaints allege, a race-based government program must meet all five of these requirements to comply with Title VI, and DED and DOA cannot meet any of these requirements.

Based on this evidence, the complaints ask that USDOJ open a formal investigation and find that DED’s and DOA’s MWBE and Supplier Diversity Programs violate Title VI. The complaints assert that corrective action should include, at a minimum, a requirement that the program be open to all businesses regardless of race, or that the programs should be terminated immediately so that all procurement and contracting decisions at DED and DOA are race-neutral.

8. July 29, 2025 USDOJ Memorandum For All Federal Agencies. The USDOJ Memorandum, dated July 29, 2025 (the DOJ Guidance), provides guidance to all federal agencies regarding “the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (‘DEI’) programs.”

The DOJ Guidance provides in its Introduction: Entities receiving federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race, color, national origin, sex, religion, or other protected characteristics—no matter the program’s labels, objectives, or intentions. In furtherance of that requirement, this guidance identifies “Best Practices” as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls; these are not mandatory requirements but rather practical recommendations to minimize the risk of violations.

The following provides some key provisions of the USDOJ Memorandum.

a. Executive summary. This guidance emphasizes the significant legal risks of initiatives that involve discrimination based on protected characteristics and provides non-binding best practices to help entities avoid the risk of violations. Key points include:

i. Prohibition on protected characteristics as criteria: Using race, sex, or other protected characteristics for employment, program participation, resource allocation, or other similar activities, opportunities, or benefits, is unlawful, except in rare cases where such discrimination satisfies the relevant level of judicial scrutiny.

b. Key federal antidiscrimination provisions and law. Federal antidiscrimination laws prohibit discrimination on the basis of protected characteristics, including race, color, religion, sex, and national origin. The USDOJ Memorandum provides that the United States Supreme Court has consistently held

that policies or practices based upon protected characteristics are subject to rigorous judicial scrutiny. Race-based classifications are subject to strict scrutiny, requiring a compelling governmental interest and narrowly tailored means to achieve that interest. Sex-based classifications, the USDOJ Memorandum provides are subject to heightened scrutiny, requiring an exceedingly persuasive justification and substantial relation to an important governmental objective.

c. Unlawful discriminatory policies and practices. The following is a non-exhaustive list of unlawful practices that USDOJ provides could result in revocation of grant funding. Federal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.

i. Granting preferential treatment based on protected characteristics: What constitutes unlawful preferential treatment? Preferential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as "preferential" to certain groups. Such practices violate federal law unless they meet very narrow exceptions.

ii. Prohibited use of proxies for protected characteristics: Examples of potentially unlawful proxies: "Overcoming obstacles" narratives or diversity statements: A federally funded program requires applicants to describe obstacles they have overcome" or submit a "diversity statement" in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.

iii. Segregation based on protected characteristics: What constitutes unlawful segregation? Segregation based on protected characteristics occurs when a federally funded entity organizes programs, activities, or resources—such as training sessions—in a way that separates or restricts access based on race, sex, or other protected characteristics. Such practices generally violate federal law by creating unequal treatment or reinforcing stereotypes, regardless of the stated goal (e.g., promoting inclusion or addressing historical inequities). Exceptions are narrow and include only cases where federal law expressly permits race-based remedies for specific, documented acts of past discrimination by the institution itself or in specialized contexts such as correctional facilities where courts have recognized compelling institutional interests.

iv. What constitutes unlawful use of protected characteristics? Unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for employment (e.g., hiring, promotions), contracts (e.g., vendor agreements),

v. Examples of unlawful practices: Sex-based selection for contracts: A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion, such as policies favoring "minority- or women-owned" businesses without satisfying the appropriate level of judicial scrutiny.

vi. Recommendations on best practices:

Focus on skills and qualifications: Base selection decisions on specific, measurable skills and qualifications directly related to job performance or program participation. For example, rather than asking about "cultural competence," assess specific skills such as language proficiency or relevant educational credentials. Criteria like socioeconomic status, ... must not be used if selected to prioritize individuals based on racial, sex based, or other protected characteristics.

Include nondiscrimination clauses in contracts to third parties and monitor compliance: Incorporate explicit nondiscrimination clauses in grant agreements, contracts, or partnership agreements, requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics. Monitor third parties that receive federal funds to ensure ongoing compliance, including reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices. Terminate funding for noncompliant programs.

d. Conclusion. The USDOT Guidance provides that the recommended best practices in this guidance are: "non-binding suggestions to help entities comply with federal antidiscrimination laws" and "practical recommendations to minimize the risk of violations."

9. Indiana DOT (INDOT) Request for Waiver of Race and Gender Conscious Requirements of the Federal DBE Program: September 5, 2025, Signed by 16 other state Attorneys General.

General. The State of Indiana Attorney General has sent a letter to USDOT in support of a Request for Waiver of Race and Gender Conscious Requirements of the Federal DBE Program submitted by INDOT. INDOT seeks a waiver of its obligation to apply INDOT's race and gender presumption in how it awards contracts in the Department's highway, transit, and airport financial assistance programs. The letter is signed by 16 other state Attorneys General. The Attorney General of Virginia did not sign the letter. The letter provides that "the waiver is needed to provide temporary relief for INDOT from unconstitutional requirements contained in the Department's regulations. In addition, the letter says: "If and when other state departments of transportation file similar requests for waiver with the Department, it should, for the same reason, grant such requests as well."

The letter asserts that: "In administering the program, state departments of transportation like INDOT are forced, by the Department's regulations, to apply a presumption that any small business owned by a woman or a member of certain minority groups is socially and economically disadvantaged and therefore eligible for funds set aside as part of the program. Businesses owned by men or non-minorities do not benefit from any such presumption and are therefore at a disadvantage when competing for funds reserved for DBEs." The letter states that this is race and gender discrimination.

Therefore, the letter concludes that USDOT should "alleviate the constitutional harm its regulations are inflicting on INDOT and contractors in Indiana and across the United States. It can do so by granting INDOT—and other state departments of transportation that may submit requests in the future—waivers from the regulations that impose the presumption."

The letter claims that the DBE race and gender presumption is unconstitutional, citing *SFFA*. The letter states that: While "remediating past instances of discrimination may in some instances serve as a compelling interest that withstands strict scrutiny, that is true only where there is a clear 'showing of prior discrimination by the governmental unit involved' that the racial classification is meant to address. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)." Citing Supreme Court cases, the letter asserts

that the discrimination to be remedied must be specifically identified—“[a] generalized assertion of past discrimination in a particular industry or region is not adequate,” and it must be the result of “past intentional discrimination.” Further, the letter argues quoting *Croson*, 488 U.S. 469, 497 (1989), a “statistical disparity” alone, except perhaps in very rare cases, will generally not “demonstrat[e] the kind of prior discrimination in hiring or promotion that would justify race-based relief.”

The letter notes that it will not “rehearse here all of the reasons why the racial and gender presumption of the DBE program fails to satisfy this test. Those reasons are set out persuasively by the Court in *MAMCO*, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024).” USDOT, the letter points out, “has acknowledged the presumption’s illegality in a motion for a proposed consent order filed in that case. See *Mid-Am. Milling Co., LLC v. United States Dep’t of Transportation*, 3:23-cv-00072, Dkt. 82, Joint Motion (May 28, 2025).”

The letter provides that: “We write to ask the Department to exercise its administrative authority to grant waivers to the requirements of the DBE program to relieve INDOT of the unlawful requirements of 49 CFR § 26.67 and associated provisions of the DBE regulations.” The letter references EO No. 14151, entitled “Ending Radical and Wasteful Government DEI Programs and Preferencing,” and EO No. 14173, entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” The letter also references that USDOT’s “DBE regulations expressly empower the Department to provide that relief, at least temporarily while litigation over the presumption proceeds. In relevant part, the regulations provide that states may apply for, and the Department may grant, a ‘waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts.’ 49 CFR § 26.15(b).”

The letter also points out that “courts that have previously (and incorrectly) upheld the race and gender presumption against equal protection challenges have specifically noted that the waiver provision of 49 CFR § 26.15 gives the Department flexibility to prevent, at least to some degree, the race and gender presumption from leading to constitutional violations. See *Sherbrooke Turf*, 345 F.3d 964, 972 (8th Cir. 2003) (concluding that the DBE program’s racial components were narrowly tailored for purposes of strict scrutiny in part because “DOT may grant an exemption or waiver from any or all requirements of the program”). Through grant of a waiver, standards within the DBE program, the letter states, “can be relaxed if uncompromising enforcement would yield negative consequences.” Quoting *Midwest Fence*, 840 F.3d 932, 943 (7th Cir. 2016).

The letter references other reasons but concludes that “paramount among the reasons to grant the waiver—and a reason that on its own is sufficient—is the fact that, without the waiver, INDOT will continue to be subjected to the Department’s unconstitutional and unjustifiable requirements that INDOT select contractors based on race and gender.”

10. The October 3, 2025 USDOT Interim Final Rule (IFR), September 30, 2025 Guidance, and USDOT Official FAQs. On October 3, 2025, USDOT issued a new IFR and made it effective immediately.

The IFR notes that “in light of DOT’s and DOJ’s determination that the DBE program’s race- and sex-based presumptions are unconstitutional, DOT is issuing this IFR to remove the presumptions from the DBE program regulations set forth in 49 CFR Part 26.” The IFR and USDOT Guidance to the IFR provide that “because the ACDBE presumptions are functionally identical and suffer the same constitutional

infirmity, this IFR also removes the presumptions from the ACDBE regulations set forth in 49 CFR Part 23.” The IFR and Guidance state that “while also eliminating the effects of the unconstitutional presumptions and reliance in whole or in part on claims of disadvantage based on race or sex, this IFR requires each Unified Certification Program (UCP) to reevaluate any currently certified DBE or ACDBE, to recertify any DBE or ACDBE that meets the new certification standards, and to decertify any DBE or ACDBE that does not meet the new certification standards.” The IFR includes certain requirements that apply during the pendency of this reevaluation process.

The Guidance and IFR provide:

“The Interim Final Rule removes race- and sex-based presumptions from the definitions of “socially and economically disadvantaged individual,” and instead provides that the owner of a DBE or ACDBE applicant must demonstrate on a case-by-case basis that the individual meets the criteria described in 49 CFR § 26.67.”

The IFR changes the definition of “socially and economically disadvantaged individual” in § 26.5 to remove the race- and sex-based presumptions “that DOT and DOJ and have found to violate the Fifth Amendment. Under the revised rule, any individual seeking to demonstrate that he or she is a “socially and economically disadvantaged individual” will be required to make the same individualized showing of disadvantage, regardless of the individual’s race or sex.”

The Guidance specifies “Section 26.67 provides, in turn, that an owner must:

- (1) Demonstrate that the owner is socially and economically disadvantaged based on his or her own experiences and circumstances that occurred within American society, and without regard to race or sex;
- (2) submit to the certifier a personal narrative establishing the existence of disadvantage by a preponderance of the evidence based on individualized proof regarding specific instances of economic hardship, systemic barriers, and denied opportunities that impeded the owner’s progress or success in education, employment, or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons;
- (3) state how and to what extent the impediments caused the owner economic harm, including a full description of type and magnitude, and establish the owner is economically disadvantaged in fact relative to similarly situated non-disadvantaged individuals;
- (4) state how and to what extent the impediments caused the owner economic harm, including a full description of type and magnitude; and
- (5) attach to the Personal Narrative a current personal net worth statement and any other financial information the owner considers relevant.”

The Guidance provides under the IFR, that each UCP established pursuant to 49 CFR § 26.81 must immediately begin to apply these new certification standards. The IFR “requires each UCP to reevaluate all current DBEs and ACDBEs, to recertify any DBE or ACDBE that meets the new certification standards, and to decertify any DBE or ACDBE that does not meet the new certification standards. The decertification procedures of 49 CFR § 26.87 do not apply to any decertification decisions under this process.”

The Guidance points out that the IFR provides “that until a UCP completes the reevaluation process outlined above, each recipient covered by that UCP may not: (1) include DBE contract goals or concession-specific ACDBE goals; or (2) count any participation toward overall DBE or ACDBE goals. These requirements will ensure that existing DBEs and ACDBEs do not continue to receive any benefits as a result of their certification under the old standards.” And, the IFR “provides that until a UCP completes the reevaluation process, no recipient covered by that UCP shall be subject to the compliance provisions of 49 CFR § 23.57 or 49 CFR § 26.47. Recipients will also not be required to update their overall goals during this process.”

The comment period for the IFR ended on November 3, 2025.

USDOT issued on October 24, 2025, its Official Frequently Asked Questions (FAQs) on USDOT’s DBE Program and ACDBE Program Implementation Modifications IFR. These FAQs are posted on the USDOT website, and respond to questions and responses regarding the IFR, including: timing of the required changes by recipients; contracting questions; prohibitions of terminations of DBEs during the reevaluation period; how does the IFR affect projects that are currently authorized/advertised and projects/contracts already awarded that have DBE goals; recipients should issue amendments to project advertisements to remove a DBE goal; certification reevaluation process and requirements; goal setting and counting requirements; new certification applications; and related matters.

This Appendix report does not address further the EOs, the Attorney General Memorandum, or USDOJ investigations referenced above, which are in flux at this time. There have been challenges to the EOs, which are pending. For example, a federal district court in the District of Maryland has entered a nationwide preliminary injunction against the EOs that target DEI type programs. See, *Nat’l Ass’n of Diversity Officers in Higher Education v. Trump*, 2025 WL 573764 (D. Md. Feb. 21, 2025). This order is based on finding EO No. 14173 is void for vagueness and violates the First Amendment.

In addition, it is noteworthy that there is a February 13, 2025 letter from 16 states' Attorneys General regarding: “Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives.” The letter provides guidance supporting “the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as “DEI” or “DEIA” initiatives) in creating and maintaining legally compliant and thriving workplaces.” The letter appears to be in response to the recent EOs. The Attorney General of Virginia is not one of the signatories to the February 13, 2025 letter.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE programs, or race-, ethnicity-, or gender-neutral programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds, including public agencies, commissions, and authorities. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Fourth Circuit Court of Appeals

1. *H.B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010). The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.) The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with NCDOT. Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part, and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (DBE) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4, and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 quoting section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision that was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

a. Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 quoting *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, quoting *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, citing *Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (Fourth Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

b. Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 *quoting Hogan*, 458 U.S. at 726.

c. Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, *quoting West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

d. Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group

won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group's participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, *quoting Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id.*, *citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the five-year period ending in June 2003. (The study was published in 2004.) *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n.6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five-year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans, the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data—reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf*, 345 F.3d 964, 973 (Eighth Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated in state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's

response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

e. Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In

addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

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

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

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

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

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

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250.

The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

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

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

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

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

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

i. Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The

Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, citing *Adarand Constructors v. Slater*, 228 F.3d at 1179 (quoting *United States v. Paradise*, 480 U.S. 149, 178 (1987)).

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

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

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

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

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

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

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

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the

Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

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

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

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

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

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

2. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, NCDOT, et al. (Rowe)*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010). In *Rowe*, the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

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

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

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

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

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

b. March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants’ Motion to Dismiss or for Partial Summary Judgment, defendants’ Motion to Dismiss the Claim for Mootness and plaintiff’s Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants’ Motion to Dismiss or for

partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the

NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

c. September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women, and finally, the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

d. December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina MWBE Program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and NCDOT, while administering the MWBE Program, violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

e. North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE Program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE Program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE Program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the

items of work to be included in the contract.” *Id.* NCDOT would also consider “the annual goals mandated by Congress and the North Carolina General Assembly.” *Id.*

A firm could be certified as an MBE or WBE by showing NCDOT that it is “owner controlled by one or more socially and economically disadvantaged individuals.” N.C. Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE Program did not directly discriminate in favor of minority and women contractors, but rather “encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998, and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE Program, as amended after the 2004 study, includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE Program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

f. Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE Program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state-funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

g. Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

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

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

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

3. *Associated Utility Contractors of Maryland, Inc. (AUC) v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002). This case is instructive because the court found the EO of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

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

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

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

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

4. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc. (MMCA)*, 83 F. Supp.2d 613 (D. Md. 2000). Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000).

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant MMCA opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the

City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for MWBEs, which had been established at 20 percent and 3 percent, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

a. Facts and procedural history. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20 percent of the value of subcontracts be awarded to MBEs and 3 percent to WBEs. *Id.* at 615. As permitted under then-controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of "[p]ast discrimination in the City's contracting process by prime contractors against minority and women's business enterprises" *Id.* The City Council also found that "[m]inority and women's business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;" that "[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these

problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority- and women-owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20 percent MBE and 3 percent WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20 percent MBE and 3 percent WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this lawsuit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20 percent and 3 percent goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

b. AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have

individual standing in their own right to challenge the constitutionality of the City's set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

c. Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City's set-aside goals required AUC members to "select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors" in order to bid successfully on City public works contracts for work exceeding \$25,000 ("City public works contracts"). *Id.* at 618. AUC claimed, therefore, that the City's set-aside goals violated the Fourteenth Amendment's guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* citing *Croson*, 488 U.S. at 493-95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a "two step analysis for evaluating a race-conscious remedy." *Id.* at 619 citing *Maryland Troopers Ass'n*, 993 F.2d at 1076. "First, the [government] must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary....' 'Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of

racial inferiority or simple racial politics.” *Id.* at 619, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076 (citing *Croson*).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

d. Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, quoting *Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson’s* evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

e. Preenactment versus postenactment evidence. In evaluating the first step of the *Croson* test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action

was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth

Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon postenactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that postenactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911-12 (11th Cir.1997), cert. denied, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

f. City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20 percent for MBEs and 3 percent for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is

not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in-process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

g. Holding. The court held that for these reasons it entered the injunction against the City in December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

APPENDIX C.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to estimate the availability of businesses located in Virginia for the construction, professional services, and non-professional services and goods prime contracts and subcontracts Commonwealth of Virginia state agencies and higher education institutions (collectively referred to as *the Commonwealth*) award. Appendix C expands on the information presented in Chapter 6 to further describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument; and
- D. Survey execution.

A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with thousands of businesses throughout the *relevant geographic market area (RGMA)*, which we identified as the state of Virginia. Davis Research surveyed businesses with locations in the RGMA that perform work in fields closely related to the types of contracts and procurements the Commonwealth awarded between July 1, 2019 and June 30, 2024 (*the study period*). We began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract the Commonwealth awarded during the study period and identified 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about local businesses D&B listed as having their primary lines of business within those work specializations. Davis Research attempted to contact each of those businesses multiple times on different days of the week and at different times of the day to ask them to participate in an *availability survey*. In total, we attempted to contact 21,357 local businesses that perform work relevant to Commonwealth contracting and procurement. We were able to successfully contact 3,609 of those businesses, 1,565 of which completed surveys.

B. Representative Businesses

The objective of the availability analysis was not to collect information about every business operating in the RGMA but instead was to collect information from a large, unbiased subset of local businesses that appropriately represent the entire relevant business population. That approach allowed BBC to estimate the availability of small and microbusinesses, as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses, for Commonwealth work in an accurate, statistically valid manner.¹ In addition, we did not design the survey effort to contact every local business possibly performing construction, professional services, or non-professional services and goods work. Instead, we reviewed the relevant prime contract and subcontract dollars the Commonwealth awarded during the study

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

period, determined the types of work most relevant to those projects, and limited our survey efforts to those businesses that perform work aligned with those work types. Figure C-1 lists the 8-digit work specialization codes within construction, professional services, and non-professional services and goods most related to the contract and procurement dollars the Commonwealth awarded during the study period, on which BBC focused as part of the availability analysis. We grouped those specializations into distinct subindustries, which are shown as headings in Figure C-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect extensive information from relevant businesses located in the RGMA. As an example, the instrument the study team used with construction businesses is presented at the end of Appendix C. We modified the construction survey instrument slightly for use with businesses working in the professional services and non-professional services and goods industries to reflect terms more commonly used in those industries and to collect information specifically relevant to them.² (For example, BBC substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services businesses.)

1. Survey structure. The availability survey included 15 sections, and Davis Research attempted to cover all sections with each business the firm successfully contacted.

a. Identification of purpose. The survey began by identifying the Commonwealth as the survey sponsor and describing the purpose of the study. (e.g., “The Commonwealth is conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, the Commonwealth wants to understand the availability of different types of businesses for the contracts and procurements it awards. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Virginia.”)

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information if the business representative provided it (see areas “X” and “Y” of the survey).

c. Verification of for-profit business status. The surveyor asked whether the entity was a for-profit business as opposed to a government or non-profit organization (Question A1). Surveyors continued the survey only with those entities that responded “yes” to that question.

d. Verification of business age. The surveyor asked in what year the business was originally established (Question A2).

e. Verification of active business status. The surveyor asked whether the entity was in business and operational (Question A3). Surveyors continued the survey only with those entities that responded “yes” to that question.

² BBC also developed email versions of the survey instruments for businesses that preferred to complete the survey online.

Figure C-1.
Subindustries and work types included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Concrete work		Masonry, stonework, tile setting, and plastering	
17710000	Concrete work	17420200	Acoustical and insulation work
Electrical work		17420203	Insulation, buildings
17310000	Electrical work	17410000	Masonry and other stonework
17319903	General electrical contractor	17420100	Plaster and drywall work
Excavation, drilling, wrecking, and demolition		17420000	Plastering, drywall, and insulation
17990900	Building site preparation	Nonresidential building construction	
17949901	Excavation and grading, building construction	15420100	Commercial and office building contractors
17940000	Excavation work	15420101	Commercial and office building, new construction
17950000	Wrecking and demolition work	15420103	Commercial and office buildings, renovation and repairs
Highway, street, and bridge construction		15420403	Hospital construction
16229901	Bridge construction	15410000	Industrial buildings and warehouses
16220000	Bridge, tunnel, and elevated highway construction	15419905	Industrial buildings, new construction, not elsewhere classified
16110202	Concrete construction: roads, highways, sidewalks, etc	15420000	Nonresidential construction, not elsewhere classified
16119901	General contractor, highway and street construction	15419909	Renovation, remodeling and repairs: industrial buildings
16110203	Grading	15420400	Specialized public building contractors
16110101	Guardrail construction, highways	Other special trade contractors	
16110000	Highway and street construction	17210300	Industrial painting
16119902	Highway and street maintenance	17210303	Pavement marking contractor
16110204	Highway and street paving contractor	Plumbing and HVAC	
16110102	Highway and street sign installation	17110401	Mechanical contractor
16229902	Highway construction, elevated	17110000	Plumbing, heating, air-conditioning
16110100	Highway signs and guardrails	Roofing, siding, and sheet metal work	
16110205	Resurfacing contractor	17610103	Roofing contractor
16110200	Surfacing and paving		
16229903	Tunnel construction		

Figure C-1.
Subindustries and work types included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Water, sewer, and utility lines		Water, sewer, and utility lines (continued)	
16230200	Communication line and transmission tower construction	16230300	Water and sewer line construction
16230302	Sewer line construction	16230303	Water main construction
16230203	Telephone and communication line construction	16230000	Water, sewer, and utility lines
16239906	Underground utilities contractor		
Non-professional services and goods			
Automobiles and vehicle parts and supplies		Communications equipment (continued)	
50130100	Automotive supplies and parts	36699901	Intercommunication systems, electric
55110000	New and used car dealers	36630106	Marine radio communications equipment
55119903	Trucks, tractors, and trailers: new and used	59990605	Mobile telephones and equipment
		36630107	Multiplex equipment
Cleaning and janitorial services		36630108	Pagers (one-way)
73490100	Building and office cleaning services	36630000	Radio and t.v. communications equipment
73490101	Building cleaning service	36630100	Radio broadcasting and communications equipment
		36630109	Radio receiver networks
Communications equipment		57319907	Radios, two-way, citizens band, weather, short-wave
36630101	Airborne radio communications equipment	36630110	Receivers, radio communications
36630102	Amplifiers, RF power and IF	59990603	Telephone equipment and systems
59990601	Audio-visual equipment and supplies	36630111	Transmitter-receivers, radio
73590501	Audio-visual equipment and supply rental		
36630103	Carrier equipment, radio communications	Concrete, asphalt, sand, and gravel products	
36630104	Cellular radio telephone	50329901	Aggregate
36630105	Citizens' band (CB) radio	29510000	Asphalt paving mixtures and blocks
50650200	Communication equipment	32410000	Cement, hydraulic
36690000	Communications equipment, not elsewhere classified	32730000	Ready-mixed concrete

Figure C-1.
Subindustries and work types included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and goods (continued)			
Electrical equipment and supplies		Furniture (continued)	
50630000	Electrical apparatus and equipment	25420200	Office and store showcases and display fixtures
50630205	Electrical construction materials	25220200	Office bookcases, wallcases and partitions, except wood
50630206	Electrical supplies, not elsewhere classified	25220300	Office cabinets and filing drawers, except wood
50650000	Electronic parts and equipment, not elsewhere classified	25220100	Office chairs, benches, and stools, except wood
36690201	Highway signals, electric	25220400	Office desks and tables, except wood
50630504	Signaling equipment, electrical	25410104	Office fixtures, wood
36690206	Traffic signals, electric	57129904	Office furniture
36690200	Transportation signaling devices	25220000	Office furniture, except wood
Facilities support services		50210106	Office furniture, not elsewhere classified
87440000	Facilities support services	25220202	Panel systems and partitions, office: except wood
Furniture		25429904	Shelving, office and store, except wood
25220101	Benches, office: except wood	25410203	Shelving, office and store, wood
25210101	Benches, office: wood	25999905	Stools with casters (not household or office)
25220201	Bookcases, office: except wood	25220103	Stools, office: except wood
25210201	Bookcases, office: wood	25210103	Stools, office: wood
25220301	Cabinets, office: except wood	25410100	Store and office display cases and fixtures
25210202	Cabinets, office: wood	25220402	Tables, office: except wood
25220102	Chairs, office: padded or plain: except wood	25210302	Tables, office: wood
25210102	Chairs, office: padded, upholstered, or plain: wood	25220203	Wallcases, office: except wood
25220401	Desks, office: except wood	25210100	Wood office chairs, benches and stools
25210301	Desks, office: wood	25210300	Wood office desks and tables
25210203	Filing cabinets (boxes), office: wood	25210200	Wood office filing cabinets and bookcases
25420204	Fixtures, office: except wood	25210000	Wood office furniture
25420206	Fixtures: display, office, or store: except wood	25219900	Wood office furniture, not elsewhere classified
50210100	Office and public building furniture		

Figure C-1.
Subindustries and work types included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and goods (continued)			
Heavy construction equipment rental		Office equipment and supplies (continued)	
50820301	Concrete processing equipment	51110000	Printing and writing paper
50820302	Contractor's materials	51120000	Stationery and office supplies
50820303	Cranes, construction	59430000	Stationery stores
50820304	Excavating machinery and equipment		
50820300	General construction machinery and equipment	Other construction materials	
73530000	Heavy construction equipment rental	50840803	Elevators
50820305	Ladders	35340100	Elevators and equipment
50820306	Masonry equipment and supplies		
50820308	Tractors, construction	Other goods	
		51430000	Dairy products, except dried or canned
Industrial equipment and machinery		51419901	Food brokers
50850000	Industrial supplies	51430100	Milk
50840805	Pumps and pumping equipment, not elsewhere classified	51420000	Packaged frozen goods
		51450200	Snack foods
		Other services	
Landscaping services		49530100	Hazardous waste collection and disposal
07829903	Landscape contractors	75210101	Parking lots
		49530200	Refuse collection and disposal services
Office equipment and supplies		Other transit services	
59991401	Business machines and equipment	41420000	Bus charter service, except local
50440200	Copying equipment	47299901	Carpool/vanpool arrangement
51120405	Laser printer supplies	41199906	Vanpool operation
50440000	Office equipment		
50449900	Office equipment, not elsewhere classified		
51120500	Office filing supplies		
59439902	Office forms and supplies		
51129907	Office supplies, not elsewhere classified		
50440207	Photocopy machines		

Figure C-1.
Subindustries and work types included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and goods (continued)			
Petroleum and petroleum products		Safety equipment (continued)	
51720202	Diesel fuel	50870500	Firefighting equipment
51720200	Engine fuels and oils	50990300	Safety equipment and supplies
59830000	Fuel oil dealers		
51720100	Gases	Security guard services	
51720203	Gasoline	73810105	Security guard service
51729905	Petroleum brokers		
51719901	Petroleum bulk stations	Security systems services	
51710000	Petroleum bulk stations and terminals	73820000	Security systems services
51719900	Petroleum bulk stations and terminals, not elsewhere classified		
51720000	Petroleum products, not elsewhere classified	Staffing services	
51719902	Petroleum terminals	73610000	Employment agencies
		73630103	Temporary help service
Printing, copying, and mailing		Trucking, hauling, and storage	
27520000	Commercial printing, lithographic	42129905	Dump truck haulage
		42140000	Local trucking with storage
Rebar and reinforcing steel		Uniforms and apparel	
34410000	Fabricated structural metal	72130204	Uniform supply
Safety equipment		56990102	Uniforms
50630500	Electric alarms and signaling equipment	56990100	Uniforms and work clothing
50990100	Firearms and ammunition, except sporting		
Professional services			
Advertising, marketing, and public relations		Business and management consulting	
73119901	Advertising consultant	87429904	General management consultant
87439903	Public relations and publicity		
Architectural and design services		Construction management	
87120000	Architectural services	87419902	Construction management
		87420402	Construction project management consultant
		73899907	Contractors' disbursement control

Figure C-1.
Subindustries and work types included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional services (continued)			
Engineering		Landscape architecture	
87120101	Architectural engineering	07810201	Landscape architects
87110402	Civil engineering	07810000	Landscape counseling and planning
87110400	Construction and civil engineering	07810202	Landscape counseling services
		07810203	Landscape planning services
Environmental services		Testing and inspection	
87489905	Environmental consultant	73890200	Inspection and testing services
Financial services and consulting		Transportation planning services	
87210000	Accounting, auditing, and bookkeeping	87480204	Traffic consultant
Human resources and job training services		87420410	Transportation consultant
87420200	Human resource consulting services	87480200	Urban planning and consulting services
IT and data services			
73730000	Computer integrated systems design		
73710101	Computer software systems analysis and design, custom		
73730200	Systems integration services		

f. Interest in future work. The surveyor asked businesses about their interest in future prime contract and subcontract work with the Commonwealth or other government agencies (Question A4). Surveyors continued the survey only with those entities that responded “yes” to that question.

g. Confirmation of primary lines of work. The respondent was asked to confirm their primary lines of work according to D&B (Question A5a). If D&B’s work specialization codes were incorrect, businesses described their primary lines of work (Question A5b). Surveyors then asked businesses about other types of work they perform (Question A5c). BBC coded information on primary lines of work and additional types of work (if any) into appropriate 8-digit D&B work specialization codes.

h. Locations and affiliations. The surveyor asked if the business had other locations (Questions A6, A7a, and A7b) and if the business was a subsidiary or affiliate of another business (Questions A8 and A9).

i. Willingness and ability to work. The surveyor asked businesses that do construction-related and professional services-related work whether they are willing and able to work in various roles (Questions B1 through B3)(not included in the non-professional services and goods survey instrument).

j. Geographic area. The surveyor asked whether the business could serve customers in various regions of Virginia (Questions C1 through C10).

k. Capacity. The surveyor asked about the value of the largest prime contract and subcontract the business can compete for and perform (Question D1), as well as the smallest prime contract and subcontract the business would be willing to compete for or perform (Question D2).

l. Ownership. The surveyor asked whether the business was at least 51 percent owned and controlled by minorities, women, or SDVs (Questions E1 through E5). If the respondent indicated that the business was minority-owned, the respondent was also asked about the race of the business’ owner(s) (Question E3). BBC confirmed that information through several other data sources, including:

- Commonwealth contract and vendor data;
- The Small, Women-owned, and Minority-owned Business (SWaM) Program certification directory;
- D&B business listings and other business information sources;
- Information from other available certification directories and business lists; and
- Business websites and other secondary research.

m. Business size. The surveyor asked questions about the business’ size in terms of revenue and number of employees across all the business’ locations (Questions F1 through F4).

n. Potential barriers in the marketplace. The surveyor asked an open-ended question about the respondent’s experiences working with the Commonwealth and other local government agencies as well as general insights about conditions in the Virginia marketplace (Question G1). In addition, the survey included a question asking whether the respondent would be willing to participate in a follow-up interview about conditions in the local marketplace, which BBC used to recruit participants for in-depth interviews (Question G2).

o. Contact information. The survey concluded with questions about the respondent’s name, position with the business, and contact information (Questions H1 through H3).

2. Data verification. As with nearly any survey effort, BBC largely took survey respondents’ responses at face value. If we had data that allowed us to verify certain responses, we did so. (For example, if a survey respondent indicated that their business’ bid capacity was \$100 million but its annual revenue was \$500,000, then we used a defined process to adjust the business’ bid capacity downward.) Although it is possible that respondents misrepresented information about their businesses as part of availability surveys, there are two factors that help mitigate the effect any such misrepresentations had on our analyses:

- First, in the introduction to the survey, surveyors explicitly informed potential respondents that the survey was designed solely to collect information about their businesses, and it would have no impact on any present or future work opportunities with any organizations in the region (see the example survey instrument at the end of Appendix C). We did so to minimize any motivation to mischaracterize or exaggerate business characteristics such as annual revenue, bid capacity, or primary lines of work.
- Second, misrepresentations of business information would be particularly problematic if certain types of businesses (e.g., minority- or woman-owned businesses) were more likely to do so than other types of businesses (e.g., non minority- or woman-owned businesses), because the availability analysis and other disparity study analyses were largely conducted in terms of percentages relative to other businesses. However, BBC had no evidence that participants representing certain groups of businesses were more or less likely to provide erroneous information as part of availability surveys than other groups.

Finally, it is important to note that courts that have assessed disparity study methodology—including the Ninth Circuit Court of Appeals—have ruled that organizations and researchers are not required to verify the accuracy of self-reported information from surveys, interviews, and other efforts in order to use that information to assess outcomes and barriers that businesses face in competing for organizations’ contracts and procurements.³

D. Survey Execution

Davis Research conducted all availability surveys between May and August 2025. The firm attempted to survey the owner, manager, or other officer of each business who could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure C-2 presents the disposition of the 21,357 businesses the study team attempted to contact for availability surveys and how that number resulted in the 3,609 businesses the study team was able to successfully contact.

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

Figure C-2.
Disposition of attempts to
contact businesses for
availability surveys

	Number of businesses
Beginning list	21,357
Less non-working phone numbers	2,621
Less wrong number/business	1,045
Unique business listings with working phone numbers	17,691
Less no answer	10,945
Less could not reach responsible staff member	3,115
Less language barrier	22
Businesses successfully contacted	3,609

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B were:

- Non-working phone numbers (2,621 listings); or
- Wrong numbers for the desired businesses (1,045 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them.

b. Working phone numbers. As shown in Figure C-2, there were 17,691 businesses with working phone numbers Davis Research attempted to contact. The firm was unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 10,945 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 3,115 businesses.
- The firm could not conduct the availability survey due to language barriers for 22 businesses.

Thus, Davis Research was able to successfully contact 3,609 businesses.

2. Businesses included in the availability database. Figure C-3 presents the disposition of the 3,609 businesses Davis Research successfully contacted and how that number resulted in the 1,255 businesses BBC considered potentially available for Commonwealth work.

**Figure C-3.
Disposition of
successfully contacted
businesses**

	Number of businesses
Businesses successfully contacted	3,609
Less businesses not interested in discussing availability for work	1,408
Less companies no longer in business	620
Less not a for-profit business	16
Businesses that completed surveys	1,565
Less line of work outside of study scope	8
Less no interest in future work	269
Less cannot perform work in Virginia	6
Less multiple locations of same business	27
Businesses potentially available for Commonwealth work	1,255

a. Businesses not eligible or interested in discussing availability for Commonwealth work. Of the 3,609 businesses the study team successfully contacted:

- We excluded 1,408 businesses that reported that they were not interested in discussing their availability for Commonwealth work;
- We excluded 620 businesses that indicated they were no longer in business; and
- We excluded 16 businesses from the analysis that indicated they were not-for-profit businesses.

b. Businesses available for Commonwealth work. A total of 1,565 businesses completed availability surveys, but BBC did not deem all of those businesses as potentially available for the prime contracts and subcontracts the Commonwealth awards. We excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded eight businesses that reported primary lines of work outside the study scope.⁴
- We excluded 269 businesses that reported they were not interested in contracting opportunities with the Commonwealth or other government organizations.
- We excluded six businesses that reported that they do not perform work in Virginia.
- We excluded 27 survey participants who represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record according to the following rules:
 - If respondents from different locations of the same business indicated different lines of work, BBC conducted additional secondary research to reconcile that information into one primary line of work.
 - BBC combined the different roles of work (i.e., prime contractor or subcontractor) different respondents representing the same business reported into a single response. For example, if one respondent reported that the business works as a prime contractor and another

⁴ Examples include software, banking, real estate, and utilities.

respondent reported that the business works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts.

- BBC considered the largest project any respondents representing the same business reported being able to perform as the business' capacity (i.e., the largest project for which the business could be considered available).

After those exclusions and reconciliations, BBC compiled a database of 1,255 businesses we considered potentially available for Commonwealth work.

AVAILABILITY SURVEY INSTRUMENT.

Construction

Hello. My name is [INTERVIEWER NAME] from Davis Research, calling on behalf of the Commonwealth of Virginia. This is not a sales call. The Commonwealth is conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, the Commonwealth wants to understand the *availability* of different types of businesses for the contracts and procurements it awards. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Virginia.

The survey is designed only to gather information and will have no impact on present or future work opportunities with the Commonwealth or any other organizations. Your participation in the survey would be very valuable to the process, and it should only take 15 minutes to complete.

Whom can I speak with to gather information about your business' characteristics and potential interest in working with government and other public agencies, entities, and offices in the region?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS.]

[IF ASKED, THE INFORMATION DEVELOPED IN THE SURVEYS WILL RESULT IN DATA ON BUSINESSES QUALIFIED AND INTERESTED IN WORKING WITH GOVERNMENT AND OTHER PUBLIC AGENCIES, ENTITIES, AND OFFICES IN THE REGION AND WILL INFORM VARIOUS ANALYSES AS PART OF THE RESEARCH.]

Please answer each question as honestly and accurately as possible so the Commonwealth can develop a realistic understanding of the businesses potentially available for government and other public agency work in the region.

X1. I have a few basic questions about your business and the type of work you do. Can you confirm this is [BUSINESS NAME]?

1=Correct business [SKIP TO Y4]

2=Incorrect business

99=Refused [TERMINATE]

Y1. What is the name of this business?

1=Verbatim

Y2. Is [NEW BUSINESS NAME] associated with [OLD BUSINESS NAME] in any way?

1=Yes, same owner doing business under a different name

2=Yes, can give information about new business

3=Business bought/sold/changed ownership

98=No, does not have information [TERMINATE]

99=Refused to give information [TERMINATE]

Y3. Do you work for [NEW BUSINESS NAME]?

1=Yes

2=No [TERMINATE]

Y4. Can you give me the address for [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM]

A1. Let me confirm [BUSINESS NAME/NEW BUSINESS NAME] is a for-profit business, as opposed to a non-profit organization, a foundation, or government office. Is that correct?

1=Yes, a for-profit business

2=No, other [TERMINATE]

A2. In what year was your business established?

1=VERBATIM

A3. Is your company currently in business and operational?

1=Yes

2=No [TERMINATE]

A4. I'm also interested in the sectors in which your business works. Specifically, is your business interested in performing work on projects for government or other public agencies, entities, or offices in the region?

1=Yes

2=No [TERMINATE]

98=Don't know

99=Refused

[NOTE TO INTERVIEWER: IF ASKED, EXAMPLES INCLUDE STATES, CITIES, COUNTIES, PUBLIC SCHOOLS AND UNIVERSITIES, TRANSPORTATION ORGANIZATIONS, AND OTHERS]

A5a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates your main line of work is [SIC DESCRIPTION]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes [SKIP TO A5c]

2=No

98=Don't know

99=Refused

A5b. What would you say is the main line of work at [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES BUSINESS' MAIN LINE OF WORK IS "GENERAL CONSTRUCTION" OR "GENERAL CONTRACTOR," PROBE TO FIND OUT MORE DETAIL ABOUT TYPES OF WORK THEY PERFORM.]

1=VERBATIM

A5c. What other types of work, if any, does your business perform?

1=VERBATIM

97=(NONE)

A6. Is this the sole location of your business, or do you have offices in other locations?

1=Sole location [SKIP to A8]

2=Have other locations

98=Don't know

99=Refused

A7a. Is this location the principal location for your business, or is your business primarily conducted at another location?

[NOTE TO INTERVIEWER - "PRINCIPAL LOCATION" MEANS THE OFFICE AT WHICH SENIOR MANAGEMENT AND LEADERSHIP ARE LOCATED AND WHERE MANAGEMENT AND FINANCIAL RECORDS ARE MAINTAINED.]

1=Yes [SKIP TO A8]

2=No

98=(DON'T KNOW) [SKIP TO A8]

99=(REFUSED) [SKIP TO A8]

A7b. What is the city and state of your business' principal location?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. CITY

. STATE

1=VERBATIM

A8. Is your business a subsidiary or affiliate of another business?

1=Independent [SKIP TO B1]

2=Subsidiary or affiliate of another business

98=Don't know [SKIP TO B1]

99=Refused [SKIP TO B1]

A9. What is the name of the parent company?

1=VERBATIM

98=Don't know

99=Refused

A prime or general contractor is a business that contracts directly with the project owner. In contrast, a subcontractor is a business that contracts with a prime or general contractor as part of a larger project. Some businesses work in both roles on different projects. Based on these definitions:

B1. Is your business willing and able to work as a prime contractor or general contractor?

1=Yes

2=No

98=Don't know

99=Refused

B2. Is your business willing and able to work as a subcontractor?

1=Yes

2=No

98=Don't know

99=Refused

B3. Is your business willing and able to supply construction materials or goods?

1=Yes

2=No

98=Don't know

99=Refused

As you answer the following questions, please think about the geographic areas in Virginia your business is able to perform work or serve customers in.

C1. Is your business able to perform work throughout Virginia or only in certain parts of the state?

1=All of the state [SKIP to D1]

2=Only parts of the state

3=None of the state [SKIP TO D1]

98=Don't know

99=Refused

I'm going to go through several regions of Virginia. For each one, please tell me if your business is able to work there.

C2. Is your business able to perform work in any part of the Hampton Roads region, which includes Virginia Beach, Newport News, Norfolk, and other nearby cities and towns?

1=Yes

2=No

98=Don't know

99=Refused

C3. Is your company able to do work in any part of the Southern region of Virginia, which includes Danville and Martinsville?

1=Yes

2=No

98=Don't know

99=Refused

C4. Is your company able to do work in any part of the Southwest region of Virginia, which includes Bristol and Galax?

1=Yes

2=No

98=Don't know

99=Refused

C5. Is your company able to do work in any part of the West Central region of Virginia, which includes Lynchburg, Roanoke, and Blacksburg?

1=Yes

2=No

98=Don't know

99=Refused

C6. Is your company able to do work in any part of the Central region of Virginia, which includes Richmond and Charlottesville?

1=Yes

2=No

98=Don't know

99=Refused

C7. Is your company able to do work in any part of the Valley region of Virginia, which includes Harrisonburg, Staunton, and Winchester?

1=Yes

2=No

98=Don't know

99=Refused

C8. Is your company able to do work in any part of the Northern region of Virginia, which includes Alexandria and Fairfax?

1=Yes

2=No

98=Don't know

99=Refused

C9. Is your company able to do work in any part of the Eastern region of Virginia, which includes Essex, Northumberland, and Lancaster counties but does not include the Eastern shore?

1=Yes

2=No

98=Don't know

99=Refused

C10. Is your company able to do work in any part of the Eastern shore of Virginia, which includes Accomack and Northampton counties?

1=Yes

2=No

98=Don't know

99=Refused

D1. Now I'd like to ask you about the size of work your business is able to compete for or perform. In terms of dollar value, what is the largest prime contract, subcontract, or other piece of work your company is able to compete for or perform?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=\$100,000 or less

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=Greater than \$200 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

D2. Now, what is the smallest prime contract, subcontract, or other piece of work your company is willing to compete for or perform?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=\$100,000 or less

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=Greater than \$200 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

E1. My next questions are about the ownership of your business. A business is defined as a woman-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as women. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a woman-owned business?

1=Yes

2=No

98=Don't know

99=Refused

E2. A business is defined as a minority-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as Asian, Black, Hispanic, Native American, Middle Eastern or North African, or another non-White race or ethnicity. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a minority-owned business?

1=Yes

2=No – [SKIP TO E4]

98=Don't know [SKIP TO E4]

99=Refused [SKIP TO E4]

E3. Which of the following best represents the race/ethnicity of the business' owner(s)?

1=Black

2=Asian Pacific (examples include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic or Latin (examples include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (examples include American Indians, Alaska Natives, or Native Hawaiians)

5=Subcontinent Asian (examples include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka)

6=Middle Eastern or North African (examples include persons whose origins are from Afghanistan, Algeria, Armenia, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen)

7=Other, specify _____

98=Don't know

99=Refused

E4. A business is defined as a veteran-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by veterans of the United States military. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a veteran-owned business?

[NOTE TO INTERVIEWER – U.S. MILITARY SERVICES INCLUDE THE U.S. ARMY, AIR FORCE, NAVY, MARINES, AND COAST GUARD.]

1=Yes

2=No [SKIP TO F1]

98=Don't know [SKIP TO F1]

99=Refused [SKIP TO F1]

E5. Does the owner(s) have a mental or physical disability that resulted directly from their service in the United States military?

1=Yes

2=No

98=Don't know

99=Refused

F1. Now I want to ask you a few questions about your business' size. Dun & Bradstreet indicates that your business has about [number] employees across all its locations. Is that an accurate estimate of the number of employees who work at your business, including both full-time and part-time employees?

1=Yes [SKIP TO F3]

2=No

98=Don't know [SKIP TO F3]

99=Refused [SKIP TO F3]

F2. About how many employees work at your business, including both full-time and part-time employees, across all your locations?

1=VERBATIM

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

1=Sole proprietorship/no employees	10=251-500 employees
2=1-4 employees	11=501-750 employees
3=5-9 employees	12=751-1,000 employees
4=10-25 employees	13=1,001-1,250 employees
5=26-50 employees	14=1,251-1,500 employees
6=51-100 employees	15=1,501 or more employees
7=101-150 employees	98=(DON'T KNOW)
8=151-200 employees	99=(REFUSED)
9=201-250 employees	

F3. Dun & Bradstreet lists the average annual gross revenue of your business, including all your locations, as [DOLLAR AMOUNT]. Is that an accurate estimate of your business' average annual gross revenue?

1=Yes [SKIP TO G1a]
2=No
98=Don't know [SKIP TO G1a]
99=Refused [SKIP TO G1a]

F4. Roughly, what was the average annual gross revenue of your business over the past three years, including all of your locations?

1=VERBATIM

[READ LIST IF NECESSARY]

1=\$1 Million or less	7= More than \$19 Million to \$25 Million
2=More than \$1 Million to \$3 Million	8= More than \$25 Million to \$30 Million
3=More than \$3 Million to \$6 Million	9=More than \$30 Million
4=More than \$6 Million to \$9 Million	98= (DON'T KNOW)
5=More than \$9 Million to \$12 Million	99= (REFUSED)
6=More than \$12 Million to \$19 Million	

G1. We're interested in whether your business has experienced barriers or difficulties related to working with, or attempting to work with the Commonwealth of Virginia or other government or public agencies, entities, or offices in Virginia. Do you have any thoughts to share?

1=VERBATIM [PROBE FOR COMPLETE THOUGHTS]

97=No comments

G2. Would you be willing to participate in a follow-up interview about any of those topics?

1=Yes

2=No

H1. Just a few final questions. What is your name?

1=VERBATIM

H2. What is your position at [BUSINESS NAME/NEW BUSINESS NAME]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=Other, specify _____

99=Refused

H3. At what email address can you be reached?

1= VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Verniece Love, Deputy Director, Virginia Department of Small Business and Supplier Diversity at 804-786-3100 or Verniece.love@sbsd.virginia.gov.

If you have any questions for the Disparity Study project team or wish to submit written questions, comments, or insights about the marketplace, please email VAdisparity@bbcresearch.com.

APPENDIX D.

Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of small businesses and microbusinesses, as well as minority-, woman-, and service-disabled veteran (SDV)-owned businesses in construction, professional services, and non-professional services and goods prime contracts and subcontracts Commonwealth of Virginia state agencies and higher education institutions (collectively referred to as *the Commonwealth*) awarded between July 1, 2019 and June 30, 2024 (the *study period*) with the percentage of contract and procurement dollars one might expect them to award to those businesses based on their availability for that work.¹ Appendix D presents results from the disparity analysis for relevant business groups and various sets of projects the Commonwealth awarded during the study period.

A. Format and Information

Each table in Appendix D presents disparity analysis results for a different set of projects. For example, Figure D-1 presents disparity analysis results for all relevant projects state agencies awarded during the study period. A review of Figure D-1 introduces the calculations and format of all disparity analysis tables in Appendix D. Figure D-1 presents disparity study results for each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of their size or ownership characteristics.
- Row (2) presents results for all minority-owned businesses considered together, regardless of their certification status.
- Rows (3) through (6) present results for businesses of each relevant minority group, regardless of their certification status.
- Row (7) presents results for all White woman-owned businesses, regardless of their certification status.
- Row (8) presents results for all SDV-owned businesses, regardless of their certification status.
- Row (9) presents results for microbusinesses, regardless of their certification status.
- Row (10) presents results for all small businesses, regardless of their certification status. Microbusinesses are also included in results alongside other small businesses.

1. Utilization analysis results. Each results table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the set. As shown in row (1) of column (a) of Figure D-1, we analyzed 243,091 contract elements state agencies awarded during the study period. The values presented

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

in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (4) of column (a), Black-owned businesses participated in 14,831 contract elements state agencies awarded during the study period.

- Column (b) presents the total number of unique businesses that participated in each contract set. As shown in row (1) of column (b) in Figure D-1, 3,765 unique businesses participated in state agency contracts and procurements during the study period. The values presented in column (b) represent the number of unique businesses in each business group that participated in agency work. For example, as shown in row (4) of column (b), 183 unique Black-owned businesses participated in state agency contracts and procurements awarded during the study period.
- Column (c) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (c) of Figure D-1, BBC examined approximately \$17.1 billion that was associated with the 243,091 relevant contract elements state agencies awarded during the study period. The value presented in column (c) for each individual business group represents the dollars state agencies awarded to that particular group on the set of contract elements. For example, as shown in row (4) of column (c), the organization awarded approximately \$207.5 million in project dollars to Black-owned businesses during the study period.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c) and then expressing the result as a percentage. For example, for Black-owned businesses, the study team divided \$207.5 million by \$17.1 billion and multiplied by 100 for a result of 1.2 percent, as shown in row (4) of column (d).

2. Availability results. Column (e) of Figure D-1 presents the availability of each relevant group for all the contract elements BBC analyzed as part of the project set. Availability represents the percentage of dollars one might expect the Commonwealth to award to businesses of a particular group based on their specific characteristics and the characteristics of the contract elements included in a particular set of projects. Availability estimates, which are represented as percentages of the total dollars associated with the project set, serve as benchmarks against which to compare the participation of specific groups in those projects. For example, as shown in row (4) of column (e), the availability of Black-owned businesses for state agency work is 7.7 percent. That is, one might expect the organization to award 7.7 percent of relevant contract dollars to Black-owned businesses based on their availability for that work.

3. Disparity indices. BBC calculated a disparity index, or ratio, for each relevant business group, which compares the participation of small businesses; microbusinesses; and minority-, woman-, and SDV-owned businesses in state agency work to their estimated availability for that work. Column (f) of Figure D-1 presents the disparity index for each group. For example, as reported in row (4) of column (f), the disparity index for Black-owned businesses was \$0.16, indicating that state agencies awarded approximately \$0.16 to Black-owned businesses for every dollar one might expect the organization to award to those businesses based on their availability for that work. For disparity indices exceeding \$2.00, BBC reported an index of "\$2.00+."

B. Index and Tables

The table of contents presents an index of the sets of projects for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix D provides a description of the subset of projects BBC analyzed for that particular set of projects.

Table of Contents

Table	Agency	Contract area	Role	Contract size	Region	Subcontractor Plan
D-1	State agencies	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-2	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-3	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	Construction	Prime contracts and subcontracts	N/A	N/A	All contracts
D-4	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	Professional services	Prime contracts and subcontracts	N/A	N/A	All contracts
D-5	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	Non-professional services and goods	Prime contracts and subcontracts	N/A	N/A	All contracts
D-6	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Prime contracts	N/A	N/A	All contracts
D-7	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Subcontracts	N/A	N/A	All contracts
D-8	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Prime contracts	Large	N/A	All contracts
D-9	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Prime contracts	Small	N/A	All contracts
D-10	State agencies, VASCUPP Tier 2, VASCUPP Tier 3	All industries	Prime contracts	Micro	N/A	All contracts
D-11	State agencies	Construction	Prime contracts and subcontracts	N/A	N/A	All contracts
D-12	State agencies	Professional services	Prime contracts and subcontracts	N/A	N/A	All contracts
D-13	State agencies	Non-professional services and goods	Prime contracts and subcontracts	N/A	N/A	All contracts
D-14	State agencies	All industries	Prime contracts	N/A	N/A	All contracts
D-15	State agencies	All industries	Subcontracts	N/A	N/A	All contracts
D-16	State agencies	All industries	Prime contracts	Large	N/A	All contracts
D-17	State agencies	All industries	Prime contracts	Small	N/A	All contracts
D-18	State agencies	All industries	Prime contracts	Micro	N/A	All contracts
D-19	State agencies	All industries	Prime contracts and subcontracts	N/A	Hampton Roads	All contracts
D-20	State agencies	All industries	Prime contracts and subcontracts	N/A	Southern	All contracts
D-21	State agencies	All industries	Prime contracts and subcontracts	N/A	Southwest	All contracts
D-22	State agencies	All industries	Prime contracts and subcontracts	N/A	West Central	All contracts
D-23	State agencies	All industries	Prime contracts and subcontracts	N/A	Central	All contracts
D-24	State agencies	All industries	Prime contracts and subcontracts	N/A	Valley	All contracts
D-25	State agencies	All industries	Prime contracts and subcontracts	N/A	Northern	All contracts
D-26	State agencies	All industries	Prime contracts and subcontracts	N/A	Eastern	All contracts
D-27	State agencies	All industries	Prime contracts and subcontracts	N/A	Eastern Shore	All contracts
D-28	State agencies	All industries	Prime contracts and subcontracts	N/A	N/A	Yes
D-29	State agencies	All industries	Prime contracts and subcontracts	N/A	N/A	No
D-30	VASCUPP - Tier 3	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-31	University of Virginia	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-32	Virginia Polytechnic Institute & State University	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-33	Virginia Commonwealth University	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-34	George Mason University	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-35	James Madison University	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-36	College of William & Mary	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts
D-37	VASCUPP - Tier 2	All industries	Prime contracts and subcontracts	N/A	N/A	All contracts

Figure D-1.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	243,091	3,765	\$17,109,559			
Race and gender						
(2) Minority	23,422	408	\$1,835,523	10.7 %	23.3 %	\$0.46
(3) Asian	5,221	121	\$1,419,828	8.3 %	10.5 %	\$0.79
(4) Black	14,831	183	\$207,487	1.2 %	7.7 %	\$0.16
(5) Hispanic	1,863	93	\$191,880	1.1 %	4.7 %	\$0.24
(6) Native American	1,507	11	\$16,328	0.1 %	0.4 %	\$0.24
(7) White woman	61,996	339	\$701,788	4.1 %	13.6 %	\$0.30
Veteran status						
(8) Service-disabled veteran	4,400	50	\$130,721	0.8 %	7.1 %	\$0.11
Business size						
(9) Micro	124,200	1,811	\$3,183,000	18.6 %	40.4 %	\$0.46
(10) Small	189,678	2,949	\$10,092,690	59.0 %	88.5 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-2.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	693,154	4,847	\$27,085,269			
Race and gender						
(2) Minority	35,743	482	\$2,271,798	8.4 %	21.6 %	\$0.39
(3) Asian	8,626	131	\$1,522,760	5.6 %	9.0 %	\$0.63
(4) Black	20,364	219	\$408,580	1.5 %	6.7 %	\$0.22
(5) Hispanic	4,573	119	\$307,672	1.1 %	5.3 %	\$0.21
(6) Native American	2,180	13	\$32,787	0.1 %	0.6 %	\$0.21
(7) White woman	154,601	417	\$1,244,175	4.6 %	12.3 %	\$0.37
Veteran status						
(8) Service-disabled veteran	5,943	57	\$166,329	0.6 %	5.6 %	\$0.11
Business size						
(9) Micro	188,888	2,285	\$5,066,129	18.7 %	40.4 %	\$0.46
(10) Small	462,294	3,719	\$17,415,171	64.3 %	88.5 %	\$0.73

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-3.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Construction
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	43,269	1,432	\$8,882,629			
Race and gender						
(2) Minority	4,375	143	\$230,123	2.6 %	19.7 %	\$0.13
(3) Asian	195	25	\$20,134	0.2 %	5.5 %	\$0.04
(4) Black	1,464	61	\$50,885	0.6 %	3.7 %	\$0.15
(5) Hispanic	2,659	52	\$150,375	1.7 %	9.2 %	\$0.18
(6) Native American	57	5	\$8,729	0.1 %	1.2 %	\$0.08
(7) White woman	2,742	128	\$245,080	2.8 %	7.1 %	\$0.39
Veteran status						
(8) Service-disabled veteran	228	13	\$19,136	0.2 %	1.9 %	\$0.11
Business size						
(9) Micro	18,696	766	\$1,993,741	22.4 %	33.9 %	\$0.66
(10) Small	38,836	1,264	\$7,269,368	81.8 %	91.0 %	\$0.90

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-4.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Professional services
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	76,316	1,409	\$10,590,860			
Race and gender						
(2) Minority	10,759	170	\$1,487,041	14.0 %	29.6 %	\$0.47
(3) Asian	7,750	90	\$1,336,882	12.6 %	16.3 %	\$0.77
(4) Black	351	53	\$53,203	0.5 %	9.4 %	\$0.05
(5) Hispanic	652	22	\$76,202	0.7 %	3.6 %	\$0.20
(6) Native American	2,006	5	\$20,753	0.2 %	0.3 %	\$0.68
(7) White woman	5,416	108	\$301,165	2.8 %	14.4 %	\$0.20
Veteran status						
(8) Service-disabled veteran	2,326	16	\$124,731	1.2 %	9.7 %	\$0.12
Business size						
(9) Micro	14,548	596	\$1,771,058	16.7 %	45.0 %	\$0.37
(10) Small	36,242	909	\$5,893,949	55.7 %	90.1 %	\$0.62

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-5.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Non-professional services and goods
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	573,569	2,006	\$7,611,780			
Race and gender						
(2) Minority	20,609	169	\$554,634	7.3 %	12.8 %	\$0.57
(3) Asian	681	16	\$165,743	2.2 %	2.8 %	\$0.78
(4) Black	18,549	105	\$304,491	4.0 %	6.5 %	\$0.61
(5) Hispanic	1,262	45	\$81,094	1.1 %	3.2 %	\$0.33
(6) Native American	117	3	\$3,306	0.0 %	0.3 %	\$0.17
(7) White woman	146,443	181	\$697,931	9.2 %	15.4 %	\$0.59
Veteran status						
(8) Service-disabled veteran	3,389	28	\$22,462	0.3 %	4.3 %	\$0.07
Business size						
(9) Micro	155,644	923	\$1,301,330	17.1 %	41.5 %	\$0.41
(10) Small	387,216	1,546	\$4,251,854	55.9 %	83.3 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-6.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	690,110	4,030	\$21,639,039			
Race and gender						
(2) Minority	35,367	335	\$1,842,699	8.5 %	21.6 %	\$0.39
(3) Asian	8,492	55	\$1,257,779	5.8 %	9.5 %	\$0.61
(4) Black	20,249	192	\$306,329	1.4 %	6.7 %	\$0.21
(5) Hispanic	4,454	75	\$247,787	1.1 %	4.8 %	\$0.24
(6) Native American	2,172	13	\$30,804	0.1 %	0.6 %	\$0.24
(7) White woman	154,261	388	\$968,369	4.5 %	12.9 %	\$0.35
Veteran status						
(8) Service-disabled veteran	5,929	50	\$145,620	0.7 %	5.9 %	\$0.11
Business size						
(9) Micro	187,697	1,957	\$3,309,856	15.3 %	39.9 %	\$0.38
(10) Small	459,956	3,259	\$13,257,194	61.3 %	88.1 %	\$0.70

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-7.
 Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	3,044	1,475	\$5,446,230			
Race and gender						
(2) Minority	376	202	\$429,099	7.9 %	21.6 %	\$0.37
(3) Asian	134	89	\$264,980	4.9 %	6.9 %	\$0.71
(4) Black	115	53	\$102,251	1.9 %	6.7 %	\$0.28
(5) Hispanic	119	58	\$59,885	1.1 %	7.4 %	\$0.15
(6) Native American	8	2	\$1,983	0.0 %	0.5 %	\$0.07
(7) White woman	340	120	\$275,806	5.1 %	10.1 %	\$0.50
Veteran status						
(8) Service-disabled veteran	14	11	\$20,708	0.4 %	4.3 %	\$0.09
Business size						
(9) Micro	1,191	611	\$1,756,273	32.2 %	42.2 %	\$0.76
(10) Small	2,338	1,020	\$4,157,977	76.3 %	89.9 %	\$0.85

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-8.

Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Large contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	1,493	571	\$14,812,587			
Race and gender						
(2) Minority	90	34	\$1,253,087	8.5 %	20.8 %	\$0.41
(3) Asian	32	6	\$957,962	6.5 %	10.0 %	\$0.64
(4) Black	29	18	\$154,446	1.0 %	5.3 %	\$0.20
(5) Hispanic	25	9	\$134,128	0.9 %	4.9 %	\$0.19
(6) Native American	4	1	\$6,551	0.0 %	0.6 %	\$0.08
(7) White woman	102	37	\$445,354	3.0 %	12.1 %	\$0.25
Veteran status						
(8) Service-disabled veteran	9	5	\$73,688	0.5 %	6.2 %	\$0.08
Business size						
(9) Micro	266	116	\$1,966,894	13.3 %	31.3 %	\$0.42
(10) Small	933	355	\$9,038,350	61.0 %	85.9 %	\$0.71

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-9.

Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Small contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	4,959	1,210	\$3,400,560			
Race and gender						
(2) Minority	384	81	\$272,813	8.0 %	24.6 %	\$0.33
(3) Asian	152	15	\$163,000	4.8 %	9.6 %	\$0.50
(4) Black	132	37	\$52,851	1.6 %	9.9 %	\$0.16
(5) Hispanic	88	25	\$49,866	1.5 %	4.6 %	\$0.32
(6) Native American	12	4	\$7,095	0.2 %	0.5 %	\$0.41
(7) White woman	370	101	\$225,581	6.6 %	13.9 %	\$0.48
Veteran status						
(8) Service-disabled veteran	52	11	\$37,806	1.1 %	6.0 %	\$0.19
Business size						
(9) Micro	999	335	\$629,331	18.5 %	56.4 %	\$0.33
(10) Small	3,192	805	\$2,066,107	60.8 %	92.6 %	\$0.66

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-10.

Agency Name: State agencies, Tier 2 HEIs, Tier 3 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Micro contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	683,658	3,850	\$3,425,892			
Race and gender						
(2) Minority	34,893	323	\$316,799	9.2 %	22.1 %	\$0.42
(3) Asian	8,308	52	\$136,817	4.0 %	7.0 %	\$0.57
(4) Black	20,088	189	\$99,032	2.9 %	9.8 %	\$0.30
(5) Hispanic	4,341	70	\$63,793	1.9 %	4.5 %	\$0.41
(6) Native American	2,156	12	\$17,158	0.5 %	0.7 %	\$0.68
(7) White woman	153,789	381	\$297,434	8.7 %	15.0 %	\$0.58
Veteran status						
(8) Service-disabled veteran	5,868	50	\$34,127	1.0 %	4.8 %	\$0.21
Business size						
(9) Micro	186,432	1,918	\$713,631	20.8 %	60.5 %	\$0.34
(10) Small	455,831	3,165	\$2,152,737	62.8 %	93.2 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-11.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Construction
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	17,714	1,037	\$3,453,149			
Race and gender						
(2) Minority	1,257	109	\$87,138	2.5 %	19.8 %	\$0.13
(3) Asian	113	21	\$14,271	0.4 %	4.7 %	\$0.09
(4) Black	793	47	\$15,787	0.5 %	4.3 %	\$0.11
(5) Hispanic	297	36	\$49,492	1.4 %	9.8 %	\$0.15
(6) Native American	54	5	\$7,588	0.2 %	1.0 %	\$0.22
(7) White woman	1,346	93	\$65,210	1.9 %	7.5 %	\$0.25
Veteran status						
(8) Service-disabled veteran	155	11	\$2,242	0.1 %	2.7 %	\$0.02
Business size						
(9) Micro	8,792	575	\$1,131,524	32.8 %	37.6 %	\$0.87
(10) Small	15,605	942	\$2,755,832	79.8 %	90.4 %	\$0.88

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Source: BBC Research & Consulting Disparity Analysis.

Figure D-12.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Professional services
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	36,805	1,077	\$8,717,919			
Race and gender						
(2) Minority	6,822	144	\$1,381,959	15.9 %	30.2 %	\$0.52
(3) Asian	4,673	84	\$1,261,472	14.5 %	17.1 %	\$0.84
(4) Black	248	40	\$44,471	0.5 %	9.2 %	\$0.06
(5) Hispanic	525	16	\$68,815	0.8 %	3.6 %	\$0.22
(6) Native American	1,376	4	\$7,200	0.1 %	0.3 %	\$0.33
(7) White woman	3,867	78	\$208,817	2.4 %	14.5 %	\$0.16
Veteran status						
(8) Service-disabled veteran	1,551	12	\$113,452	1.3 %	10.6 %	\$0.12
Business size						
(9) Micro	9,755	441	\$1,300,989	14.9 %	41.3 %	\$0.36
(10) Small	19,589	687	\$4,723,687	54.2 %	90.7 %	\$0.60

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-13.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: Non-professional services and goods
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	188,572	1,651	\$4,938,491			
Race and gender						
(2) Minority	15,343	155	\$366,426	7.4 %	13.5 %	\$0.55
(3) Asian	435	16	\$144,084	2.9 %	2.8 %	\$1.03
(4) Black	13,790	96	\$147,228	3.0 %	7.3 %	\$0.41
(5) Hispanic	1,041	41	\$73,573	1.5 %	3.1 %	\$0.48
(6) Native American	77	2	\$1,540	0.0 %	0.3 %	\$0.12
(7) White woman	56,783	168	\$427,761	8.7 %	16.1 %	\$0.54
Veteran status						
(8) Service-disabled veteran	2,694	27	\$15,026	0.3 %	4.0 %	\$0.08
Business size						
(9) Micro	105,653	795	\$750,487	15.2 %	40.9 %	\$0.37
(10) Small	154,484	1,320	\$2,613,170	52.9 %	83.3 %	\$0.64

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-14.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	241,225	3,113	\$13,558,518			
Race and gender						
(2) Minority	23,161	277	\$1,481,915	10.9 %	23.2 %	\$0.47
(3) Asian	5,100	47	\$1,156,006	8.5 %	11.1 %	\$0.77
(4) Black	14,765	159	\$138,180	1.0 %	7.6 %	\$0.13
(5) Hispanic	1,790	60	\$171,603	1.3 %	4.1 %	\$0.31
(6) Native American	1,506	11	\$16,127	0.1 %	0.4 %	\$0.32
(7) White woman	61,822	319	\$574,821	4.2 %	14.4 %	\$0.30
Veteran status						
(8) Service-disabled veteran	4,389	44	\$110,425	0.8 %	7.6 %	\$0.11
Business size						
(9) Micro	123,412	1,531	\$1,829,745	13.5 %	39.8 %	\$0.34
(10) Small	188,271	2,562	\$7,305,288	53.9 %	88.1 %	\$0.61

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-15.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	1,866	1,012	\$3,551,041			
Race and gender						
(2) Minority	261	160	\$353,608	10.0 %	23.8 %	\$0.42
(3) Asian	121	83	\$263,822	7.4 %	8.2 %	\$0.91
(4) Black	66	36	\$69,307	2.0 %	7.9 %	\$0.25
(5) Hispanic	73	40	\$20,278	0.6 %	7.2 %	\$0.08
(6) Native American	1	1	\$201	0.0 %	0.5 %	\$0.01
(7) White woman	174	65	\$126,967	3.6 %	10.6 %	\$0.34
Veteran status						
(8) Service-disabled veteran	11	9	\$20,296	0.6 %	5.3 %	\$0.11
Business size						
(9) Micro	788	433	\$1,353,255	38.1 %	42.7 %	\$0.89
(10) Small	1,407	699	\$2,787,402	78.5 %	90.3 %	\$0.87

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-16.

Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Large contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	912	386	\$9,795,237			
Race and gender						
(2) Minority	66	25	\$1,102,413	11.3 %	22.6 %	\$0.50
(3) Asian	28	5	\$934,491	9.5 %	11.9 %	\$0.80
(4) Black	14	11	\$36,761	0.4 %	6.2 %	\$0.06
(5) Hispanic	20	8	\$124,610	1.3 %	4.1 %	\$0.31
(6) Native American	4	1	\$6,551	0.1 %	0.3 %	\$0.23
(7) White woman	54	25	\$282,565	2.9 %	14.0 %	\$0.21
Veteran status						
(8) Service-disabled veteran	2	2	\$62,462	0.6 %	8.3 %	\$0.08
Business size						
(9) Micro	145	68	\$1,134,265	11.6 %	32.3 %	\$0.36
(10) Small	529	241	\$5,163,879	52.7 %	86.0 %	\$0.61

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-17.

Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Small contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	2,755	753	\$1,951,855			
Race and gender						
(2) Minority	242	51	\$167,696	8.6 %	26.0 %	\$0.33
(3) Asian	110	12	\$112,241	5.8 %	10.5 %	\$0.55
(4) Black	77	23	\$31,501	1.6 %	11.3 %	\$0.14
(5) Hispanic	49	14	\$21,180	1.1 %	3.7 %	\$0.29
(6) Native American	6	2	\$2,774	0.1 %	0.5 %	\$0.30
(7) White woman	209	63	\$125,533	6.4 %	14.9 %	\$0.43
Veteran status						
(8) Service-disabled veteran	34	7	\$25,212	1.3 %	6.4 %	\$0.20
Business size						
(9) Micro	526	192	\$332,814	17.1 %	58.2 %	\$0.29
(10) Small	1,689	503	\$1,093,816	56.0 %	93.2 %	\$0.60

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-18.

Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts

Micro contracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	237,558	2,964	\$1,811,425			
Race and gender						
(2) Minority	22,853	268	\$211,805	11.7 %	23.4 %	\$0.50
(3) Asian	4,962	45	\$109,274	6.0 %	7.6 %	\$0.80
(4) Black	14,674	156	\$69,917	3.9 %	11.1 %	\$0.35
(5) Hispanic	1,721	57	\$25,812	1.4 %	4.1 %	\$0.35
(6) Native American	1,496	10	\$6,801	0.4 %	0.7 %	\$0.53
(7) White woman	61,559	312	\$166,723	9.2 %	15.5 %	\$0.59
Veteran status						
(8) Service-disabled veteran	4,353	44	\$22,751	1.3 %	4.7 %	\$0.27
Business size						
(9) Micro	122,741	1,498	\$362,666	20.0 %	61.0 %	\$0.33
(10) Small	186,053	2,481	\$1,047,593	57.8 %	93.8 %	\$0.62

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-19.
 Agency Name: State agencies
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	14,114	781	\$266,677			
Race and gender						
(2) Minority	2,075	75	\$8,669	3.3 %	18.7 %	\$0.17
(3) Asian	139	9	\$3,298	1.2 %	5.0 %	\$0.25
(4) Black	1,846	51	\$4,227	1.6 %	9.6 %	\$0.17
(5) Hispanic	85	13	\$1,137	0.4 %	3.7 %	\$0.11
(6) Native American	5	2	\$7	0.0 %	0.3 %	\$0.01
(7) White woman	4,203	105	\$24,672	9.3 %	14.9 %	\$0.62
Veteran status						
(8) Service-disabled veteran	83	17	\$351	0.1 %	5.3 %	\$0.03
Business size						
(9) Micro	8,361	365	\$35,795	13.4 %	50.5 %	\$0.27
(10) Small	11,346	646	\$138,111	51.8 %	91.1 %	\$0.57

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-20.

Agency Name: State agencies

Southside

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	26,890	863	\$624,982			
Race and gender						
(2) Minority	1,330	73	\$21,939	3.5 %	21.5 %	\$0.16
(3) Asian	112	8	\$7,470	1.2 %	3.4 %	\$0.36
(4) Black	1,053	43	\$11,453	1.8 %	12.7 %	\$0.14
(5) Hispanic	81	18	\$2,691	0.4 %	5.0 %	\$0.09
(6) Native American	84	4	\$325	0.1 %	0.4 %	\$0.13
(7) White woman	8,348	105	\$70,017	11.2 %	17.3 %	\$0.65
Veteran status						
(8) Service-disabled veteran	132	15	\$891	0.1 %	2.5 %	\$0.06
Business size						
(9) Micro	13,267	387	\$159,058	25.4 %	52.9 %	\$0.48
(10) Small	20,873	709	\$404,586	64.7 %	91.0 %	\$0.71

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-21.

Agency Name: State agencies

Southwest

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	13,544	485	\$146,175			
Race and gender						
(2) Minority	1,150	19	\$6,366	4.4 %	18.4 %	\$0.24
(3) Asian	88	4	\$1,839	1.3 %	3.9 %	\$0.32
(4) Black	880	9	\$3,547	2.4 %	4.2 %	\$0.58
(5) Hispanic	25	4	\$819	0.6 %	9.5 %	\$0.06
(6) Native American	157	2	\$162	0.1 %	0.7 %	\$0.16
(7) White woman	2,751	64	\$12,730	8.7 %	16.8 %	\$0.52
Veteran status						
(8) Service-disabled veteran	188	8	\$277	0.2 %	3.8 %	\$0.05
Business size						
(9) Micro	8,627	205	\$28,522	19.5 %	50.3 %	\$0.39
(10) Small	11,313	371	\$91,369	62.5 %	92.1 %	\$0.68

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-22.

Agency Name: State agencies

West Central

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	49,932	1,546	\$1,141,156			
Race and gender						
(2) Minority	3,044	115	\$69,530	6.1 %	16.9 %	\$0.36
(3) Asian	414	24	\$44,623	3.9 %	8.5 %	\$0.46
(4) Black	1,489	58	\$11,828	1.0 %	5.5 %	\$0.19
(5) Hispanic	294	26	\$11,054	1.0 %	2.5 %	\$0.39
(6) Native American	847	7	\$2,024	0.2 %	0.3 %	\$0.62
(7) White woman	11,299	177	\$55,568	4.9 %	13.8 %	\$0.35
Veteran status						
(8) Service-disabled veteran	1,302	20	\$6,514	0.6 %	4.8 %	\$0.12
Business size						
(9) Micro	23,909	700	\$180,351	15.8 %	44.9 %	\$0.35
(10) Small	39,782	1,286	\$857,206	75.1 %	88.9 %	\$0.84

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-23.

Agency Name: State agencies

Central

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	98,507	2,777	\$13,478,349			
Race and gender						
(2) Minority	11,235	310	\$1,671,379	12.4 %	23.9 %	\$0.52
(3) Asian	2,807	102	\$1,321,198	9.8 %	11.1 %	\$0.88
(4) Black	6,972	132	\$168,457	1.2 %	7.6 %	\$0.16
(5) Hispanic	1,151	66	\$169,486	1.3 %	4.8 %	\$0.26
(6) Native American	305	10	\$12,238	0.1 %	0.4 %	\$0.23
(7) White woman	24,154	257	\$476,781	3.5 %	13.2 %	\$0.27
Veteran status						
(8) Service-disabled veteran	2,224	34	\$106,592	0.8 %	7.6 %	\$0.10
Business size						
(9) Micro	52,735	1,218	\$2,528,231	18.8 %	38.9 %	\$0.48
(10) Small	77,023	2,091	\$7,987,778	59.3 %	88.5 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-24.

Agency Name: State agencies

Valley

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	8,243	479	\$136,721			
Race and gender						
(2) Minority	507	24	\$1,981	1.4 %	16.5 %	\$0.09
(3) Asian	74	4	\$581	0.4 %	4.3 %	\$0.10
(4) Black	404	12	\$808	0.6 %	7.3 %	\$0.08
(5) Hispanic	21	6	\$127	0.1 %	4.5 %	\$0.02
(6) Native American	8	2	\$464	0.3 %	0.3 %	\$1.31
(7) White woman	2,927	75	\$13,116	9.6 %	14.1 %	\$0.68
Veteran status						
(8) Service-disabled veteran	13	6	\$28	0.0 %	2.6 %	\$0.01
Business size						
(9) Micro	4,116	207	\$19,832	14.5 %	50.8 %	\$0.29
(10) Small	6,527	379	\$58,669	42.9 %	92.2 %	\$0.47

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-25.

Agency Name: State agencies

Northern

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	5,743	455	\$319,410			
Race and gender						
(2) Minority	556	58	\$6,028	1.9 %	21.4 %	\$0.09
(3) Asian	72	8	\$1,527	0.5 %	7.6 %	\$0.06
(4) Black	380	22	\$1,180	0.4 %	3.7 %	\$0.10
(5) Hispanic	99	26	\$3,308	1.0 %	9.6 %	\$0.11
(6) Native American	5	2	\$12	0.0 %	0.5 %	\$0.01
(7) White woman	1,563	66	\$5,469	1.7 %	11.2 %	\$0.15
Veteran status						
(8) Service-disabled veteran	59	8	\$71	0.0 %	3.1 %	\$0.01
Business size						
(9) Micro	3,190	212	\$67,859	21.2 %	32.5 %	\$0.65
(10) Small	4,230	361	\$104,051	32.6 %	77.9 %	\$0.42

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-26.

Agency Name: State agencies

Eastern

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	2,397	180	\$22,543			
Race and gender						
(2) Minority	362	16	\$1,041	4.6 %	17.9 %	\$0.26
(3) Asian	2	2	\$37	0.2 %	2.3 %	\$0.07
(4) Black	353	10	\$942	4.2 %	10.6 %	\$0.40
(5) Hispanic	6	3	\$58	0.3 %	2.9 %	\$0.09
(6) Native American	1	1	\$5	0.0 %	1.7 %	\$0.01
(7) White woman	967	31	\$5,840	25.9 %	19.5 %	\$1.33
Veteran status						
(8) Service-disabled veteran	3	3	\$14	0.1 %	2.5 %	\$0.02
Business size						
(9) Micro	1,498	72	\$4,687	20.8 %	52.9 %	\$0.39
(10) Small	1,743	128	\$9,813	43.5 %	92.9 %	\$0.47

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-27.

Agency Name: State agencies

Eastern Shore

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	401	60	\$7,417			
Race and gender						
(2) Minority	17	7	\$41	0.6 %	19.0 %	\$0.03
(3) Asian	2	1	\$0	0.0 %	7.5 %	\$0.00
(4) Black	15	6	\$41	0.6 %	5.5 %	\$0.10
(5) Hispanic	0	0	\$0	0.0 %	4.9 %	\$0.00
(6) Native American	0	0	\$0	0.0 %	0.6 %	\$0.00
(7) White woman	190	10	\$125	1.7 %	3.4 %	\$0.49
Veteran status						
(8) Service-disabled veteran	11	2	\$35	0.5 %	11.4 %	\$0.04
Business size						
(9) Micro	245	28	\$6,660	89.8 %	36.3 %	\$2.00 +
(10) Small	272	47	\$7,217	97.3 %	88.3 %	\$1.10

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-28.

Agency Name: State agencies

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Subcontractor Plan

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	9,936	2,037	\$15,990,084			
Race and gender						
(2) Minority	1,039	227	\$1,685,076	10.5 %	23.5 %	\$0.45
(3) Asian	447	95	\$1,340,754	8.4 %	10.8 %	\$0.77
(4) Black	340	67	\$156,876	1.0 %	7.5 %	\$0.13
(5) Hispanic	219	60	\$175,820	1.1 %	4.8 %	\$0.23
(6) Native American	33	5	\$11,626	0.1 %	0.4 %	\$0.19
(7) White woman	635	147	\$567,505	3.5 %	13.4 %	\$0.26
Veteran status						
(8) Service-disabled veteran	97	19	\$117,070	0.7 %	7.3 %	\$0.10
Business size						
(9) Micro	2,083	729	\$2,919,990	18.3 %	39.0 %	\$0.47
(10) Small	5,800	1,389	\$9,380,872	58.7 %	88.2 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-29.

Agency Name: State agencies

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

No Subcontractor Plan

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	233,155	2,874	\$1,119,475			
Race and gender						
(2) Minority	22,383	261	\$150,446	13.4 %	20.5 %	\$0.65
(3) Asian	4,774	41	\$79,074	7.1 %	5.7 %	\$1.23
(4) Black	14,491	154	\$50,610	4.5 %	10.0 %	\$0.45
(5) Hispanic	1,644	56	\$16,060	1.4 %	4.1 %	\$0.35
(6) Native American	1,474	10	\$4,701	0.4 %	0.6 %	\$0.67
(7) White woman	61,361	309	\$134,283	12.0 %	16.0 %	\$0.75
Veteran status						
(8) Service-disabled veteran	4,303	43	\$13,650	1.2 %	4.3 %	\$0.28
Business size						
(9) Micro	122,117	1,481	\$263,010	23.5 %	60.5 %	\$0.39
(10) Small	183,878	2,419	\$711,818	63.6 %	93.4 %	\$0.68

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-30.
Agency Name: Tier 3 HEIs
Time period: 07/01/2019 - 06/30/2024
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	418,325	2,354	\$7,483,913			
Race and gender						
(2) Minority	8,987	141	\$246,849	3.3 %	19.1 %	\$0.17
(3) Asian	2,816	27	\$75,401	1.0 %	6.7 %	\$0.15
(4) Black	3,397	63	\$73,075	1.0 %	4.9 %	\$0.20
(5) Hispanic	2,501	45	\$89,027	1.2 %	6.5 %	\$0.18
(6) Native American	273	6	\$9,347	0.1 %	1.0 %	\$0.12
(7) White woman	87,275	205	\$349,458	4.7 %	9.5 %	\$0.49
Veteran status						
(8) Service-disabled veteran	887	20	\$20,454	0.3 %	3.0 %	\$0.09
Business size						
(9) Micro	53,886	924	\$1,526,860	20.4 %	38.5 %	\$0.53
(10) Small	248,684	1,779	\$5,604,913	74.9 %	88.2 %	\$0.85

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-31.
 Agency Name: University of Virginia
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	214,457	952	\$2,174,406			
Race and gender						
(2) Minority	4,870	45	\$79,969	3.7 %	20.2 %	\$0.18
(3) Asian	969	8	\$16,429	0.8 %	6.1 %	\$0.12
(4) Black	1,574	24	\$25,053	1.2 %	5.6 %	\$0.21
(5) Hispanic	2,205	11	\$34,847	1.6 %	6.2 %	\$0.26
(6) Native American	122	2	\$3,639	0.2 %	2.3 %	\$0.07
(7) White woman	40,396	74	\$104,559	4.8 %	9.8 %	\$0.49
Veteran status						
(8) Service-disabled veteran	61	5	\$5,091	0.2 %	3.3 %	\$0.07
Business size						
(9) Micro	19,763	295	\$668,172	30.7 %	39.8 %	\$0.77
(10) Small	123,246	667	\$1,743,251	80.2 %	87.8 %	\$0.91

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-32.
 Agency Name: Virginia Polytechnic Institute & State University
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	54,394	1,075	\$1,576,886			
Race and gender						
(2) Minority	739	41	\$42,218	2.7 %	13.4 %	\$0.20
(3) Asian	87	4	\$4,239	0.3 %	5.4 %	\$0.05
(4) Black	483	22	\$9,028	0.6 %	3.6 %	\$0.16
(5) Hispanic	69	11	\$25,451	1.6 %	3.9 %	\$0.42
(6) Native American	100	4	\$3,500	0.2 %	0.5 %	\$0.46
(7) White woman	1,238	86	\$41,938	2.7 %	8.8 %	\$0.30
Veteran status						
(8) Service-disabled veteran	255	4	\$3,171	0.2 %	2.9 %	\$0.07
Business size						
(9) Micro	13,262	377	\$236,517	15.0 %	38.2 %	\$0.39
(10) Small	31,420	785	\$1,127,432	71.5 %	87.2 %	\$0.82

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-33.
 Agency Name: Virginia Commonwealth University
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	75,051	724	\$849,076			
Race and gender						
(2) Minority	1,718	43	\$26,155	3.1 %	19.5 %	\$0.16
(3) Asian	937	6	\$9,112	1.1 %	5.6 %	\$0.19
(4) Black	675	23	\$14,836	1.7 %	7.4 %	\$0.24
(5) Hispanic	80	12	\$1,868	0.2 %	5.6 %	\$0.04
(6) Native American	26	2	\$339	0.0 %	0.9 %	\$0.04
(7) White woman	27,619	74	\$61,494	7.2 %	12.2 %	\$0.59
Veteran status						
(8) Service-disabled veteran	421	7	\$2,555	0.3 %	4.4 %	\$0.07
Business size						
(9) Micro	5,383	239	\$248,526	29.3 %	45.8 %	\$0.64
(10) Small	45,953	516	\$500,055	58.9 %	87.4 %	\$0.67

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-34.
 Agency Name: George Mason University
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	19,524	667	\$1,281,475			
Race and gender						
(2) Minority	472	37	\$69,955	5.5 %	27.5 %	\$0.20
(3) Asian	383	13	\$36,242	2.8 %	10.1 %	\$0.28
(4) Black	37	9	\$13,576	1.1 %	4.6 %	\$0.23
(5) Hispanic	47	13	\$18,972	1.5 %	12.3 %	\$0.12
(6) Native American	5	2	\$1,165	0.1 %	0.6 %	\$0.16
(7) White woman	1,973	47	\$89,961	7.0 %	9.2 %	\$0.76
Veteran status						
(8) Service-disabled veteran	77	9	\$2,989	0.2 %	2.6 %	\$0.09
Business size						
(9) Micro	2,556	156	\$160,644	12.5 %	35.3 %	\$0.36
(10) Small	8,650	403	\$792,296	61.8 %	88.2 %	\$0.70

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-35.

Agency Name: James Madison University

Time period: 07/01/2019 - 06/30/2024

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	24,776	589	\$819,741			
Race and gender						
(2) Minority	480	22	\$10,742	1.3 %	14.4 %	\$0.09
(3) Asian	79	6	\$5,146	0.6 %	6.7 %	\$0.09
(4) Black	342	8	\$3,213	0.4 %	2.7 %	\$0.15
(5) Hispanic	51	7	\$1,821	0.2 %	4.7 %	\$0.05
(6) Native American	8	1	\$563	0.1 %	0.2 %	\$0.33
(7) White woman	3,792	46	\$32,945	4.0 %	7.4 %	\$0.54
Veteran status						
(8) Service-disabled veteran	67	7	\$1,334	0.2 %	2.2 %	\$0.07
Business size						
(9) Micro	6,772	158	\$56,162	6.9 %	34.4 %	\$0.20
(10) Small	15,891	404	\$742,553	90.6 %	88.9 %	\$1.02

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-36.
 Agency Name: College of William & Mary
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	30,123	586	\$782,329			
Race and gender						
(2) Minority	708	24	\$17,811	2.3 %	18.1 %	\$0.13
(3) Asian	361	5	\$4,232	0.5 %	6.3 %	\$0.09
(4) Black	286	11	\$7,369	0.9 %	5.4 %	\$0.17
(5) Hispanic	49	7	\$6,068	0.8 %	5.9 %	\$0.13
(6) Native American	12	1	\$142	0.0 %	0.5 %	\$0.03
(7) White woman	12,257	58	\$18,560	2.4 %	10.0 %	\$0.24
Veteran status						
(8) Service-disabled veteran	6	5	\$5,313	0.7 %	2.6 %	\$0.26
Business size						
(9) Micro	6,150	168	\$156,840	20.0 %	37.2 %	\$0.54
(10) Small	23,524	416	\$699,327	89.4 %	91.2 %	\$0.98

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.

Figure D-37.
 Agency Name: Tier 2 HEIs
 Time period: 07/01/2019 - 06/30/2024
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Business group	(a) Contract elements	(b) Businesses utilized	(c) Dollars (thousands)	(d) Participation	(e) Availability	(f) Disparity index
(1) All businesses	31,738	1,519	\$2,491,798			
Race and gender						
(2) Minority	3,334	122	\$189,426	7.6 %	17.7 %	\$0.43
(3) Asian	589	13	\$27,531	1.1 %	5.5 %	\$0.20
(4) Black	2,136	77	\$128,018	5.1 %	5.9 %	\$0.87
(5) Hispanic	209	28	\$26,765	1.1 %	5.9 %	\$0.18
(6) Native American	400	4	\$7,112	0.3 %	0.4 %	\$0.65
(7) White woman	5,330	174	\$192,929	7.7 %	11.9 %	\$0.65
Veteran status						
(8) Service-disabled veteran	656	22	\$15,154	0.6 %	3.2 %	\$0.19
Business size						
(9) Micro	10,802	596	\$356,269	14.3 %	45.4 %	\$0.32
(10) Small	23,932	1,182	\$1,717,568	68.9 %	89.1 %	\$0.77

Note: A business must have a location in the relevant geographic market area to be classified into the business groups in rows 2 through 10.